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2016]

A NEW SENTENCING BLUEPRINT: THE THIRD CIRCUIT ALLOWS  
DISADVANTAGED BUSINESS ENTERPRISE FRAUD CONVICTIONS  
TO BE OFFSET BY CONSTRUCTION CONTRACT  
PERFORMANCE IN *UNITED STATES v. NAGLE*

CHRISTOPHER C. REESE\*

“Sentencing white-collar offenders presents vexing issues in determining the appropriate punishment for conduct that may not immediately appear criminal, or that may involve amorphous victims . . . .”<sup>1</sup>

I. BREAKING GROUND: AN INTRODUCTION TO DISADVANTAGED BUSINESS  
ENTERPRISE FRAUD

Financial fraud inflicts devastating consequences upon its victims.<sup>2</sup> According to one scholar, “new, undetected financial frauds are hatched every day.”<sup>3</sup> Furthermore, “the amount of direct losses to investors . . . now dwarf[s] those of earlier fraud eras.”<sup>4</sup> Such financial crimes have caused “thousands of people” billions of dollars in losses and “take[n] a

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1. Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 61 WAYNE L. REV. 27, 33–34 (2015).

2. See *Financial Fraud Crimes Victims*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/usao-wdwa/victim-witness/victim-info/financial-fraud> [<https://perma.cc/J9E7-ARL4>] (last updated Feb. 10, 2015) (discussing harm frequently suffered by financial fraud victims).

3. See Bruce L. Simon, *A Commonsense Approach to Financial Fraud Cases*, TRIAL MAG., Apr. 1, 2003, at 73, 73 (discussing methods attorneys can use to detect financial fraud).

4. See Daniel V. Dooley, Sr., & Mark Radke, *Does Severe Punishment Deter Financial Crimes?*, 4 CHARLESTON L. REV. 619, 621 (2010) (discussing regulatory perspective after large-scale financial crimes committed by executives of WorldCom, Enron, Adelphia, and Cendant). The authors contrast these crimes with the “multi-billion dollar ‘Ponzi’ schemes” committed by “Bernie Madoff, Scott Rothstein, and Allen Stanford . . . .” See *id.* at 620–21 (citing Amy Sherman & Jay Weaver, *Rothstein Expected to Plead Guilty in Scheme*, TAMPA BAY TIMES (Jan. 5, 2010, 8:19 PM), <http://www.tampabay.com/news/politics/stateroundup/rothstein-expected-to-plead-guilty-in-scheme/1063336> [<https://perma.cc/S34Q-SUMH>]); see also Karen Berman & Joe Knight, *What Did Bernard Madoff Do?*, HARVARD BUS. REV. (June 30, 2009), <https://hbr.org/2009/06/what-did-bernard-madoff-do> [<https://perma.cc/C7DF-BWRV>] (examining Bernie Madoff’s historically large financial crime).

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staggering human toll.”<sup>5</sup> Despite the occurrence of recent, historically significant financial crimes, you are much more likely to encounter someone who committed fraud totaling far less than a billion dollars, where the number of victims and amount of losses are much harder to identify.<sup>6</sup>

For instance, suppose you know someone who tricked the government into giving his or her company federally-funded construction contracts “set aside for . . . disadvantaged enterprises.”<sup>7</sup> Despite the deception, the contracts were fully performed, and no involved parties lost money.<sup>8</sup> The federal prosecutor assigned to this case may have difficulty determining what sentence to seek.<sup>9</sup> On the other hand, defense counsel will need to know how to best protect the guilty defendant’s freedom.<sup>10</sup> Given the government’s recent increased scrutiny of construction contracts and “movement toward increased legal action and harsher penalties

5. See Henning, *supra* note 1, at 28–29 (quoting Sentencing Hearing Transcript at 47, *United States v. Madoff*, No. 09-CR-213 (S.D.N.Y. June 29, 2009), available at <http://www.justice.gov/usao/nys/madoff/20090629sentencingtranscriptcorrected.pdf> [<https://perma.cc/STK3-R2M6>] [hereinafter Sentencing Hearing]) (internal quotation marks omitted); see also Eric Tucker, *Sentencing Changes Sought for Business Crimes*, DAILY NEWS (Aug. 14, 2014), <http://www.memphisdailynews.com/news/2014/aug/14/sentencing-changes-sought-for-business-crimes> [<https://perma.cc/MGD2-87H9>].

6. See Henning, *supra* note 1, at 33–34 (discussing difficulties of white-collar crime sentencing); Peter J. Henning, *The Challenge of Sentencing White-Collar Defendants*, N.Y. TIMES (Feb. 25, 2013, 2:14 PM), [http://dealbook.nytimes.com/2013/02/25/the-challenge-of-sentencing-white-collar-defendants/?\\_r=0](http://dealbook.nytimes.com/2013/02/25/the-challenge-of-sentencing-white-collar-defendants/?_r=0) [<https://perma.cc/9JN4-5QYC>] (noting that “impact of white-collar offenses is far broader than most street crimes, but also much more diffuse”); see also Bradley J. Sauer, *Detering False Claims in Government Contracting: Making Consistent Use of 18 U.S.C. § 287*, 39 PUB. CONT. L.J. 897, 911 n.91 (2010) (“To term procurement fraud a victimless crime is . . . an oversimplification . . . [because] [t]he [g]overnment and the public at large are victims every time a false claim is submitted on a government contract.”). However, “procurement fraud” is often viewed as a “victimless crime” because “no individual is particularly harmed by the act.” See *id.*; Marion Barriskell, *Fraud: A Victimless Crime?*, KPMG, <http://www.kpmg.com/east-africa/en/IssuesAndInsights/ArticlesPublications/Documents/Fraud%20-%20a%20victimless%20crime.pdf> [<https://perma.cc/GH87-CMQ8>] (last visited Oct. 10, 2016) (discussing perception of fraud as crime with “no victims to the act”).

7. See *United States v. Nagle*, Crim. No. 1:09-CR-384, 2015 WL 7710467, at \*1–2 (M.D. Pa. Nov. 30, 2015) (describing factual background of case). This hypothetical is based on the facts of *Nagle*. See *id.* For a discussion of the facts of *Nagle*, see *infra* notes 79–87 and accompanying text.

8. See *Nagle*, 2015 WL 7710467, at \*2 (discussing profitability of contracts).

9. See Dana Liebelson, *Why Nobody Is Really Happy with New Guidelines for Punishing White-Collar Criminals*, HUFFINGTON POST, (Apr. 22, 2015, 5:01 PM), [http://www.huffingtonpost.com/2015/04/22/white-collar-sentencing-reform\\_n\\_7119826.html](http://www.huffingtonpost.com/2015/04/22/white-collar-sentencing-reform_n_7119826.html) [<https://perma.cc/TL6Y-JE4J>] (discussing tension between advocates of more lenient white-collar sentencing standards and advocates of stronger white-collar sentencing standards).

10. See Kenneth Mann, DEFENDING WHITE COLLAR CRIME 5 (1985) (noting white-collar defense counsel’s “commitment to helping the guilty go free”).

against contractors,” answering these questions has become a top priority.<sup>11</sup>

In *United States v. Nagle*,<sup>12</sup> the Third Circuit set forth a blueprint for sentencing those convicted of this type of fraud, known as Disadvantaged Business Enterprise (DBE) fraud.<sup>13</sup> The court weakened prosecutors’ chances of successfully seeking extremely long prison sentences when the court allowed offsetting for contract performance in calculating how much loss a defendant’s DBE fraud caused.<sup>14</sup> This impediment, however, affects only one aspect of federal criminal sentencing, and the court suggested a basis for less, or perhaps *more*, leniency at the other aspects of the sentencing process.<sup>15</sup>

In analyzing *Nagle*, this Casebrief will proceed in three parts. Part II will focus on the goals and potential abuse of the federal DBE program and the mechanics of criminal sentencing in the Third Circuit.<sup>16</sup> Part III will address the facts, procedural history, and holding of *Nagle*.<sup>17</sup> Part IV will argue that the Third Circuit constrains prosecutors seeking long prison sentences for those convicted of DBE fraud by allowing perform-

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11. See Kim Slowey, *The Coming Crackdown: Why Penalties for Construction Owners Are on the Rise*, CONSTRUCTION DIVE (Oct. 19, 2015), <http://www.constructiondive.com/news/the-coming-crackdown-why-penalties-for-construction-owners-are-on-the-rise/407571/> [https://perma.cc/FC7A-CAEJ] (discussing government’s increased focus on prosecuting unlawful conduct by construction contractors). Slowey also notes one practitioner’s opinion that DBE requirements can be difficult for non-DBE firms to satisfy because “[t]here [are not] enough [DBE] firms out there that really can do the actual work . . . .” See *id.* (alteration in original) (quoting attorney regarding legal work with respect to DBEs); see also Nicholas T. Solosky, *Contractor Alert: USDOT DBE Fraud Enforcement*, ABOVE THE LAW (Oct. 30, 2015, 2:00 PM), <http://abovethelaw.com/2015/10/contractor-alert-usdot-dbe-fraud-enforcement/> [https://perma.cc/GBG3-TUXQ] (“We are currently in the midst of an unprecedented uptick in the prosecution of (alleged) government contractor fraud . . . .”).

12. 803 F.3d 167 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1238 (2016).

13. See *id.* at 183; see also Edward DeLisle & Jacqueline Ryan, *Third Circuit Allows for Offset when Calculating Loss in DBE Fraud Cases*, FED. CONSTRUCTION CONTRACTING BLOG (Oct. 27, 2015), <http://federalconstruction.phslegal.com/2015/10/articles/contractor-information-sources/third-circuit-allows-for-offset-when-calculating-loss-in-dbe-fraud-cases/> [https://perma.cc/3WDK-D9AU] (discussing holding of *Nagle*).

14. See *Nagle*, 803 F.3d at 183. For a critical analysis of the Third Circuit’s decision in *Nagle*, see *infra* notes 100–17 and accompanying text.

15. See *United States v. Fumo*, 655 F.3d 288, 308 (3d Cir. 2011) (quoting *United States v. Wright*, 642 F.3d 148, 152 (3d Cir. 2011)) (noting U.S. district courts determine criminal sentences following “three-step process”). For a discussion of the sentencing steps followed by the Third Circuit, see *infra* notes 61–74 and accompanying text.

16. For a discussion of the federal DBE program, the goals of the program, how the program is criminally abused, and how those convicted of such crimes are sentenced in the Third Circuit, see *infra* notes 20–74 and accompanying text.

17. For a discussion of the underlying facts of *Nagle*, the lower court’s decision, and the Third Circuit’s decision on appeal, see *infra* notes 75–117 and accompanying text.

ance offsetting in calculating the proper U.S. Sentencing Guidelines range.<sup>18</sup> Finally, Part IV will also offer practical advice to prosecutors and defense attorneys with respect to how a defendant convicted of DBE fraud should be sentenced.<sup>19</sup>

## II. LAYING A SOLID FOUNDATION: BACKGROUND INFORMATION ON THE FEDERAL DBE PROGRAM AND THE MECHANICS OF CRIMINAL SENTENCING IN THE THIRD CIRCUIT

Beginning in 1982, the DBE program has required federally-funded agencies to spend a portion of their funds on contracts performed by DBEs.<sup>20</sup> The DBE program aims to prevent discrimination in the award of federally-funded construction contracts.<sup>21</sup> But the DBE program is often the subject of fraud, with non-DBE companies scheming to obtain funds not otherwise allocated to them.<sup>22</sup> Courts are tasked with punishing these defendant-companies, but they have some flexibility in determining sentences.<sup>23</sup>

### A. What Is the Federal DBE Program?

Congress created the DBE program for “recipients of federal transportation . . . funds.”<sup>24</sup> The DBE program requires all state and local agencies “receiv[ing] at least \$250,000 [in federal funds] in any fiscal year”

18. For a critical analysis of the Third Circuit’s decision in *Nagle*, see *infra* notes 121–28 and accompanying text.

19. For advice for prosecutors, see *infra* notes 129–38 and accompanying text. For advice for defense attorneys, see *infra* notes 139–46 and accompanying text.

20. See *Disadvantaged Business Enterprise Program (DBE)*, FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/civilrights/programs/dbess.cfm> [<https://perma.cc/9E6E-439T>] (last updated Aug. 1, 2016) (providing overview of federal DBE program). For a brief history of the federal DBE program, see *infra* notes 24–34 and accompanying text.

21. See *Disadvantaged Business Enterprise (DBE) Program*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise> [<https://perma.cc/77U6-9TRU>] (last updated Feb. 17, 2016) (discussing objectives of federal DBE program). For a discussion of the DBE program’s goals, see *infra* notes 35–42 and accompanying text.

22. See Wally Zimolong, *The Two Most Common Types of DBE Fraud*, SUPPLEMENTAL CONDITIONS (Jan. 7, 2014), <http://www.supplementalconditions.com/2014/01/the-two-most-common-types-of-dbe-fraud/> [<https://perma.cc/Z26F-GLKY>] (highlighting two common DBE varieties). For additional discussion about how the DBE program can be abused, see *infra* notes 43–60 and accompanying text.

23. See Linda Greenhouse, *Court Restores Sentencing Powers of Federal Judges*, N.Y. TIMES (Dec. 10, 2007), [http://www.nytimes.com/2007/12/10/washington/10cnd-scotus.html?\\_r=0](http://www.nytimes.com/2007/12/10/washington/10cnd-scotus.html?_r=0) [<https://perma.cc/9T5K-RP7B>] (discussing discretionary sentencing power of federal judges). For a discussion of sentencing within the Third Circuit, see *infra* notes 61–74 and accompanying text.

24. See 23 U.S.C. § 324 (2012); 49 C.F.R. §§ 26.1–26.109 (2016); see also George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 GEO. MASON U. C.R. L.J. 423, 423 (2007) [hereinafter La Noue, *Setting Goals*] (citing 49 C.F.R. § 26.3); see also George R. La Noue, *Western States’ Light: Restructuring the Federal Transportation Disadvantaged Business Enterprise Program*, 22

to apply “a certain percentage of the federal funds” to contracts with DBEs.<sup>25</sup> Only “socially and economically disadvantaged” businesses qualify as DBEs.<sup>26</sup>

A business is considered socially disadvantaged if a majority of “the business is owned and operated” by an individual from a “traditionally disadvantaged group” of people.<sup>27</sup> Those receiving federal funds must either directly hire a DBE prime contractor or hire a non-DBE prime contractor that uses DBE subcontractors to complete a portion of the work.<sup>28</sup> The latter option can be particularly desirable because many DBEs are “often not capable of taking on government-construction projects as main contractors.”<sup>29</sup> Once a DBE is hired to work a government-construction project, the DBE must complete “commercially useful functions.”<sup>30</sup>

#### B. *What Are the Goals of the Federal DBE Program?*

The DBE program is an affirmative action program focusing primarily on assisting certain “racial, ethnic, and gender classifications.”<sup>31</sup> By ensur-

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GEO. MASON. U. C.R. L.J. 1, 3 (2011) [hereinafter La Noue, *Western States’ Light*] (citing 49 U.S.C. § 31105(f) (2012)).

25. See La Noue, *Setting Goals*, *supra* note 24, at 423 (discussing federal DBE program); see also La Noue, *Western States’ Light*, *supra* note 24, at 3 (discussing same).

26. See La Noue, *Setting Goals*, *supra* note 24, at 423 (citing 49 C.F.R. § 26.5) (discussing types of businesses that qualify as DBEs).

27. See Michael Yangming Xiao, Note, *Deferred/Non Prosecution Agreements: Effective Tools to Combat Corporate Crime*, 23 CORNELL J.L. & PUB. POL’Y 233, 237 (2013) (discussing federal DBE program’s application to “businesses owned and operated by traditionally disadvantaged groups”). Further, as La Noue observes:

All women and minority owners are entitled to the presumption that they are socially disadvantaged. Their personal, educational, political, or social achievements are not considered relevant in considering whether they are “disadvantaged.” To be considered economically disadvantaged, the firm owner’s net worth must be less than \$750,000, not including personal residence or the value of the business . . . . [F]or heavy and highway construction firms to qualify for economic disadvantaged status, DBEs must not have gross revenues averaging more than \$27.5 million in a three year period.

La Noue, *Setting Goals*, *supra* note 24, at 424 (footnotes omitted) (citing various DOT regulations).

28. See La Noue, *Western States’ Light*, *supra* note 24, at 4 (discussing requirements of DBE).

29. See Xiao, *supra* note 28, at 237 (discussing limited size and resources of DBEs and their ability to fulfill government contracts).

30. See *id.* at 237–38 (internal quotation marks omitted) (noting that performing “commercially useful functions” requires DBE to be “responsible for the execution of a distinct element of the work of a contract,” including “actually performing, managing and supervising the work involved, and [furnishing] all supervision, labor, tools, equipment, materials and supplies necessary to perform that distinct element of the work of the contract”).

31. See 49 C.F.R. § 26.1 (2016) (listing objectives of federal DBE program); Gerard P. Brady & Jared Hand, *The Perils of Doing Business with Disadvantaged Business Enterprises*, 32 CONSTRUCTION L., 37, 37 (2012) (stating DBE program is “designed to increase the participation of minority and disadvantaged business

ing that some federal funds are always set aside to hire DBE companies, the program aims to “increase both the competitiveness of DBEs and their participation in state and local procurement.”<sup>32</sup>

The DBE program officially purports to prevent discrimination in awarding federal Department of Transportation (DOT) contracts, so DBEs can “compete fairly” with non-DBE companies on “a level playing field.”<sup>33</sup> Moreover, the program’s initiatives are designed to “remove barriers to [ ] participation” that prevent DBEs from obtaining federally-funded construction contracts, in turn helping DBEs develop business on a broader scale.<sup>34</sup>

Justice Stevens buttressed this view in his dissent to *Adarand Constructors v. Peña*,<sup>35</sup> where he noted that minority subcontractors are often subject to disadvantages less obvious “than direct, intentional racial prejudice.”<sup>36</sup> In *Adarand*, Adarand Constructors, Inc. (Adarand) challenged the constitutionality of rules that prompted a prime contractor to award a federal guardrail subcontract to a DBE subcontractor, despite Adarand’s bid being the lowest bid—a decision the prime contractor made to get an extra payment for hiring a subcontractor presumed to be disadvantaged.<sup>37</sup> The court held “that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a

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enterprises . . . in federally funded public construction contracts”); La Noue, *Western States’ Light*, *supra* note 24, at 4; Xiao, *supra* note 27, at 237 (stating the DBE program was created “as an affirmative action program for businesses owned and operated by traditionally disadvantaged groups”); Stephen Harrison, *Construction – Minority Participation Goals: Compliance Burden for the Construction Contractor*, COHN REZNICK, <https://www.cohnreznick.com/construction-minority-participation-goals-compliance-burden-construction-contractor> [<https://perma.cc/Q8UG-BF53>] (last visited Oct. 13, 2016) (providing overview of DBE program and noting goal of allowing “DBEs to compete equally for contracts”).

32. See Xiao, *supra* note 27, at 237 (discussing goals of DBE program).

33. See Joseph M. Amico, Note, *Affirmative Action in Construction Contracting and New Jersey’s “Emerging Small Business Enterprise” Program*, 16 RUTGERS RACE & L. REV. 79, 84 (2015) (citing 49 C.F.R. § 26.1(b)) (discussing DOT’s DBE program regulations).

34. See *id.* at 84–85 (citing 49 C.F.R. § 26.1) (highlighting DOT’s goals for DBE program).

35. 515 U.S. 200 (1995).

36. See *id.* at 261 (Stevens, J., dissenting) (discussing additional challenges minority subcontractors may face). In *Adarand*, a construction company challenged the constitutionality of rules that prompted a prime contractor’s decision to award a federal guardrail subcontract to a DBE subcontractor despite Adarand’s bid being the lowest bid—a decision the prime contractor made to get an extra payment for hiring a subcontractor that was presumed to be disadvantaged. See *id.* at 205 (discussing background of case).

37. See *id.* (discussing factual background of case). The payment sought by the prime contractor was provided for in a provision of its contract with a division of DOT, as required by federal law. See *id.* The clause also required “a race-based presumption of social and economic disadvantage.” See *id.* at 207 (citing 48 C.F.R. §§ 19.001, 19.703(a)(2)(1994)).

reviewing court under strict scrutiny.”<sup>38</sup> Justice Stevens, dissenting for reasons beyond the scope of this Casebrief, wrote that minority subcontractors are more likely to have recently entered a particular industry, resulting in fewer business relationships.<sup>39</sup> Accordingly, minority subcontractors are “less likely to receive favors from the entrenched business persons who award subcontracts only to people with whom—or with whose friends—they have an existing relationship.”<sup>40</sup> Thus, when the DBE program’s funds are misallocated, the program’s goals of “creat[ing] a level playing field” and “remov[ing] barriers” for DBEs are undermined.<sup>41</sup>

### C. *What Are the Criminal Aspects of DBE Fraud?*

DBE fraud itself is not a “statutorily-defined crime.”<sup>42</sup> While DBE fraud in the colloquial sense is not punishable under any particular statute, the underlying acts often subject the perpetrator to criminal liability under traditional criminal statutes such as those prohibiting mail fraud, wire fraud, and money laundering.<sup>43</sup> Thus, businesses can face criminal liability when they fail to comply with federal DBE regulations.<sup>44</sup>

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38. *See id.* at 207 (discussing standard that must be applied to federally-required “race-based presumption of social *and* economic disadvantage”).

39. *See id.* at 261 (observing relative newness to industry may disadvantage subcontractors).

40. *See id.* Justice Stevens also noted that the DBE program is a “forward-looking response to practical problems faced by minority subcontractors.” *See id.* at 261–62.

41. *See* 49 C.F.R. § 26.1 (2016); *see also* H.B. Rowe Co., Inc. v. Tippett, 615 F.3d 233, 247–48 (4th Cir. 2010) (discussing evidence of social barriers faced by disadvantaged businesses); Xiao, *supra* note 27, at 239 (noting negative impact on disadvantaged groups when funds are not allocated as prescribed); Elizabeth McCormick, *Tough Challenges Face Minority Contractors*, LEDGER, <http://www.theledger.com/news/20030427/tough-challenges-face-minority-contractors> [<https://perma.cc/J4QA-899F>] (last updated Apr. 27, 2003, 9:21 AM) (discussing challenges faced by minority construction contractors such as “financing, breaking through the ‘good old boy’ network[,] and resistance to change”).

42. *See* Xiao, *supra* note 28, at 237 (noting non-existence of DBE fraud-specific statutes). Xiao also observes that DBE fraud, as a *malum prohibitum* crime, “is wrongful because it is prohibited by law,” and the bad act is “commit[ting] other statutorily-defined crimes” that forms the fraud. *See id.* (citing BLACK’S LAW DICTIONARY 588 (9th ed. 2009)). In contrast, *malum in se* crimes, such as murder or rape, are crimes where “the act is bad in itself.” *See id.* Due to this distinction, the author asserts that those who commit DBE fraud “can more likely be rehabilitated without imprisonment . . . .” *See id.*

43. *See* 18 U.S.C. §§ 1341, 1343, 1957 (2012) (prohibiting mail fraud, wire fraud, and money laundering, respectively); *see also* Michelle McVicker, *The Real Cost of DBE Fraud*, U.S. DEP’T OF TRANSP. 4 (Mar. 2, 2016), <https://cms.dot.gov/sites/dot.gov/files/docs/S3TheRealCostofDBEFraud.pdf> [<https://perma.cc/K99M-AMMA>] (listing numerous statutorily-defined crimes used to prosecute DBE fraud).

44. *See* Lawrence Dany III & Patricia Gorham, *Avoiding DBE Program Fraud*, CONSTRUCTION TODAY (Apr. 14, 2016), <http://www.construction-today.com/sections/columns/2649-avoiding-dbe-program-fraud> [<https://perma.cc/NBY5-B3>]



DBE fraud harms victims in both “direct” and “indirect” ways.<sup>45</sup> The direct victims of DBE fraud are certified DBEs who did not get work set aside for them by the DBE program, plus other non-DBE contractors who abided by the rules but were not awarded government contracts.<sup>46</sup> The indirect victims of DBE fraud are taxpayers, whose “funds [are diverted for] purposes other than [what was] intended by Congress.”<sup>47</sup>

DBE fraud does not typically result in any “serious” financial harm to the involved parties—though the government’s funds are allocated improperly, there may be “little practical difference in having . . . a construction project done by a DBE subcontractor or a non-DBE subcontractor, assuming that the quality of the work is similar.”<sup>48</sup> Thus, the primary harm DBE fraud causes is the disruption of the federal initiative to help minority and female owners of construction businesses.<sup>49</sup>

DBE fraud occurs most frequently in two forms.<sup>50</sup> First, DBE fraud occurs when a non-DBE prime contractor claims to have used a DBE subcontractor, but actually performed the work itself.<sup>51</sup> Second, DBE fraud

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CU] (discussing “pitfalls associated with working on government contracts that include a DBE component”).

45. See Xiao, *supra* note 27, at 238 (discussing victims of DBE fraud’s limited scope and unique impact on only traditionally disadvantaged social groups).

46. See McVicker, *supra* note 43, at 7 (discussing consequences of DBE fraud). The author notes the DBE fraud prevents real DBEs from “grow[ing] and build[ing] their businesses” and from “gain[ing] crucial experience.” See *id.*

47. See *id.* (noting that taxpayers are impacted when public funds are allocated contrary to congressional intent).

48. See Xiao, *supra* note 28 at 238.

49. See *id.*; see also Alex Shea & Steve Pitaniello, *DBE Fraud and the Cost of Non-compliance*, NAVIGANT, [https://www.navigant.com/-/media/www/site/insights/construction/2016/dbefraudandthecostofnoncompliance\\_ifh19.pdf](https://www.navigant.com/-/media/www/site/insights/construction/2016/dbefraudandthecostofnoncompliance_ifh19.pdf) [<https://perma.cc/E6LB-VB8D>] (explaining that meeting “10% DBE goal” for “the new Tappan Zee Bridge project in New York . . . [would result in] approximately \$314 million in contracts and subcontracts . . . awarded to DBEs”).

50. See Hanna Lee Blake, *DBE Contractors and Those Working with DBEs Travel a Highly Treacherous Road on Federally-Funded Highway Projects*, WATT TIEDER (Summer 2015), <http://watttieder.com/resources/articles/dbe-contractors-and-those-working-with-dbes> [<https://perma.cc/U79K-QF8R>] (“The most common types of schemes addressed in highly publicized DBE fraud cases and investigations are the ‘front scheme’ and the ‘pass-through scheme.’”); McVicker, *supra* note 43, at 5 (highlighting “front company” and “pass-through” schemes as two common forms of DBE fraud); Zimolong, *supra* note 22 (discussing “fronting” and “pass-through fraud” as most common forms of DBE fraud).

51. See McVicker, *supra* note 43, at 5 (discussing use of “front company” to deceive federal agencies). The author states that the “front company” used by the non-DBE contractor “exists only on paper,” that the “[w]ork [is] done by the prime or non-DBE subcontractor,” and that the fake “DBE is paid a small fee.” See *id.*; William K. Rashbaum, *Fraud Inquiries Focus on Public-Works Hiring in New York*, N.Y. TIMES (Nov. 23, 2010), [http://www.nytimes.com/2010/11/24/nyregion/24fraud.html?\\_r=0](http://www.nytimes.com/2010/11/24/nyregion/24fraud.html?_r=0) [<https://perma.cc/6VER-4MUV>] (noting utilization of “what were essentially front companies to evade requirements” of DBE program); Zimolong, *supra* note 22 (discussing use of “fronting” where a valid-seeming DBE is “in reality . . . ‘controlled’ by a non-DBE”).

can occur when a DBE serves as a mere “pass-through” for the non-DBE prime contractor, which uses the DBE to obtain the contracts but does not require the DBE to contribute meaningfully to the contract’s fulfillment.<sup>52</sup>

D. *What Are the Mechanics of Sentencing Those Convicted of DBE Fraud Within the Third Circuit?*

Given the differences bound to occur between DBE fraud schemes, along with prosecutors’ ability to charge different DBE fraud defendants with different statutorily-defined crimes, the mechanics of federal criminal sentencing must be examined.<sup>53</sup> This subsection will address the mechanics of criminal sentencing within the Third Circuit, which follows a “three-step process” for sentencing defendants after *United States v. Booker*.<sup>54</sup>

First, the district court must properly “calculate[ ] the applicable [sentencing] range” under the U.S. Sentencing Guidelines (Guidelines).<sup>55</sup> Though step one requires this calculation, the Guidelines are not binding on the court—the range merely serves as the mandatory starting point before proceeding to the next two steps.<sup>56</sup> The amount of loss a defen-

52. See *McVicker*, *supra* note 43, at 5 (discussing use of “pass-through” to deceive federal agencies). In the “pass-through” scenario, the DBE is real and “qualified to be a DBE, but [it] performs no commercially useful function,” because “[s]ome or all of the work [is] done by the prime or non-DBE subcontractor. See *id.* The author notes that the “DBE is paid a small fee” for its role in the scheme. See *id.*; see also *Rashbaum*, *supra* note 51 (noting simplicity of pass-through DBE fraud scheme); *Zimolong*, *supra* note 22 (discussing “pass-through fraud” where “a non-DBE firm actually performs the work and [the] DBE firm collects a commission for submitting invoices or payment applications to the general contractor claiming it, rather than the non-DBE, performed the work”).

53. See *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.” (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982))); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.”); Wayne R. LaFare et al., 4 CRIMINAL PROCEDURE § 13.2(a) (4th ed. 2015) (“The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law.”); Terrence M. Hicks, Top Ten Indicators of DBE Fraud & Abuse, LINKEDIN (Apr. 14, 2015), <https://www.linkedin.com/pulse/top-ten-indicators-dbe-fraud-abuse-terrence-m-hicks> [<https://perma.cc/6X65-W6XB>] (analyzing ten different factors that may be present indicating existence of DBE fraud). For varying examples of DBE fraud schemes, see *supra* text accompanying notes 53–57.

54. 543 U.S. 220 (2005).

55. See *United States v. Fumo*, 655 F.3d 288, 308 (3d Cir. 2011) (citing *United States v. Wright*, 642 F.3d 148, 152 (3d Cir. 2011)) (discussing first step of sentencing process, which “includes the application of any sentencing enhancements”). For a look at the current guidelines, see U.S. Sentencing Guidelines Manual (2015), available at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf> [<https://perma.cc/LL5A-PRVS>] [hereinafter Guidelines Manual].

56. See *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.” (citing 18 U.S.C. §§ 3553(a)(4), (5) (2012))); see also *United States v.*

dant caused is a critical factor in calculating the proper Guidelines range.<sup>57</sup> Further, “[t]he amount of loss that a [DBE fraud] defendant is found to have caused largely drives the determination of [the] recommended sentencing range under the Guidelines.”<sup>58</sup>

Second, the district court must consider all departure motions—i.e., motions that allow the court to consider “depart[ing] from the applicable guidelines range” when “there exists an aggravating or a mitigating circumstance . . . .”<sup>59</sup> Though departures should apply only in “atypical case[s],” the Guidelines do provide a list of reasons for adjusting a Guidelines range upward or downward.<sup>60</sup> For example, the Guidelines encourage upward adjustments for harm to property that is not accounted for, and for instances of “significant disruption of a governmental function.”<sup>61</sup> The district court must explain the departure’s impact on the range determination under the Guidelines after any departures are granted.<sup>62</sup>

Third, the district court must consider applying any variances pursuant to the statutory factors appearing in 18 U.S.C. § 3553(a).<sup>63</sup> This sec-

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Langford, 516 F.3d 205, 212 (3d Cir. 2008) (discussing importance of using Guidelines as one factor when calculating sentence).

57. See Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 McGEORGE L. REV. 757, 767 (2006) (noting loss calculation was “single most important factor” in sentencing WorldCom CEO Bernie Ebbers).

58. Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1003 (2010) (discussing importance of loss calculation in determining proper Guidelines range).

59. See U.S.S.G. § 5K2.0(a)(1)(A) (prescribing departure process); see also *Fumo*, 655 F.3d at 308 (discussing step two of sentencing process where all departure motions must be addressed).

60. See OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM’N, *Primer: Departures and Variances* 5 (2015) (internal quotation marks omitted) (quoting Guidelines Manual, *supra* note 55, Ch. 1, Pt. A(4)(b)) (describing application of departures and noting they should “only apply in the ‘atypical’ case lying outside the ‘heartland’ of conduct covered by the guidelines”); see also *id.* at 4–40 (providing overview of departures authorized by Guidelines).

61. See *id.* at 19–21 (quoting *United States v. Cole*, 357 F.3d 780 (8th Cir. 2004)). Under the Guidelines, “[i]f the offense caused property damage or loss not taken into account within the [G]uidelines, the court may increase the sentence above the authorized guideline range” in an amount “depend[ent] on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.” See U.S.S.G. § 5K2.5. Additionally, “[i]f the defendant’s conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized [Guidelines] range to reflect the nature and extent of the disruption and the importance of the governmental function affected.” *Id.* § 5K2.7.

62. See *Fumo*, 655 F.3d at 308 (citing *United States v. Wright*, 642 F.3d 148, 152 (3d Cir. 2011)) (discussing requirement that court explain changes made at step two).

63. See *id.* (discussing step three of sentencing process where “court [must] consider[ ] the recommended Guidelines range together with the statutory factors . . . and determine[ ] the appropriate sentence . . .” (citation omitted) (quot-

tion instructs courts to impose sentences “sufficient, but not greater than necessary,” when issuing a sentence.<sup>64</sup> Several factors should be considered, including: (1) “the nature and circumstances of the offense,” (2) the need to “reflect the seriousness of the offense, to promote respect of the law, and to provide just punishment for the offense,” and (3) the need for deterrence.<sup>65</sup> Courts complete this step by taking the range calculated in step one, adding or subtracting any departures from step two, and increasing or decreasing the range to reflect applied variances.<sup>66</sup>

E. *Have Other Circuit Courts Ruled on DBE Fraud Sentencing?*

The Fourth, Seventh, and Eleventh Circuits have reviewed DBE fraud cases and ruled on issues related to sentence determinations.<sup>67</sup> First, in *United States v. Brothers Construction Co.*,<sup>68</sup> the Fourth Circuit affirmed the sentences of Brothers Construction Company of Ohio, Inc. (Brothers) and Tri-State Asphalt Corp. (Tri-State) for their participation in a pass-through DBE fraud scheme.<sup>69</sup> The Fourth Circuit based its decision on then-current Sentencing Guidelines when it affirmed the district court’s loss calculation of \$185,835.20—the amount “earmarked for DBE project participation by Brothers.”<sup>70</sup> Second, in *United States v. Leahy*,<sup>71</sup> the Sev-

ing *Wright*, 642 F.3d at 152)). Unlike departures, variances are not subject to analysis under the Guidelines. *See id.* at 317 (quoting *United States v. Floyd*, 499 F.3d 308, 311 (3d Cir. 2007)) (explaining that departures are deviations from the Guidelines range based on “reasons contemplated by the Guidelines themselves,” while variances are deviations “based on an exercise of the court’s discretion under [18 U.S.C.] § 3553(a)”).

64. *See* 18 U.S.C. § 3553(a) (2012) (instructing courts on application of sentences).

65. *See id.* § 3553(a)(1)–(2) (outlining factors courts should consider in determining whether variance is appropriate). This citation omits several other enumerated factors that typically deserve attention. *See id.* § 3553(a). However, the author has chosen to highlight factors that encompass DBE fraud’s inherent frustration of DBE program goals. For advice for practitioners, see *infra* notes 129–46 and accompanying text.

66. *See Fumo*, 655 F.3d at 308 (citing *Wright*, 642 F.3d at 152) (discussing court’s responsibility at step three of sentencing process and noting that variances pursuant to 18 U.S.C. § 3553(a) “may vary upward or downward from the range suggested by the Guidelines”).

67. *See* *United States v. Maxwell*, 579 F.3d 1282, 1307 (11th Cir. 2009) (affirming DBE fraud sentence); *United States v. Leahy*, 464 F.3d 773, 789–90 (7th Cir. 2006) (remanding for recalculation of DBE fraud sentence under Guidelines); *United States v. Bros. Constr. Co. of Ohio, Inc.*, 219 F.3d 300, 321 (4th Cir. 2000) (affirming DBE fraud sentence).

68. 219 F.3d 300 (4th Cir. 2000).

69. *See id.* For a discussion of the complex factual history of the pass-through DBE fraud scheme central to *Brothers*, see *id.* at 304–08 (explaining how Tri-State and Brothers attempted to defraud government DBE program).

70. *See id.* at 318 (noting loss “as contemplated by the [G]uidelines”); *see also* U.S. SENTENCING COMM’N, *Guidelines Manual* 147 (Nov. 1, 1997), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1997/manual/CHAP2-3.pdf> [<https://perma.cc/H2KP-S69U>] [hereinafter *1997 Guidelines*].

71. 464 F.3d 773 (7th Cir. 2006).

enth Circuit reached a similar conclusion when it remanded the district court's decision for re-sentencing.<sup>72</sup> In *Leahy*, James Duff essentially fooled government officials into thinking his companies, Windy City Maintenance and Remedial Environmental Manpower, were true DBEs.<sup>73</sup> The court based its decision on then-current Sentencing Guidelines when it held that "[t]he district court . . . erred" by "computing the 'total value of the benefits diverted from intended recipients or uses' . . . [and instead] 'used the contract loss formula of contract price minus the benefit provided.'"<sup>74</sup> Finally, in *United States v. Maxwell*,<sup>75</sup> the Eleventh Circuit affirmed Dewitt Jackson Maxwell's sentence for his participation in a pass-through DBE fraud scheme.<sup>76</sup> Relying on the current Guidelines, the Eleventh Circuit reached a result in line with *Brothers* and *Leahy*: the amount of loss caused in DBE fraud cases is the sum of the DBE contracts "diverted [from the program] to the unintended recipient."<sup>77</sup>

### III. BUILDING THE CASE: A SUMMARY OF THE FACTS, PROCEDURAL HISTORY, AND HOLDING OF *NAGLE*

In *Nagle*, the Third Circuit reviewed a district court's sentences of two individuals convicted of DBE fraud.<sup>78</sup> The court's review focused on step one of the sentencing process: whether the sentences issued by the district court were calculated correctly under the Guidelines.<sup>79</sup> The court held

72. *See id.* at 800 (remanding case to district court).

73. *See id.* at 778–81 (discussing factual background of case).

74. *See id.* at 790 (holding that U.S.S.G. § 2F1.1 n.8(d) should have been used to calculate loss caused by James Duff's DBE fraud schemes). To view a copy of the 1998 version of U.S.S.G. § 2F1.1 n.8(d), see U.S. SENTENCING COMM'N, *Guidelines Manual* 148 (Nov. 1, 1998), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1998/manual/Chap2-3.pdf> [<https://perma.cc/S6P3-CYC7>] [hereinafter *1998 Guidelines*].

75. 579 F.3d 1282 (11th Cir. 2009).

76. *See id.* at 1288 ("After thorough review, we affirm the convictions and the sentence."). For the factual background of the case, see *id.* at 1288–95 (discussing pass-through DBE fraud scheme run by Maxwell).

77. *See id.* at 1305–06 (analyzing loss under U.S.S.G. § 2B1.1 n.3(F)(ii)). For clarity, the Fourth, Seventh, and Eleventh Circuits each used the same Application Note language in reaching their decisions, though the codification changed over time. Compare *1997 Guidelines*, *supra* note 70, at 147 ("In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses."), with *1998 Guidelines*, *supra* 74, at 148 ("In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses."). The Eleventh Circuit also cited *Brothers* and *Leahy* in its decision. *See id.* at 1306 (discussing DBE fraud loss calculation in other circuit courts).

78. *See, e.g.*, Linda Chiem, *3rd Circ. Orders Resentencing in \$136M Hwy Contract Fraud*, LAW360 (Sept. 30, 2015, 8:33 PM), <http://www.law360.com/articles/709394/3rd-circ-orders-resentencing-in-136m-hwy-contract-fraud> [<https://perma.cc/V9MX-UNJN>] (discussing *Nagle*); DeLisle, *supra* note 13 (discussing *Nagle*). For a discussion of the facts of *Nagle*, see *infra* notes 79–87 and accompanying text.

79. *See, e.g.*, Chiem, *supra* note 78 (discussing *Nagle*); see also DeLisle, *supra* note 13 (discussing *Nagle*); David A. Vicinanza et al., *Third Circuit Reins in Loss*

that the sentences were improperly calculated at step one because the district court did not correctly determine the amount of loss for which each defendant was responsible.<sup>80</sup>

#### A. *The Facts of the Case*

Joseph W. Nagle (Nagle) and Ernest G. Fink (Fink) owned and operated Schuylkill Products, Inc. (SPI) and CDS Engineers, Inc. (CDS), “a wholly-owned subsidiary of SPI.”<sup>81</sup> Neither company “qualified as” a DBE.<sup>82</sup> SPI and DBE-certified Marikina Engineers and Construction Corporation (Marikina) worked together to procure federally-funded transportation construction contracts in Pennsylvania.<sup>83</sup> The companies compensated Marikina by “pay[ing] Marikina a fixed fee for its participation” while they retained any profits.<sup>84</sup>

SPI’s use of Marikina constituted a classic “pass-through” DBE fraud scheme.<sup>85</sup> Under the agreement, Marikina performed no work on any of the contracts it procured for SPI and CDS—in fact, SPI and CDS “perform[ed] all of the work” required by the DBE contracts.<sup>86</sup> To hide the

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*Formula for DBE Fraud Prosecutions, NOW + NEXT: GOV’T INVESTIGATIONS & WHITE COLLAR DEF. ALERT* (Nixon Peabody LLP, Washington, D.C.) (Oct. 2, 2015), [http://www.nixonpeabody.com/files/179946\\_GIWC%20Alert\\_2OCT15.pdf](http://www.nixonpeabody.com/files/179946_GIWC%20Alert_2OCT15.pdf) [<https://perma.cc/VK3F-EQVV>] (discussing Third Circuit’s reformulation of loss calculation in *Nagle*). For a discussion of the decision from the U.S. District Court for the Middle District of Pennsylvania, see *infra* notes 88–99 and accompanying text.

80. See *United States v. Nagle*, 803 F.3d 167, 183 (3d Cir. 2015) (announcing correct method for calculating loss in DBE fraud cases), *cert. denied*, 136 S. Ct. 1238 (2016); see also DeLisle, *supra* note 13 (discussing *Nagle*); Chiem, *supra* note 78 (discussing *Nagle*); Vicinanza et al., *supra* note 79 (discussing *Nagle*). For a discussion of the Third Circuit’s decision, see *infra* notes 100–17 and accompanying text.

81. See *Nagle*, 803 F.3d at 171–72 (3d Cir. 2015) (discussing roles of Nagle and Fink). SPI focused on “mak[ing] concrete bridge beams for highway construction [projects],” while CDS handled the installation of the beams. See *Ex-Owner of Schuylkill County Firm Sentenced in Largest Minority Business Fraud in U.S. History*, *READING EAGLE* (July 16, 2014, 12:01 AM), <http://www.readingeagle.com/news/article/ex-owner-of-schuylkill-county-firm-sentenced-in-largest-minority-business-fraud-in-us-history> [<https://perma.cc/UAJ8-KCJN>] (discussing sentencing of Fink and noting corporate purposes of SPI and CDS).

82. See *Nagle*, 803 F.3d at 172 (characterizing SPI and CDS as not possessing DBE status).

83. See *id.* (referring to contractual agreement between SPI and Marikina where Marikina would serve as SPI’s DBE subcontractor for federally-funded construction projects, and noting that “Marikina was certified as a DBE . . . in Pennsylvania”). Marikina was owned by “an American citizen of Filipino descent.” See *id.*

84. See *id.* (discussing financial arrangement between SPI and Marikina).

85. See DeLisle, *supra* note 13 (noting SPI’s use of Marikina as pass-through); McVicker, *supra* note 43 (discussing “pass-through” DBE fraud schemes); Vicinanza et al., *supra* note 79 (discussing Third Circuit’s reformulation of loss calculation in *Nagle*); McVicker, *supra* note 43 (discussing “pass-through” DBE fraud schemes); Rashbaum, *supra* note 51 (discussing pass-through DBE fraud scheme); Zimolong, *supra* note 22 (discussing “pass-through fraud”).

86. See *Nagle*, 803 F.3d at 172 (discussing mechanics of scheme).

scheme, SPI and CDS took numerous steps to hide their true identities during each project.<sup>87</sup> Moreover, Marikina's procurement efforts were actually conducted by SPI.<sup>88</sup>

SPI's agreement with Marikina existed from 1993 to 2008.<sup>89</sup> During Fink's ownership, Marikina obtained DBE contracts from PennDOT and SEPTA "worth over \$119 million" and \$16 million, respectively.<sup>90</sup> During Nagle's ownership, Marikina obtained "nearly \$54 million" worth of PennDOT and SEPTA DBE contracts.<sup>91</sup>

### B. *The District Court's Decision*

In November 2009, after an extensive investigation by federal authorities, Nagle and Fink were "charged in a [thirty-two] count indictment" stemming from their use of Marikina as a pass-through.<sup>92</sup> After a jury trial, Nagle was convicted of all but four of the charges asserted in the

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87. *See id.* (discussing various actions taken by SPI and CDS to disguise identities while performing contracts). SPI and CDS took many deceptive actions: SPI used stationery and email addresses bearing Marikina's name . . . [and] used Marikina's log-in information to access PennDOT's electronic contract management system. CDS employees who performed construction work on site used vehicles with magnetic placards of Marikina's logo covering SPI's and CDS's logos. SPI and CDS employees used Marikina business cards and separate cell phones to disguise whom they worked for. They also used a stamp of Cruz's signature to endorse checks from the prime contractors for deposit into SPI's bank accounts. Although Marikina's payroll account paid CDS's employees, CDS reimbursed Marikina for the labor costs.

*Id.*

88. *See id.* (noting SPI "identified subcontracts that SPI and CDS could fulfill, prepared the bid paperwork, and submitted the information to prime contractors in Marikina's name").

89. *See id.* (discussing duration of contractual relationship).

90. *See id.* (discussing DBE funds obtained while Fink owned and managed SPI from 1993 to 2008).

91. *See id.* (discussing DBE funds obtained while Nagle owned and managed SPI from 2004 to 2008).

92. *See United States v. Nagle*, Crim. No. 1:09-CR-384, 2015 U.S. Dist. LEXIS 159902, at \*1 (M.D. Pa. Nov. 30, 2015) (discussing initial charges brought against Nagle and Fink), *appeal filed*, No. 15-3974 (3d Cir. Dec. 29, 2015); Press Release, U.S. Attorney's Office for the Middle Dist. of Pa., Former Chief Operating Officer and Co-Owner of Schuylkill Products Sentenced in Largest Disadvantaged Business Enterprise Fraud in Nation's History (July 14, 2014), *available at* <https://www.justice.gov/usao-mdpa/pr/former-chief-operating-officer-and-co-owner-schuylkill-products-sentenced-largest> [<https://perma.cc/GW23-F8X8>] ("The investigation was conducted by the FBI, the U.S. Department of Transportation Inspector General's Office, the U.S. Department of Labor Inspector General's Office, and the Criminal Investigation Division of the IRS."). Nagle and Fink were charged with "one count of conspiracy to defraud the United States . . . eleven counts of wire fraud . . . six counts of mail fraud . . . one count of conspiracy to engage in unlawful monetary transactions . . . and eleven counts of engaging in unlawful monetary transactions . . ." *See Nagle*, 803 F.3d at 173 (citations omitted).

indictment.<sup>93</sup> The district court found that Nagle’s Guidelines range would increase by twenty-four levels due to the monetary loss he was found to have caused: \$53.9 million, “the face value of the PennDOT and SEPTA contracts Marikina received while . . . [Nagle] was an executive . . . .”<sup>94</sup> Similarly, the district court found that Fink’s Guidelines range would increase by twenty-six levels due to the monetary loss for which he was responsible: \$135.8 million, “the face value of the PennDOT and SEPTA contracts Marikina received while [Fink] was an executive . . . .”<sup>95</sup> The district court calculated these ranges pursuant to the Guidelines, taking into account the loss for which Nagle and Fink were responsible.<sup>96</sup> Additionally, the district court held that Nagle and Fink “were not entitled to a credit against the loss for the work performed” on the projects.<sup>97</sup>

The district court ultimately “sentenced [Nagle] to [eighty-four] months of incarceration, one year of supervised release, a \$25,000 fine, a \$2,600 special assessment, and no restitution.”<sup>98</sup> Soon after, “[t]he District Court sentenced [Fink] to [fifty-one] months of incarceration, one year of supervised release, a \$25,000 fine, a \$100 special assessment, and no restitution.”<sup>99</sup> Nagle and Fink subsequently appealed their sentences to the Third Circuit Court of Appeals.<sup>100</sup>

### C. *The Third Circuit’s Reversal*

In their appeals, “Nagle and Fink challenge[d] the District Court’s calculation of the amount of loss they were responsible for under the Sen-

93. *See Nagle*, 803 F.3d at 173 (discussing jury’s decision to convict Nagle on certain charges).

94. *See id.* at 174–75 (noting loss caused by Nagle “amounted to a twenty-four-level increase in the Guidelines offense level”).

95. *See id.* (noting loss caused by Fink “amounted to a twenty-six-level increase in the Guidelines offense level”).

96. *See id.* at 174 (discussing calculation of loss under Guidelines). The district court calculated how much loss each was responsible for under section 2B1.1 of the Guidelines. *See id.* Specifically, the court relied on Application Note 3(F)(ii) to 2B1.1 of the Guidelines to hold that “the amount of loss was the face value of the DBE contracts Marikina received” from PennDOT and SEPTA. *See id.* For a discussion of the role loss plays in calculating a Guidelines range, see *supra* notes 72–73 and accompanying text.

97. *See Nagle*, 803 F.3d at 174 (discussing district court’s calculation of loss).

98. *See id.* at 175 (discussing district court’s original determination of Nagle’s sentence). In reaching Nagle’s sentence, the district court granted a departure and a variance due to “the guideline range overstat[ing] the seriousness of the offense . . . .” *See United States v. Nagle*, Crim. No. 1:09-CR-384, 2015 U.S. Dist. LEXIS 159902, at \*9 (M.D. Pa. Nov. 30, 2015), *appeal filed*, 15-3974 (3d Cir. Dec. 29, 2015).

99. *Nagle*, 803 F.3d at 175 (discussing district court’s original determination of Fink’s sentence). Like the court did for Nagle, the district court granted a departure for Fink due to “the guideline range’s overstatement of the seriousness of his offense.” *See Nagle*, 2015 U.S. Dist. LEXIS 159902, at \*9–10.

100. *See Nagle*, 803 F.3d at 175 (referring to timely appeals by Nagle and Fink).



tencing Guidelines.”<sup>101</sup> Unlike the district court, the Third Circuit held “that under either [Application Note 3(A) or 3(F)], the amount of loss Nagle and Fink [were] responsible for [was] the face value of the [DBE] contracts Marikina received *minus* the fair market value of the services they provided under the contracts.”<sup>102</sup>

First, the court analyzed Application Note 3(A) and found it defined loss as either “actual loss” or “intended loss,” whichever is greater.<sup>103</sup> The court then looked to applicable case law to hold that under Application Note 3(A), loss was subject to offsetting for performance.<sup>104</sup> The court pointed out that “the amount of loss in [ ] fraud case[s], unlike [loss] in [ ] theft case[s], often depends on the actual value received by the defrauded victim.”<sup>105</sup>

Applying this principle, the court concluded that, under Application Note 3(A), Nagle and Fink were responsible only for “the value of the [DBE] contracts Marikina received less the value of performance [PennDOT and SEPTA received on those contracts.]”<sup>106</sup> Second, the

101. *See id.* at 179 (discussing procedural posture of case). The Third Circuit examined Nagle and Fink’s criminal sentences first for “procedural and then substantive reasonableness.” *See id.* (citing *United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009)). “Procedural reasonableness requires the District Court to calculate the correct . . . sentencing range” for each defendant. *See id.* (citing *Tomko*, 562 F.3d at 567). Further, an appellate court exercises plenary review when interpreting “loss.” *See id.* (quoting *United States v. Fumo*, 655 F.3d 288, 309 (3d Cir. 2011)).

102. *See id.* at 180 (emphasis added). The court first examined Section 2B1.1 of the Guidelines:

Section 2B1.1 of the Guidelines governs the calculation of the offense level for crimes involving, among other things, fraud and deceit. Subsection (a) provides the base offense level . . . . Subsection (b) provides an extensive list of adjustments for offense-specific characteristics. The first of these adjustments—and the one relevant to this appeal—is the adjustment for the amount of loss. As the loss increases, the offense level increases . . . .

*Id.* at 179. Because “[t]he main text of the Guidelines does not define ‘loss’ . . . . [the court] turn[ed] to the application notes that accompany § 2B1.1.” *Id.* (discussing content of section 2B1.1 Application Notes 3(A) and 3(F)). Nagle and Fink argued that the loss they caused should have been calculated under Application Note 3(A) and that they were “entitled to a credit for the services they performed” under either Application Note 3(A) or 3(F). *See id.* at 180.

103. *See id.* at 179 (defining “actual loss” and “intended loss” (quoting Guidelines Manual, *supra* note 55, § 2B1.1 cmt. n.3(A)(i)-(ii) (internal quotation marks omitted))).

104. *See id.* at 180 (quoting *United States v. Dickler*, 64 F.3d 818, 825 (3d Cir. 1995)) (discussing “normal fraud cases ‘where value passes in both directions . . . .’”); *see also* *United States v. Nathan*, 188 F.3d 190, 210 (3d Cir. 1999) (citing *United States v. Schneider*, 930 F.2d 555, 5558 (7th Cir. 1991)) (calculating loss by “offset[ing] the contract price by the actual value of the components provided”). The court pointed out that *Dickler* interpreted a different section of the Guidelines—§ 2F1.1—but notes that § 2F1.1 was merged into § 2B1.1 in 2001. *See Nagle*, 803 F.3d at 180 n.7.

105. *See id.* at 181 (quoting *Nathan*, 188 F.3d at 210).

106. *See id.* (applying loss formula).

court analyzed Application Note 3(F)(ii), “assuming that the DBE program [was] a ‘government benefit’” for purposes of its analysis.<sup>107</sup> The court found that under Application Note 3(F)(ii), Nagle and Fink would be responsible for the full value of the DBE contracts because profits are “not the only benefit [a] DBE obtains when it receives [ ] contract[s].”<sup>108</sup> In addition to profits, the court identified a DBE’s opportunity to form and develop business connections with “suppliers, labor, and the broader industry” as a key benefit denied to DBEs when non-DBEs actually perform the work.<sup>109</sup>

But the court went further and found Nagle and Fink were also entitled to a credit for contract performance under Application Note 3(F)(ii).<sup>110</sup> Under Application Note 3(E)(i), the court held that the fair market value of services rendered to the victim by the defendant before the fraud was discovered must be used to offset the loss caused by the defendant.<sup>111</sup> Thus, under Application Note 3(F)(ii), the court again found that the loss caused by Nagle and Fink was the “full face value of the contracts” obtained by Marikina minus the fair market value of the services SPI and CDS rendered to PennDOT and SEPTA.<sup>112</sup>

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107. *See id.* The court noted that under this Application Note, “‘loss’ is ‘not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses.’” *See id.* (quoting Guidelines Manual, *supra* note 55, § 2B1.1 cmt. n.3(F)(ii)).

108. *See id.* at 181 (discussing government’s arguments and Nagle and Fink’s counterarguments regarding what part of DBE program constitutes benefit under Application Note 3(F)(ii)). The government argued that the benefits were the total “face value of the [DBE] contracts Marikina [ ] [received].” *See id.* In response, Nagle and Fink argued that “the profit SPI and CDS earned on the contracts” was the only benefit. *See id.*

109. *See id.* (discussing full value of DBE program). The court explained that SPI and CDS put the entire value of the contract to use for a different purpose—SPI and CDS profited from the DBE contracts and developed their own business connections. *See id.* Nagle and Fink were unable to persuade the court to use a different definition of the word “benefit” under section 2C1.1 of the Guidelines, which defines the term as “the benefit that is offered as a bribe to an official.” *See id.* Nagle and Fink also unsuccessfully argued that benefit means “net loss.” *See id.*

110. *See id.* (discussing application note entitling Nagle and Fink to full credit for contract performance).

111. *See id.* at 181–82 (“Application Note 3(E)(i) to § 2B1.1 states that ‘the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected’ shall be credited against the loss.” (quoting Guidelines Manual, *supra* note 55, § 2B1.1 cmt.3 n.(E)(i))). The court found that Application Note 3(E)(i) applied to 3(F)(ii). *See id.* at 182.

112. *See id.* at 181; *see also id.* at 182 (“Here, Note 3E(i) means that we must subtract the ‘fair market value’ of the ‘services rendered’ by SPI and CDS on the contracts before arriving at a final loss value.”). The government argued that “Nagle and Fink [were] not entitled to a credit under [Application] Note 3(E)(i) because as non-DBEs they did not ‘render any valuable services . . . .’” *See id.* at 181. The court rejected this argument:

Although the DBE program cares about who performs the work, it also requires that the work be completed. The transportation agencies required—and received—the construction of concrete materials. They did

Finally, the court briefly addressed the government's argument that no other courts had allowed offsetting for performance in DBE fraud cases.<sup>113</sup> Though the Fourth, Seventh, and Eleventh Circuits had not permitted performance offsetting, the court declined to follow their decisions because the Fourth and Seventh Circuits decided the cases under the earlier version of the Guidelines.<sup>114</sup> Moreover, the court found that the Eleventh Circuit's decision "merely relied on [the Fourth and Seventh Circuit decisions]" in reaching the same conclusion.<sup>115</sup>

As a result, the court "vacate[d] Nagle's and Fink's sentences, and remanded [the case] for resentencing."<sup>116</sup> Notably, however, the court concluded by advising future district courts undertaking DBE fraud sentencing to "keep in mind the goals of the DBE program that have been frustrated by the fraud."<sup>117</sup>

#### IV. HARDHATS REQUIRED: AN INSPECTION OF *NAGLE* AND ADVICE FOR PRACTITIONERS ON HOW TO APPROACH THIRD CIRCUIT DBE FRAUD SENTENCING

By allowing DBE fraud convictions to be offset by contract performance, the court significantly weakened prosecutors' chances of successfully seeking lengthy prison terms for those convicted of DBE fraud.<sup>118</sup> But this obstacle mainly presents a challenge for prosecutors at step one of the sentencing process, and the court suggested that frustrated DBE program

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not receive the entire benefit of their bargain, in that their interest in having a DBE perform the work was not fulfilled, but they did receive the benefit of having the building materials provided and assembled.

*Id.*

113. *See id.* (rejecting "Government's primary argument [ ] that other courts . . . consider[ing] the issue of DBE fraud . . . have not allowed a credit against the face value of the contracts received in calculating the loss").

114. *See id.* (discussing Fourth and Seventh circuit decisions that "were decided using the previous Guidelines provision on fraud and deceit, § 2F1.1," and adding "[t]his difference is important, because the old § 2F1.1 had an application note similar to current Note 3(F)(ii) . . . but no application note similar to current Note 3(E)(i)"). The court stated that "neither the Fourth nor Seventh Circuits had occasion to consider whether Note 3(E)(i) required that the services rendered be credited against the loss." *See id.*; *see also* United States v. Leahy, 464 F.3d 773, 789–90 (7th Cir. 2006) (referring to previous provision not permitting credit for performance in DBE fraud scheme); United States v. Bros. Constr. Co. of Ohio, 219 F.3d 300, 317–18 (4th Cir. 2000) (discussing same).

115. *See Nagle*, 803 F.3d at 182–83 (citing United States v. Maxwell, 579 F.3d 1282, 1305–07 (11th Cir. 2009)) (discussing Eleventh Circuit's reliance on *Brothers* and *Leahy* without considering Application Note 3(E)(i)).

116. *See id.* at 183 (stating conclusion).

117. *See id.* For a discussion of how prosecutors can use this statement to argue for greater sentences, see *infra* notes 139–46 and accompanying text.

118. *See* Vicinanza et al., *supra* note 79 (discussing possible impact of *Nagle* on sentencing and acknowledging "offset for services rendered [that] would bring the loss amount to zero"). For a discussion of how *Nagle* could significantly shorten sentences for DBE fraud convictions, see *infra* notes 121–28 and accompanying text.

goals should be used by prosecutors to argue for fewer leniencies at steps two and three.<sup>119</sup> On the other hand, defense attorneys can combat the efforts of an aggressive prosecutor at steps two and three by focusing on how the goals of the program were not as frustrated as they may seem.<sup>120</sup>

A. *The Third Circuit Weakens Prosecutors' Chances of Successfully Seeking Lengthy Sentences in DBE Fraud Cases*

After *Nagle*, prosecutors will have a more difficult time securing long sentences in DBE fraud cases because convictions can be offset by contract performance.<sup>121</sup> At step one of federal criminal sentencing, courts determine an appropriate Guidelines range in part by calculating how much loss a defendant is responsible for.<sup>122</sup> This loss calculation essentially dictates the appropriate sentencing range.<sup>123</sup> Because Application Notes 3(A) and 3(F)(ii) are both subject to contract performance offsetting, utilizing either Application Note 3(A) or 3(F)(ii) in a DBE fraud case will result in a lower loss calculation—and a significantly diminished sentence—when a non-DBE fully performs the contract.<sup>124</sup>

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119. See Vollrath, *supra* note 58, at 1003 (discussing how loss calculation at step one of sentencing affects determination of proper Guidelines range). Because step one factors in a loss calculation, it follows logically that the Third Circuit's statement about DBE program goals can be considered at steps two and three of the sentencing process, where federal judges possess much discretion. See U.S.S.G. §§ 2B1.1(b), 5K2.0(a)(1)(A) (prescribing sentencing steps); see also *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.” (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982))); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.”); *United States v. Fumo*, 655 F.3d 288, 308 (3d Cir. 2011) (citing *United States v. Wright*, 642 F.3d 148, 152 (3d Cir. 2011)) (discussing variances at step three); LaFave, *supra* note 53 (“The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law.”); Vicinanza et al., *supra* note 79 (stating that *Nagle* “could mean more discretion-based arguments for higher sentences from the government, separate from the loss amount”). For advice for prosecutors on how to approach DBE fraud sentencing, see *infra* notes 129–38 and accompanying text.

120. See MANN, *supra* note 10, at 5 (discussing role of defense attorneys in white-collar crime prosecutions). For advice for defense attorneys on how to approach DBE fraud sentencing, see *infra* notes 139–46 and accompanying text.

121. See Vicinanza, *supra* note 79 (stating that Third Circuit's decision in *Nagle* “[c]urtail[s] an aggressive loss theory” previously used by prosecutors). For a discussion of the Third Circuit's holding in *Nagle*, see *supra* notes 100–17 and accompanying text.

122. For a discussion of step one of the federal criminal sentencing process, see *supra* notes 63–66 and accompanying text.

123. See Vollrath, *supra* note 58, at 1016–20 (discussing loss calculation's effect on ultimate determination of sentencing range under Guidelines for white-collar offenders).

124. See *United States v. Nagle*, 803 F.3d 167, 180 (2015) (holding that offsetting for contract performance applies under either Application Note 3(A) or 3(F)(ii)), *cert. denied*, 136 S. Ct. 1238 (2016); see also Vollrath, *supra* note 58 (dis-

Of course, this only holds true if the non-DBE actually rendered performance on the contract.<sup>125</sup> If a non-DBE performed only a portion of a fraudulently obtained contract—perhaps because its efforts were interrupted by law enforcement—the face value of the entire contract would be offset by only the portion of the contract actually performed, leading to a higher loss calculation and greater sentence.<sup>126</sup>

The court also advised district courts undertaking DBE fraud sentencing to be aware of the DBE program's objectives.<sup>127</sup> Having already established the offsetting procedure for step one of the sentencing process, the court seemed to suggest that the DBE program's "frustrated" purposes could prove useful at steps two and three of the sentencing process, where the court considers granting departures and variances.<sup>128</sup>

#### B. Advice for Third Circuit Federal Prosecutors

Prosecutors can make solid, *Nagle*-based arguments at each step of the federal sentencing process.<sup>129</sup> At step one, prosecutors should focus on distinguishing the facts of their case from the facts of *Nagle*.<sup>130</sup> For in-

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cluding importance of loss calculation on sentencing). Because a smaller amount of loss at step one will likely result in a lower base offense level, a lesser sentence is more likely with contract-performance offsetting. *See id.* For a discussion of offsetting DBE fraud convictions for contract performance, see *supra* notes 121–28 and accompanying text.

125. *See Nagle*, 803 F.3d at 180 (announcing formula for offsetting); *see also* Vicinanza et al., *supra* note 79 (“[W]here the work was fully completed . . . an offset for services rendered thus would bring the loss amount to zero.”). The implication of the author’s statement is that any offsetting for performance will be commensurate with the amount of services actually rendered—i.e., if a non-DBE renders half of the work due on the project, the loss will be the face value of the contracts minus the value of the half of the services rendered. *See id.* (referring to *Nagle* court’s loss calculation).

126. *See id.*

127. *See id.* at 183 (3d Cir. 2015) (“If possible and when relevant, the district court should keep in mind the goals of the DBE program that have been frustrated by the fraud.”).

128. *See id.* (discussing aims of DBE program); Vicinanza et al., *supra* note 79 (suggesting use of “more discretion-based arguments . . . separate from the loss amount”). Though this statement has been made in relation to prosecutors, this principle would apply to both sides of the adversarial criminal justice process. For a discussion of steps two and three of the federal sentencing process, see *supra* notes 67–74 and accompanying text.

129. *See* Vicinanza et al., *supra* note 79 (“[This decision] could mean more discretion-based arguments for higher sentences from the government, separate from the loss amount.”). *Nagle*-based arguments can be made at each step, though “discretion-based” arguments are much more relevant at steps two and three because step one is the calculation of the recommended Guidelines range. *See* *United States v. Booker*, 543 U.S. 220, 264 (2005) (citing 18 U.S.C. §§ 3553(a) (4), (5) (2012)) (discussing step one of federal sentencing process).

130. *See* Eugene Volokh, *Analogizing and Distinguishing Cases*, VOLOKH CONSPIRACY (Aug. 10, 2009, 2:26 PM), <http://volokh.com/posts/1249928819.shtml> [<https://perma.cc/T9K8-GKHE>] (discussing framework for distinguishing cases). For a summary of the facts in *Nagle*, see *supra* notes 79–87 and accompanying text.

stance, in *Nagle*, SPI and CDS used Marikina as a pass-through DBE to obtain DBE contracts fraudulently.<sup>131</sup> Would offsetting still apply if SPI and CDS had simply lied about their DBE status, instead of actually including a real DBE in the plan?<sup>132</sup>

At step two, prosecutors should focus heavily on the DBE program's frustrated goals in seeking upward departures.<sup>133</sup> For instance, under the encouraged upward departure for "property loss or damage not taken into account" by the sentence, prosecutors should argue that the Guidelines do not effectively cover the loss to indirect victims, such as taxpayers whose hard-earned dollars went to "purposes [not intended] by Congress."<sup>134</sup> Additionally, prosecutors should argue that the DBE fraud constituted a "significant disruption" of the DBE program—"a governmental function"—by misallocating the government's funds and depriving traditionally disadvantaged groups the benefit of the government's assistance.<sup>135</sup>

Prosecutors should approach step three similarly.<sup>136</sup> For instance, under the first factor of 18 U.S.C. § 3553(a), "the nature and circumstances of the offense," prosecutors should argue that the defendant's conduct was reprehensible in that it prevented the DBE program from leveling the playing field for traditionally disadvantaged business owners and effectively built an extra barrier to entry for them.<sup>137</sup> These subverted

131. See *Nagle*, 803 F.3d at 172 (discussing Marikina's role as pass-through DBE).

132. See *United States v. Leahy*, 464 F.3d 773, 780–81 (7th Cir. 2006) (discussing James Duff's deceptive conduct resulting in DBE certification for his non-DBE companies). For a discussion of other variations of DBE fraud schemes that a prosecutor may find helpful in determining how to distinguish a case from the facts of *Nagle*, see *supra* notes 53–57 and accompanying text.

133. See *Vicinanzo et al.*, *supra* note 79 (suggesting prosecutors can make "discretion-based arguments for higher sentences . . . separate from the loss amount"); see also U.S.S.G. § 5K2.0(a)(1)(A) (prescribing departure process). For a discussion of step two of the sentencing process, see *supra* notes 67–70.

134. See *McVicker*, *supra* note 43 (listing taxpayers as victims of DBE fraud); see also U.S.S.G. § 5K2.5 (providing grounds for upward departure when loss is not effectively covered by sentence).

135. See U.S.S.G. § 5K2.5; *United States v. Flinn*, 18 F.3d 826, 829–30 (10th Cir. 1994) ("[T]he provision is concerned with degree of disruption and importance of governmental function disrupted." (citing U.S.S.G. § 5K2.5)); see also 49 C.F.R. § 26.1 (2016) (stating intended benefits of federal DBE program); *Adarand Constructors v. Peña*, 515 U.S. 200, 261 (1995) (Stevens, J., dissenting) (acknowledging challenges faced by businesses owned by members of traditionally disadvantaged groups); *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 247–49 (4th Cir. 2010) (discussing evidence of barriers faced by DBEs); Xiao, *supra* note 27, at 239 (noting negative impact on minority-owned businesses when DBE funds are diverted from program).

136. See 18 U.S.C. § 3553(a) (2012) (providing grounds for variances). Like step two, where prosecutors used the letter of the law from U.S.S.G. § 5K2.5 to argue for higher sentences, step three also requires prosecutors to root their arguments in specific language. For a discussion of step three of the federal sentencing process, see *supra* notes 71–74 and accompanying text.

137. See 18 U.S.C. § 3553(a)(1); see also 49 C.F.R. § 26.1 (stating intended goals of federal DBE program). For a discussion of variances, see *supra* note 71

goals should also be referred to by prosecutors when arguing for upward variances based on the two other factors: retribution for the conduct, and deterrence of others acting similarly.<sup>138</sup>

### C. *Advice for Third Circuit Defense Attorneys*

Defense attorneys should focus their efforts on ensuring that offsetting for contract performance is applied at step one, and combatting any arguments for upward departures or variances at steps two and three.<sup>139</sup> At step one, defense attorneys should argue that *Nagle* is binding precedent upon district courts within the Third Circuit, requiring offsetting for contract performance in DBE fraud cases regardless of the specific facts.<sup>140</sup>

At step two, defense attorneys should point out that the court's statement suggesting attention to the DBE program's frustrated goals neither explicitly states that the frustrated goals get special attention at step two, nor is binding on the court due to its status as dicta within the *Nagle* decision.<sup>141</sup> Moreover, defense attorneys should point out that the district court in *Nagle* issued *downward* departures for Nagle and Fink on grounds that the sentence overstated the seriousness of their offenses.<sup>142</sup> Defense attorneys should respond to any prosecutor arguments for upward depar-

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and accompanying text. For a discussion of the DBE program's goals, see *supra* notes 35–42 and accompanying text.

138. See 18 U.S.C. §§ 3553(a)(1), (2)(A)–(B). Subsection (2)(A) of the statute permits upward variances based on “the need . . . to provide just punishment for the offense,” which is how the need for retribution enters the mix. See *id.* § (a)(1)(2)(A). “Retribution” is defined as “[p]unishment imposed for a serious offense.” BLACK’S LAW DICTIONARY 1511 (10th ed. 2014).

139. See *United States v. Nagle*, 803 F.3d 167, 180 (3d Cir. 2015) (“[T]he victim’s loss will normally be the difference between the value he or she gave up and the value he or she received.” (quoting *United States v. Dickler*, 64 F.3d 818, 825 (3d Cir. 1995))), *cert. denied*, 136 S. Ct. 1238 (2016). Though the Third Circuit announced a new method of calculating loss in DBE fraud cases, three other circuits have previously reviewed DBE fraud sentences and held that the total amount of loss was equivalent to the total amount of diverted DBE contracts. See *United States v. Maxwell*, 579 F.3d 1282, 1305–07 (11th Cir. 2009); *United States v. Leahy*, 464 F.3d 773, 789–90 (7th Cir. 2006); *United States v. Bros. Constr. Co.*, 219 F.3d 300, 317–18 (4th Cir. 2000).

140. See *United States v. Nagle*, No. 14-3184, slip op. at 1 (3d Cir. Sept. 30, 2015), available at <http://www2.ca3.uscourts.gov/opinarch/143184p.pdf> [<https://perma.cc/MLR5-KRED>] (marking opinion as “precedential”).

141. See *Nagle*, 803 F.3d at 183 (“If possible and when relevant, the District Court should keep in mind the goals of the DBE program that have been frustrated by the fraud.”). The court’s suggestion is void of any reference to any specific federal sentencing steps. See *id.*; see also Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 957 (2005) (discussing role played by dicta and noting that dicta is not “presumptively binding”).

142. See *United States v. Nagle*, Crim. No. 1:09-CR-384, 2015 U.S. Dist. LEXIS 159902, at \*16–18 (M.D. Pa. Nov. 30, 2015) (ordering downward departure for Nagle and Fink’s sentences after Third Circuit review and remand), *appeal filed*, No. 15-3974 (3d Cir. Dec. 29, 2015).

tures based on unaccounted-for property loss or damage by arguing that damage to indirect victims of DBE fraud is simply not calculable due to the “amorphous” and non-descript nature of the victims.<sup>143</sup> A strong response to a prosecutor’s argument that the DBE fraud disrupted a governmental service would be that there “simply [are not] enough” DBEs available to perform projects, and the available DBEs may not be equipped to handle certain projects on their own.<sup>144</sup>

At step three, defense attorneys should respond to prosecutors’ arguments for upward variances based on “the nature and circumstances of the offense,” the need for retribution, and the need for deterrence by arguing that the sentence determined in step one is sufficient and that any upward variance would be “greater than necessary.”<sup>145</sup> The defense attorney should also point out that mere subversion of the DBE program’s goals is covered in the sentence already, even with offsetting for contract performance.<sup>146</sup>

## V. CONCLUSION

In *Nagle*, the Third Circuit changed the blueprint for sentencing those convicted of DBE fraud.<sup>147</sup> The court made it much more difficult for prosecutors to seek extremely long DBE-fraud sentences by allowing offsetting for contract performance during step one of the sentencing process.<sup>148</sup> But the court advised future district courts undertaking DBE fraud sentencing to keep the frustrated goals of the DBE program in mind, inviting prosecutors and defense attorneys to focus on the undermined goals of the program when arguing at steps two and three of the sentencing process.<sup>149</sup> Practitioners can work to increase or decrease a

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143. See Henning, *supra* note 1, 32–33 (stating nature of victims is difficult to ascertain for purposes of sentencing white-collar offenders); McVicker, *supra* note 43 (listing taxpayers as victims of DBE fraud); see also U.S.S.G. § 5K2.5 (providing basis for upward departures when “the offense caused property damage or loss not taken into account within the [G]uidelines . . .”).

144. See *id.* (providing grounds for upward departure when government service disrupted); see also Slowey, *supra* note 11 (discussing quantity of DBEs that are capable of performing construction work).

145. See 18 U.S.C. §§ 3553(a)(1), (a)(2)(B) (2012). This argument would be based on the statute’s requirement that “[t]he court . . . impose a sentence sufficient, but not greater than, necessary . . .” See *id.* § 3553(a). Thus, determining what is “necessary” to punish the defendant will be key. See *id.*

146. See 18 U.S.C. § 3553(a)(2)(A). This argument would focus on the statute’s language stating that there is a “need for the sentence imposed . . . to reflect the seriousness of the offense . . .” See *id.*

147. For an analysis of *Nagle*, see *supra* notes 75–117 and accompanying text.

148. For an analysis of *Nagle*’s impact on criminal sentencing, see *supra* notes 121–28 and accompanying text.

149. For a discussion of the Third Circuit’s suggestion that future courts calculating DBE fraud sentences should stay mindful of the DBE program’s goals, see *supra* note 117 and accompanying text.



defendant's DBE fraud sentence by incorporating these arguments into their adversarial efforts.<sup>150</sup>

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150. For advice for prosecutors and defense attorneys, see *supra* notes 129–46 and accompanying text.