NO.
SUPREME COURT OF THE UNITED STATES

DANIEL SEXTON	)
	)
Petitioner	)
	)
- VS. -	)
	)
UNITED STATES OF AMERICA	)
	)
Respondent.	)

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Counsel of Record for Petitioner
Daniel Sexton

QUESTION PRESENTED FOR REVIEW

Question I. Does this Court's reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), limiting joint and several forfeiture liability to what a defendant obtained, also apply to this forfeiture order under 18 U.S.C. § 981(a)(1)(C), which held Sexton liable for nearly the entire $2.5 million loss although, as most, he obtained $624,000.

There is a Circuit Split on this issue as the 3rd and 11th Circuits found *Honeycutt* applies but the 6th Circuit said it does not.

Question II – Can costs not permitted by statute and not incurred as part of a victim bank's participation in a government investigation be ordered as restitution, contrary to this Court's holding in *Lagos v. United States,* --- U.S. ---, 138 S. Ct. 1684 (2018)?

This circuit ruling conflicts with recent Supreme Court precedent.

Question III Was the use of a dismissed California charge as a prior conviction and to place Sexton under a criminal justice sentence as to increase his algorithmic Criminal History from a I to a III, and thus increase his algorithmic, rule-based Sentencing Range, a violation of the sentencing guidelines, our principles of individualized justice, and Due Process of Law?

This circuit ruling on increasing criminal history based on a dismissed offense violates Due Process of law under the Fifth Amendment

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT
WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Daniel Sexton, Appellant, Petitioner

United States of America, Appellee, Respondent

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OPINIONS AND ORDERS BELOW

The opinion below of the United States Court of Appeals for the Sixth Circuit was rendered in *United States v. Daniel Sexton*, ___ F.3d. ___ (6th Cir. 2018) Case No. 17-5743; that opinion affirmed (Moore, dissenting) the judgment and orders of the United States District Court for the Eastern District of Kentucky in case number #: . 16-cr-40-dcr-1Sexton upon a plea of guilty to Count 1, Conspiracy to defraud an FDIC insured bank, 18 USC §1349 within that district and committing Sexton to the custody of the Bureau of Prisons to a total term of 109 months imprisonment.

JURISDICTION

i. The opinion of the United States Court of Appeals for the Sixth Circuit was entered on July 5, 2018; pursuant to Rule 13.1 of the rules of this Court, the Petition is timely filed.

ii. A petition for a rehearing was filed in this matter and denied; no extension of time within which to file a petition for a writ of certiorari has been made.

iii. This is not a cross-Petition pursuant to Rule 12.5.

iv. The statutory provision conferring jurisdiction upon this Court to review upon a writ of certiorari the judgment or order in question is 28 U.S.C. §1254.

Constitutional Provisions And Other Authorities Involved In This Case

Fifth Amendment - Constitution of the United States
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 981forfeiture
(a)(1) The following property is subject to forfeiture to the United States:
…(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

… (a) (2) For purposes of paragraph (1), the term "proceeds" is defined as follows: (A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

18 U.S.C. § 3663- restitution
(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

18 U.S.C. § 3664(e)-restitution
(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

STATEMENT OF THE CASE

Jurisdiction in the First Instance

Subject matter jurisdiction vested in the U.S. District Court for the Eastern District of Kentucky pursuant to 18 U.S.C. §3231; Sexton was indicted for offenses against the laws of the United States and was convicted upon a plea of guilty to 21 U.S.C. §§ 841 (a) (1) and (b) (1)(C) and 846 within that district.

Appellate jurisdiction vested in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1291 and 28 U.S.C. §1294.

Presentation of Issues in the Courts Below and Facts

Daniel Sexton entered a plea of guilty to conspiracy to commit bank fraud and accepted responsibility for his misconduct. But he did not agree with his Criminal History being enhanced for a dismissed state conviction.

This is not only about Daniel Sexton but about others, especially his accountant Williams, and Williams' corrupt contact within the bank that began this affair. Mr. Sexton had worked hard in both preserving and expanding the work of his grandfather and father while building a career as a musician. His success made him a target.

The District Court overruled Sexton's objections regarding Criminal History and counted a dismissed misdemeanor conviction to increase his Criminal History to III. The court then sentenced Mr. Sexton to 109 months imprisonment, more than anyone else, a fine, restitution and a forfeiture judgment.

Before the Court of Appeals it was argued that:

> Issue I – The dismissed California conviction should not have been counted as a prior conviction nor as placing Sexton under a criminal justice sentence at the time of the offense, increasing his Criminal History from a I to a III and greatly inflating his

punishment. This was procedurally unreasonable.

…

Issue III – The forfeiture order was erroneous as it held Sexton accountable for the entire loss of the conspiracy, not simply what he himself received from it.

Issue IV – The restitution judgment was erroneous as it held Sexton accountable for items not properly counted as loss of the conspiracy, such as legal fees, late fees, force place insurance, appraisal fees, property taxes and interest. (Appellant's Brief, Statement of the Issues)

The Sixth Circuit found all without merit, holding that

1) The 3rd and 11th circuits were incorrect to apply *Honeycutt v. United States* to forfeiture under 18 USC 981, and thus it held Sexton to a forfeiture judgment far beyond what he received, a judgment replicated upon the other co-defendants,
2) The restitution order for costs unrelated to the criminal investigation and not authorized by statute was not plain error, despite the the rendition during the appeal of the holding of this Court in *Lagos v. United States* such restitution costs were improper, and
3) It was acceptable to punish Sexton for his dismissed California conviction, with its 3-point enhancement of his Criminal History, just as if it had not been dismissed.

United States v. Sexton, ___ F.3. ___(6th Cir. 2018)

A petition for rehearing was made to the Court of Appeals and was denied.

This Petition follows.

REASONS FOR GRANTING THE WRIT

Question I. Does the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), limiting joint and several forfeiture liability to what a defendant obtained, also apply to this forfeiture order under 18 U.S.C. § 981(a)(1)(C), with similar language but under which held Sexton liable for nearly the entire $2.5 million loss although, as most, he obtained $624,000.

There is a Circuit Split on this issue as the 3rd and 11th Circuits held *Honeycutt* applies to a forfeiture order under 18 U.S.C. § 981 but the 6th Circuit held in this case it does not.

The district court and appeals court held Sexton liable for the entire amount stolen through a 18 U.S.C. § 981(a)(1)(C) forfeiture order, not just what he obtained. This despite the common meaning that you forfeit that which you have, this Court's ruling in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) that forfeitures were limited to what the defendant received, and the holdings of the 3rd and 11th Circuits that *Honeycutt's* reasoning applies to forfeiture under 18 U.S.C. § 981(a)(1)(C) at issue in this case. See *United States v. Gjeli*, 867 F.3d 418, 427 n.16 (3d Cir. 2017), as amended (Aug. 23, 2017); *United States v. Carlyle*, 712 F. App'x 862, 864 (11th Cir. 2017).

The forfeiture statute in *Honeycutt* and the forfeiture statute here are basically the same, *forfeiting* things (i.e., giving up what you have), with slightly different wording, but both reflecting the required nexus to a defendant and proceeds to the offense, and not justifying joint and several liability in stackable forfeiture orders. This is seen from their texts, with the statute in *Honeycutt*, 21 U.S.C. § 853(a)(1) ("Any person convicted of a violation . . . shall forfeit . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation.") matching that in *Gjeli, Carlyle* and here, 18 U.S.C. § 981(a)(1)(C) ("The following property is subject to forfeiture to the United States . . . Any

property, real or person, which constitutes or is derived from proceeds traceable to a violation.").[1]

Both the 3rd and the 11th Circuits held Honeycutt's reasoning applies in a case like Secton's. But the Sixth Circuit chose the opposite, saying "… we believe those [3rd and 11th Circuits] were incorrect. The Sixth Circuit reasoned that

> Unlike § 853(a)(1), 18 U.S.C. § 981(a)(1)(C) does not contain the phrase "the person obtained," which was the linchpin of the Supreme Court's decision in Honeycutt. Under § 981(a)(1)(C), "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section . . . 1344 of this title . . . or a conspiracy to commit such offense" is "subject to forfeiture to the United States." While property must be connected, or "traceable," to the crime, it does not need to be property that the particular defendant received. As long as the property is connected to the crime, a defendant can be liable for property that his codefendant acquired. Consequently, we hold that the reasoning of Honeycutt is not applicable to § 981(a)(1)(C).

United States v. Sexton, ___ F.3d ____ (6th Cir. 2018), File Name: 18a0132p.06, pp 11-12.

This would hold a defendant jointly and severally liable in forfeiture for that of which he may have no knowledge nor control nor ever did, and permits the government to enter repetitive, stackable orders, as here, holding each and every defendant in a case liable for the whole amount in forfeiture, an unjust windfall for the government and a tortured interpretation of the concept of

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21 U. S. C. §853(a)(1)	**18 U.S.C. § 981(a)(1)(C)**
a)PROPERTY SUBJECT TO CRIMINAL FORFEITURE Any person convicted … shall forfeit to the United States, … **(1)** *any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation*;	**(a) (1)**The following property is subject to forfeiture to the United States:… **(C)** *Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section …*

forfeiture[2], which is to lose that which *you* have, not what another has.

In doing so it violates the requirement of 18 U.S.C. § 981 that it be property *derived from proceeds traceable to a violation*; proceeds are those things of value obtained by the person, the same as set out in 21 USC 853. Thus the refutation of joint and several liability in *Honeycutt* applies to Sexton's case and the forfeiture under 18 USC 981.

This is seen in how 18 U.S.C. § 981 defines proceeds:

> **18 USC 981 (a) (2)**For purposes of paragraph (1), the term "proceeds" is defined as follows: (A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means *property of any kind obtained directly or indirectly,* as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense. (emphasis added)

Thus for 18 U.S.C. § 981(a)(1)(C), forfeiture of "proceeds" means, just as in *Honeycutt*, the property obtained by the defendant as a result of the offense. As such, as in Honeycutt, the forfeiture order as to Mr. Sexton could only be for that which he obtained, which was far less than the forfeiture order setting the entire loss caused by all the defendants, especially those that received the bulk of those proceeds.

It is respectfully requested that the Petition be granted and the order of forfeiture be vacated.

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2 Forfeiture has a long history in Anglo-American law, from deodands to the Constitution: "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." U.S.Const. Art.III, §3.

Question II – Can costs not permitted by statute nor incurred as part of a victim bank's participation in a government investigation be ordered as restitution, contrary to this Court's holding in *Lagos v. United States,* --- U.S. ---, 138 S. Ct. 1684 (2018)?

Sexton disputed a portion of the PSR's loss calculation including $50,000 in losses claimed by Forcht Bank, which included amounts for accrued interest, late fees, legal fees, property taxes, force place insurance, and appraisal fees.

During the appeal, this Court held in *Lagos v. United States,* --- U.S. ---, 138 S. Ct. 1684 (2018) that, based on the statute's language, a restitution award under § 3663A(B)(4) is "limited to government investigations and criminal proceedings" and cannot include "expenses incurred before the victim's participation in a government's investigation began." Id. at 1688, 1690

Yet the Court of Appeals found Sexton did not at trial dispute the district court's restitution determination and thus affirmed it. *United States v. Sexton*, ___ F.3d. ___ (6th Cir. 2018) File Name: 18a0132p.06, pp 13-15.

But Judge Karen Moore of the panel dissented, noting that "The general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 281 (1969). A related concept is that a district court's initially correct determination can become wrong because of a change in law, and this scenario mandates that an appellate court conclude that the district court plainly erred. *Henderson v. United States*, 568 U.S. 266, 279 (2013); see also *Johnson v. United States*, 520 U.S. 461, 468 (1997)." Thus Judge Moore found that this part of the restitution order error that required it be vacated and remanded.

The restitution statute 18 USC § 3663 does not permit charging items not set out therein, particular Accrued Interest, Late Fees. Legal Fees, Property Taxes, Force Place Insurance,

Appraisal Fees or other innominate or undefined credits charged against seized and liquidated assets as compensable amounts in a restitution order where they were after the fact of an offense and too remote to be part of that order. No restitution is permitted for consequential damages that fall outside of that properly set out in a restitution order as unrelated or insufficiently defined to establish propriety of inclusion in restitution order.

In particular, in its supplement to its declaration of victim losses Forcht Bank claimed it was owed $110, 001.32 as of January 30, 2017 for the following items:

$59,681.91	Principal Balance
$29,045.83	Accrued Interest
$1,460.74	Late Fees
$12,554.14	Legal Fees
$1,646.74	Property Taxes
$2,111.96	Force Place Insurance
$3,500.00	Appraisal Fees

These amounts, except for the balance, are not related in any way to the required "…property, real or personal, which constitutes or is derived from proceeds traceable to a violation…" as these are all *post hoc* matters, nor are they tied to the government investigation nor the criminal proceeding.

Thus under the holding of *Lagos v. Untied States* restitution must be tied to a government investigation or to a criminal proceeding, and that was not shown here. *Lagos,* 138 S. Ct. at 1687.With this failure of proof, the district court's restitution award for Forcht Bank's legal fees is no longer valid, if it ever was.

The Petition should be granted and the sentence and order of restitution vacated.

Question III Was the use of a dismissed California charge as a prior conviction and to place Sexton under a criminal justice sentence as to increase his algorithmic Criminal History from a I to a III, and thus increase his algorithmic, rule-based Sentencing Range, a violation of the sentencing guidelines, our principles of individualized justice, and Due Process of Law?

A 2005 nolo contendere plea by Mr. Sexton in California was dismissed in 2008; under California Penal Code §1203.097 , no sentence was imposed in this case. Yet it was counted as to increase Sexton's Criminal History from zero the three, increasing his Guidelines sentencing range from 78–97 to 97–121 months imprisonment, from which he received 109 months mid-range imprisonment, well above the maximum for the correct Guidelines range and highly prejudicial to Sexton.

This was justified by the district court per U.S.S.G. § 4A1.2. But Note 6 to U.S.S.G. § 4A1.2 states:

> 6. **Reversed, Vacated, or Invalidated Convictions.—**Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (*e.g.*, 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions). (emphasis added)
>
> Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History
> Category).

This clearly states that Sexton's invalidated conviction must not be counted against him as to enhance his criminal penalty.

U.S.S.G. § 4A1.2 Note 10 does address the grace of the court where a defendant is pardoned or a conviction set aside:

> 10. **Convictions Set Aside or Defendant Pardoned.—**A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j). Note 10, U.S.S.G. § 4A1.2

So "expunged" convictions are not counted, but expungable ones aren't, a distinction without a difference which is not entitled to much consideration by a sentencing court. This provision counts a conviction set aside for reasons that are *claimed* are unrelated to innocence.

Due process under the Fifth Amendment requires proof of some type, which simply isn't here. This is a proof issue the burden of which falls on the government, and in this case there was no such proof; Sexton should not have been penalized without such proof as the mere assertion is simply insufficient.

The California matter was dismissed by the California trial court, whose judge was best in a position to determine what it embraced, the California federal appeals court followed that ruling. Here, there is but the dismissal, and our federal courts may respect the judgment of our state courts. This is the foundation of federalism. Second-guessing and speculating about what might have happened is procedurally unreasonable, and substantively unreasonable for unwarranted weight to these factor in violation of Due Process of law under the Fifth Amendment, which requires facts and reason applied to those facts. 18 USC §3553 requires full consideration of the sentencing factors therein, in particular the history and characteristics of the defendant. Undue reliance on guidelines rules undercuts this as to deny Sexton an individualized sentence. Conclusions based on insufficient evidence cannot penalize Sexton.

And the anomalous proposition that expunged convictions are not counted, while other, expungable conviction are, is irrational and at odds with criminal justice practice in the United States. This is yet another substantively unreasonable element of the guidelines and its

calculations.

Yet the Court of Appeals found that this was fully appropriate, as these circumstances did not justify a lesser culpability for Sexton. *United States v. Sexton,* ___ F.3d ___ (6th Cir. 2018) File Name: 18a0132p.06, pp 4-5.

It is respectfully requested that this Petition be granted and Sexton's sentence must be vacated and this matter remanded for resentencing without consideration of his California case in setting his Criminal History.

CONCLUSION

The judgment and sentence were erroneous and this Petition for Writ of Certiorari should be granted and Mr. Sexton given the relief he has argued for herein.

Respectfully submitted,

/s Michael Losavio
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Counsel of Record for
Petitioner Daniel Sexton

Certification of Word Count and Petition Length

The undersigned certifies that this Petition for a Writ of Certiorari does not exceed 9000 words nor 40 pages in length, not counting the appendix materials, and is in compliance with the length rules of Supreme Court Rule 33.

/s Michael Losavio
Michael Losavio
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Counsel of Record for Petitioner
pursuant to the Criminal Justice Act

Certificate of Service

A copy of the foregoing Petition for a Writ of Certiorari has been served this day by U.S. Postal Mail or via a private expedited service on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

This 25th day of July, 2018

/s Michael Losavio
Michael Losavio
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Counsel of Record for Petitioner
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Statutes Involved In This Case

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(a)(1) The following property is subject to forfeiture to the United States:

…(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

… (a) (2) For purposes of paragraph (1), the term "proceeds" is defined as follows: (A) In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term "proceeds" means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.

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The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

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Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by

a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0132p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL SEXTON,

Defendant-Appellant.

No. 17-5743

Appeal from the United States District Court for the Eastern District of Kentucky at Lexington.
No. 5:16-cr-00040-1—Danny C. Reeves, District Judge.

Argued: May 1, 2018

Decided and Filed: July 5, 2018

Before: MOORE, CLAY, and KETHLEDGE, Circuit Judges.

COUNSEL

ARGUED: Michael M. Losavio, Louisville, Kentucky, for Appellant. Dmitriy Slavin, UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee. **ON BRIEF:** Michael M. Losavio, Louisville, Kentucky, for Appellant. Dmitriy Slavin, Charles P. Wisdom Jr., UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee.

CLAY, J., delivered the opinion of the court in which KETHLEDGE, J., joined, and MOORE, J., joined in part. MOORE, J. (pg. 17), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Defendant Daniel Sexton ("Sexton") appeals from the judgment entered by the district court sentencing him to 109 months' imprisonment, and ordering him to pay $2,637,058.32 in restitution and to forfeit property to the government, including a money judgment of $2,534,912. For the reasons set forth below, we **AFFIRM** the decision of the district court.

BACKGROUND

I. Factual History

Sexton operated a number of businesses in Kentucky. Jonathan Williams ("Williams") was a certified public accountant ("CPA") who acted as manager or co-owner of Sexton's companies. Sheila Flynn ("Flynn") was the office manager. Between May 2006 and September

2010, Sexton and his co-conspirators secured loans for the businesses from banks by making misrepresentations about the businesses' assets and the identity of the true borrowers. For example, Sexton owned three mobile home parks, and Sexton and Williams submitted financial records to banks and other lenders valuing the parks significantly higher than their actual value. Sexton and Williams also submitted to banks financial records falsely valuing a jet, and false and unfiled tax returns containing inflated adjusted gross income amounts. In addition, they arranged for straw purchases of condominiums that Sexton owned that were in foreclosure proceedings.

The banks who issued the loans included PBI Bank, Community Trust Bank, Farmers National Bank, Forcht Bank, and Central Bank. The total amount of funds disbursed from these banks was $8,160,400. Sexton and Williams also submitted applications for higher loan amounts ($13,600,000 and $13,800,000) toward the end of the time period involved, but those loan funds were never disbursed.

II. Procedural History

On May 5, 2016, Sexton, along with Williams, Flynn, and Joseph Tobin ("Tobin"), a bank loan officer at PBI Bank, was charged in a twenty-four count indictment. Count 1 alleged conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349 and 18 U.S.C. § 1344(1), and Counts 2–24 alleged bank fraud in violation of 18 U.S.C. § 1344(1) and 18 U.S.C. § 2. The indictment also alleged forfeiture to the U.S. of certain property pursuant to 18 U.S.C. §§ 981(a)(1)(C), 982(a)(2)(A), and 28 U.S.C. § 2461(c).

On February 3, 2017, Sexton pleaded guilty to Count 1 pursuant to a plea agreement. At sentencing, the government moved to dismiss Counts 2–24. On March 28, 2017, a Presentence

Investigation Report ("PSR") was prepared for Sexton. Relevant to this appeal, the PSR gave

Sexton a four-level increase for being an organizer or leader under USSG § 3B1.1(a). The PSR also gave Sexton one criminal history point pursuant to USSG §§ 4A1.1(c), 4A1.2(m), and 4A1.2(f) for a 2005 California sentence for willful infliction of corporal injury to which Sexton pleaded nolo contendere. Finally, the PSR gave Sexton another two criminal history points pursuant to USSG § 4A1.1(d) for committing the instant offense while on probation for the

California sentence. Sexton's guideline imprisonment range was 97–121 months. Sexton objected to both the organizer/leader adjustment and his criminal history calculation.

Sexton was sentenced on June 19, 2017. At sentencing, the district court overruled Sexton's objections to the organizer/leader enhancement and to the criminal history score. The district court applied the leader enhancement, finding that there were more than five participants, that Sexton exercised responsibility, leadership, or organizational responsibility over Flynn, that the conspiracy was otherwise extensive, and that Sexton was entitled to a large share of the fruits of the crime. The court also assessed three criminal-history points finding that the California case represented a prior sentence and that Sexton committed the instant offense while still serving that sentence. The court

sentenced Sexton to 109 months in prison.

On June 27, 2017, Sexton timely filed his notice of appeal. He argues on appeal that the district court incorrectly increased his criminal history score three points based on the California sentence, that the district court incorrectly applied the organizer/leader enhancement, that

Sexton's sentence was substantively and procedurally unreasonable, and that both the forfeiture order and restitution judgment were erroneous.

DISCUSSION

I. Criminal History Score

Standard of Review

"In reviewing a district court's application of the Sentencing Guidelines, this Court will 'accept the findings of fact of the district court unless they are clearly erroneous and [will] give due deference to the district court's application of the Guidelines to the facts.'" *United States v. Moon*, 513 F.3d 527, 539–40 (6th Cir. 2008) (quoting *United States v. Williams*, 355 F.3d 893, 897–98 (6th Cir. 2003)). "We review a district court's legal conclusions regarding the

Sentencing Guidelines *de novo*." *Id*. at 540 (citing *United States v. Latouf*, 132 F.3d 320, 331 (6th Cir. 1997)). "We review de novo a district court's criminal history calculation." *United States v. Paseur*, 148 F. App'x 404, 408 (6th Cir. 2005) (citing *United States v. Wheeler*, 330 F.3d 407, 411 (6th Cir. 2003)).

Analysis

A defendant's criminal history category is determined by looking at USSG §§ 4A1.1 and

4A1.2. A district court assigns zero to three criminal history points for each of a defendant's prior sentences. USSG § 4A1.1. A prior sentence is "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense." USSG § 4A1.2(a)(1). If the prior sentence was not a "sentence of imprisonment," the district court adds one point. USSG § 4A1.1(c). After assigning points for each of the prior sentences, the district court must determine whether the present offense was committed "while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." USSG § 4A1.1(d). If so, the court must add two points. *Id*.

On September 19, 2005, Sexton pleaded nolo contendere to willful infliction of corporal injury in the Los Angeles Superior Court of California. The court found Defendant guilty. The

court did not sentence Sexton to prison, but placed Sexton on 24 months of summary probation with several conditions. The court provided that if Sexton successfully completed summary probation, he would be permitted to withdraw his plea and the case would be dismissed. On December 23, 2008, Sexton was permitted to withdraw his plea, and the case was dismissed.

The district correctly assessed one criminal history point for this prior California sentence under USSG § 4A1.1(c). Though Sexton was not sentenced to prison, he was placed on probation by the California court, which is treated as a sentence under §4A1.1(c). USSG § 4A1.2 cmt. n.2. That Sexton was eventually permitted to withdraw his plea makes no difference. A "diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under § 4A1.1(c) even if a conviction is not formally entered." USSG § 4A1.2(f). This rule "reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency." USSG § 4A1.2 cmt. n.9. The arrangement provided by the California court fits within the definition of a diversionary disposition under § 4A1.2(f). Sexton's sentence was not otherwise reversed, vacated, invalidated, or expunged.
See id. § 4A1.2 cmt. n.6, 10.

The district also correctly assessed two criminal history points under USSG § 4A1.1(d). Sexton became involved in the instant conspiracy beginning in 2006, which was while he was still on probation for this prior California sentence.

Because the district court did not err in its criminal history analysis, we affirm the district court's criminal history calculation.

II. Leadership Adjustment

Standard of Review

"We review the district court's 'legal conclusion that a person is an organizer or

leader under [§] 3B1.1' deferentially, and its factual findings for clear error." *United States v. House*, 872 F.3d 748, 751 (6th Cir. 2017) (quoting *United States v. Olive*, 804 F.3d 747, 759 (6th Cir. 2015)). "Under the clear-error standard, we abide by the court's findings of fact unless the

record leaves us with the definite and firm conviction that a mistake has been committed." *Id.*

(quoting *United States v. Yancy*, 725 F.3d 596, 598 (6th Cir. 2013)).

Analysis

Section 3B1.1(a) of the Sentencing Guidelines mandates a four-point offense-level increase "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." To decide whether a defendant was an "organizer or leader," the Guidelines direct courts to consider a number of factors, including "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." USSG § 3B1.1 cmt. n 4. "A district court need not find each factor in order to warrant an enhancement." *United States v. Castilla-Lugo*, 699 F.3d 454, 460 (6th Cir. 2012) (citing *United States v. Gates*, 461 F.3d 703, 709 (6th Cir. 2006)). "There can . . . be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." USSG § 3B1.1 cmt. n.4.

However, "[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." USSG § 3B1.1 cmt. n.2. If a defendant did not organize, lead, manage, or supervise another participant, an upward departure may be warranted if the defendant "nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization." *Id*. This means the enhancement can be applied "where a defendant has 'exerted control over at least one individual within a criminal organization,' but not where the defendant has 'merely exercised control over the property, assets or activities of the enterprise.'" *United States v. Swanberg*, 370 F.3d 622, 629 (6th Cir. 2004) (quoting *United States v. Gort-DiDonato*, 109 F.3d 318, 321 (6th Cir. 1997)).

"The government bears the burden of proving that the enhancement applies by a preponderance of the evidence." *United States v. Vandeberg*, 201 F.3d 805, 811 (6th Cir. 2000) (citing *United States v. Martinez*, 181 F.3d 794, 797 (6th Cir. 1999)).

Sexton does not argue that the district court erred in finding the five participant requirement to have been satisfied and does not address the district court's finding that the criminal activity was otherwise extensive. Accordingly, we do not consider those issues, and instead address only whether the district court erred in concluding that Sexton was an organizer or leader of the conspiracy. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997).

The district court reasonably found that Sexton exerted control over a single individual within the criminal organization, Sheila Flynn. At sentencing, Flynn testified that she worked for one of Sexton's companies and that Sexton was her boss. Flynn testified that she prepared false documents while working at Sexton's company and under Sexton's direction, including false bank statements, false rent rolls, and a false airline appraisal. She testified that after preparing those documents, she gave them to either Williams or Sexton. She testified that the documents were then submitted to banks or loan companies. Flynn also testified that Sexton fired her in October 2005. At that time, Sexton received a foreclosure notice on his properties, decided to go to California, and took $25,000 in cash with him. In response, and while Sexton was gone, Williams and Flynn tried to seize control of the company. When Sexton returned from California, he fired Williams and Flynn and retook control of the company. He later rehired both Williams and Flynn. In light of this evidence, the district court reasonably found that that Sexton "exerted control over at least one individual within [the] criminal organization." *Swanberg*, 370 F.3d at 629.

Sexton did not merely exercise authority over one participant. Turning to the other factors, the district court also reasonably found that Sexton had a right to a larger share of the fruits of the crime. For instance, Flynn testified that some of the money from the loans "went back into the property, but a majority of it was diverted to a house in the Bahamas and a house in

Indiana." (R. 262, Sentencing Tr., PageID # 1077.) She testified that the house in the Bahamas belonged to Sexton, and the house in Indiana belonged to Sexton's girlfriend. Flynn also testified that the money for Sexton's trips to California came from the rents that the company

collected, even though the rent money was supposed to pay off the loans or bills the company incurred.

A third factor, the nature of participation in the commission of the offense, also supports the district court's conclusion. Sexton owned and operated a number of businesses involved in the scheme. His companies' assets were used to secure the loans, and his employees were used to carry out the fraudulent activities. The companies were the vehicle through which the bank fraud was accomplished. And Sexton was not a mere owner or operator of the businesses. Sexton knew of the role his businesses and employees played in the scheme, allowed the scheme to continue, participated in the scheme,[1] and benefitted from the scheme both personally and as owner and operator of those businesses. *See United States v. Lewis*, 21 F. App'x 320, 322 (6th Cir. 2001).

In all, three of the factors laid out by the Guidelines cut in favor of finding Sexton was a leader of the criminal activity. That Williams may have qualified as a leader during the same period of time does not preclude Sexton from also occupying a leadership or organizational role. USSG § 3B1.1 cmt. n.4; *United States v. Sadler*, 750 F.3d 585, 594 (6th Cir. 2014). That Williams may have been the actual brains behind the operation also does not preclude Sexton from being a leader when there is sufficient other evidence of Sexton's leadership role. *United States v. Burley*, 241 F. App'x 290, 296–97 (6th Cir. 2007).

Sexton was the owner and operator of companies that were used to perpetrate bank fraud. He opened up his businesses to carry out the fraudulent enterprise. He bankrolled the operation and provided the infrastructure for the conspiracy by allowing his assets and employees to be used to accomplish the fraud. He knew of the fraud, took actions to assist in the fraud, personally and professionally benefitted from the fraud, and at the very least implicitly approved of the fraud. Sexton also exerted control over at least one member of the conspiracy. Because

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[1]For instance, Sexton, along with Williams, met with potential lenders for the purpose of securing loans. Further, Flynn testified at sentencing that Sexton had to sign his false personal financial statements and also the disbursements that would allow them to get the money that would go to buy houses. Even Sexton's attorney admitted at sentencing that Sexton was "certainly a participant and an active participant in the offense" and "may at times, that may have been close to or even crossed the line of some sort of supervisory activity." (R. 262, Sentencing Tr., PageID # 1088.)

several of the factors listed in the Guidelines support the district court's finding, and because we give due deference to the district court's conclusion that the leadership enhancement applies, the district court did not err in applying the leadership enhancement in this case.

Accordingly, we affirm the district court's application of the enhancement.

III. Substantive Reasonableness

Standard of Review

This Court reviews sentencing decisions deferentially for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 41 (2007).

Analysis

This Court reviews a sentence for reasonableness. *United States v. Payton*, 754 F.3d 375, 377 (6th Cir. 2014). "This review has two components: procedural reasonableness and substantive reasonableness." *United States v. Solano-Rosales*, 781 F.3d 345, 351 (6th Cir. 2015).

A district court commits a procedural error by "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Gall*, 552 U.S. at 51.

To be substantively reasonable, the sentence "must be proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes of § 3553(a)." *United States v. Vowell*, 516 F.3d 503, 512 (6th Cir. 2008) (citation and internal quotation marks omitted). "A sentence may be considered substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, fails to consider relevant factors, or gives an unreasonable amount of weight to any pertinent factor." *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008) (citing *United States*

v. Webb, 403 F.3d 373, 385 (6th Cir. 2005)).

> We "afford[] a rebuttable presumption of reasonableness to a properly calculated, within-

Guidelines sentence." *United States v. Graham*, 622 F.3d 445, 464 (6th Cir. 2010) (citing *United States v. Vonner*, 516 F.3d 382, 389–90 (6th Cir. 2008) (en banc)).

The district court sentenced Sexton to the middle of the Guidelines range after explicitly mentioning and reviewing a number of § 3553(a) factors, and after considering and rejecting

Sexton's arguments. The court concluded, after considering "all of the factors of 3553, I do find that a sentence in the middle of the range is entirely appropriate and justified in this particular matter." (R. 262, Sentencing Tr., PageID # 1139.)

Sexton's main challenge is to the district court's weighing of those factors, specifically failing to give enough weight to his "minor and overstated criminal history, a family, personal remorse and acceptance of responsibility."[2] (Sexton Br. at 48.) However, "the manner in which a district court chooses to balance the applicable sentencing factors is beyond the scope of the

Court's review." *United States v. Adkins*, 729 F.3d 559, 571 (6th Cir. 2013) (citing *United States v. Sexton*, 512 F.3d 326, 332 (6th Cir. 2008); *United States v. Ely*, 468 F.3d 399, 404 (6th Cir.

2006)). And "[w]here a district court explicitly or implicitly considers and weighs all pertinent factors, a defendant clearly bears a much greater burden in arguing that the court has given an unreasonable amount of weight to any particular one." *Id*. (quoting *United States v. Thomas*, 437

F. App'x. 456, 458 (6th Cir. 2011)). The district court did consider all of the factors mentioned by Sexton and found that many of them weighed against giving him a lower sentence. For instance, the court considered Sexton's criminal history and decided that it, as well as his multiple pre-sentence bond violations relating to cocaine use, weighed in favor of the Guidelines sentence provided. Further, the district court considered recalculating the Guidelines range to remove the acceptance of responsibility credit because Sexton was "pointing the finger at everybody else." (R. 262, Sentencing Tr.,

PageID # 1133–34.)

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[2]On appeal, Sexton also argues that the district court erred in failing to consider Sexton's age, citing to the Sentencing Commission's report on the effects of aging on recidivism. However, Sexton did not raise this report or argument to this Court until his reply brief and did not raise it to the district court at all. Consequently, we will not consider this argument. *United States v. Lopez-Medina*, 461 F.3d 724, 743 n.4 (6th Cir. 2006) (deeming an argument raised for the first time in a reply brief, but not the main brief, waived (citing *McPherson*, 125 F.3d at 995–96)); *United States v. Embry*, No. 17-1923, 2018 WL 1567388, at *4 (6th Cir. Mar. 30, 2018) ("We cannot find that the sentencing court abused its discretion by failing to consider an argument that Defendant did not raise, particularly where, as here, the court would have been obligated only to consider—not to accept—the argument.").

> Because the district court justified its sentence with reference to the purposes of

§ 3553(a) and because a within Guidelines sentence is presumed reasonable, we cannot say that Sexton's sentence is unreasonable. Accordingly, we affirm Sexton's sentence.

IV. Forfeiture

Standard of Review

"We review the interpretation of federal forfeiture laws *de novo.*" *United States v. Hampton*, 732 F.3d 687, 690 (6th Cir. 2013). "However, as [Sexton] concedes, because [he] failed to object to entry of the forfeiture money judgment on any grounds, our review is for plain error." *Id*. "Plain error requires that the defendant show error that is plain and that 'affects substantial rights' and, if shown, also that the 'error seriously affects the fairness, integrity, or public reputation of the judicial proceedings.'" *Id.* (citing *Johnson v. United States*, 520 U.S. 461, 462 (1997)).

Analysis

The civil forfeiture statute, 18 U.S.C. § 981(a)(1)(C), permits the forfeiture of "proceeds traceable to a violation of section . . . 1344 of this title . . . or a conspiracy to commit such offense." However, under 28 U.S.C. § 2461(c), "[t]he government may seek criminal forfeiture for violation of any federal statute 'for which the civil or criminal forfeiture of property is authorized.'" *Hampton*, 732 F.3d at 690 (citing 28 U.S.C. § 2461(c)).

Sexton pleaded guilty to conspiracy to commit bank fraud in violation of 18 U.S.C. §§ 1349 and 1344, and the money judgment against Sexton was entered pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). The money judgment amount was for $2,534,912. On appeal, Sexton argues that the district court plainly erred in holding Sexton liable for this amount in light of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017).

In *Honeycutt*, the Supreme Court examined 21 U.S.C. § 853, a different forfeiture statute than the one involved in this case. *Id*. at 1635. Section 853(a) provides, "[a]ny person convicted of a violation of this subchapter . . . shall forfeit to the United States . . .

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the

result of such violation." First, the Supreme Court concluded that for the forfeiture statute to apply, the property needs to be tainted, meaning that it flows from the crime. 137 S. Ct. at 1632. Second, the Supreme Court determined that forfeiture is limited to property that the defendant actually acquired. *Id*. at 1632–33. The Supreme Court relied on the phrase "the person obtained" in § 853 to make this conclusion. *Id*. Finally, the Supreme Court looked to other parts of the statute, which supported limiting forfeiture to the property the defendant actually acquired as a result of the crime. *Id*. at 1633. The Supreme Court ultimately held that "[f]orfeiture . . . is limited to property the defendant himself actually acquired as the result of the crime." 137 S. Ct. at 1635. The Supreme Court further held that a defendant may not be "held jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire." *Id*. at 1630.

Since *Honeycutt* was decided, two other circuits have determined that its reasoning also applies to forfeiture under 18 U.S.C. § 981(a)(1)(C). *See United States v. Gjeli*, 867 F.3d 418, 427 n.16 (3d Cir. 2017), *as amended* (Aug. 23, 2017); *United States v. Carlyle*, 712 F. App'x

862, 864 (11th Cir. 2017). However, we believe those circuits were incorrect. Unlike § 853(a)(1), 18 U.S.C. § 981(a)(1)(C) does not contain the phrase "the person obtained," which was the linchpin of the Supreme Court's decision in *Honeycutt*. Under § 981(a)(1)(C), "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section . . . 1344 of this title . . . or a conspiracy to commit such offense" is "subject to forfeiture to the United States." While property must be connected, or "traceable," to the crime, it does not need to be property that the particular defendant received. As long as the property is connected to the crime, a defendant can be liable for property that his codefendant acquired. Consequently, we hold that the reasoning of *Honeycutt* is not applicable to § 981(a)(1)(C). And

Sexton's challenge to the district court's forfeiture order fails. Accordingly, we affirm the district court's forfeiture order.

V. Restitution

Standard of Review

"We review the propriety of a restitution order de novo." *United States v. Church*, 731 F.3d 530, 535 (6th Cir. 2013) (citing *Johnson*, 440 F.3d at 849). '"Because federal courts have no inherent power to award restitution,' restitution orders are proper 'only when and to the extent authorized by statute.'" *Id.* (quoting *United States v. Evers*, 669 F.3d 645, 655–656 (6th Cir. 2012)). Because Sexton did not object to the amount of restitution, this Court reviews for plain error. *United States v. Koeberlein*, 161 F.3d 946, 951 (6th Cir. 1998).

Analysis

Under the Mandatory Victim Restitution Act ("MVRA"), "a district court must order restitution from a defendant convicted 'of an offense against property . . . including any offense committed by fraud or deceit' if an identifiable victim has suffered a loss." *United States v. Gale*, 468 F.3d 929, 941 (6th Cir. 2006) (citing 18 U.S.C. § 3663A(a)(1), (c)(1)). The government "must prove the bank's loss by a preponderance of the evidence." *United States v. Kratt*, 579 F.3d 558, 565 (6th Cir. 2009) (citing 18 U.S.C. § 3664(e)). "In calculating restitution, 'the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order.'" *Id.* (quoting *Hughey v. United States*, 495 U.S. 411, 420 (1990)). The district court may hold co-defendants jointly and severally liable for the restitution amount.

United States v. Bogart, 576 F.3d 565, 575–76 (6th Cir. 2009) (citing 18 U.S.C. § 3664(h)).

In the plea agreement, the parties agreed to recommend a restitution amount of $2,534,912. The parties reserved the right to "object or argue in favor of other calculations." (R.

154, Plea Agreement, PageID # 441.) The PSR, which was prepared after the plea agreement was entered into, calculated a restitution amount of $2,637,058.32. The district court ordered restitution in the amount of $2,637,058.32. The court explained that the number contained in the plea agreement was lower than the number contained in the PSR because one of the

financial institutions was not able to sell some of the collateral for as much as it had originally agreed upon. The court noted that it was a joint and several obligation with Williams for the same amount, and with Flynn up to $1,467,674.

On appeal, Sexton first argues that the "charge-off" methodology used in the PSR to calculate loss was "not defined as to allow determination that [the losses] are legal in any way whatsoever." (Sexton Br. at 34.) But Sexton has not cited case law where a similar methodology was found inappropriate. And we are not persuaded by Sexton's argument. The district court based its restitution amount on the PSR, which detailed the methodology for calculating loss. The PSR explained that "[e]ach of the banks (PBI, Farmers, Forcht, and Community Trust) that lent money to the defendants, or their straw borrowers, have supplied records detailing the loan amounts, payment history, and collateral for each loan." (PSR, PageID

740.) The records provided by the banks specified "charge-off" amounts for each loan. (*Id.*)

The "charge-off" amount "is the amount of money that a bank determines it has incurred in the event of a borrower's default." (*Id.*) "The charge-off amount for a loan is calculated by subtracting the appropriate credits against loss, including but not limited to, payments made on the loan and liquidated collateral, from the principal loan balance (interest and fees are not included). The resulting difference approximates a bank's pecuniary loss for a particular loan."

(*Id.*) The PSR indicated where numbers had changed due to the sale of collateral. Because the

PSR detailed how it calculated the banks' losses, we do not think it was plain error for the district court to accept the PSR's "charge-off" methodology in order to calculate the banks' losses. *See United States v. Carmichael*, 676 F. App'x 402, 406 (6th Cir. 2017).

Sexton's remaining argument disputes a specific portion of the PSR's loss calculation— about $50,000 in losses claimed by Forcht Bank. More specifically, Forcht Bank provided a supplemental declaration of victim losses, which included amounts for accrued interest, late fees, legal fees, property taxes, force place insurance, and appraisal fees.

Sexton argues that "[t]he restitution statute does not provide" for these items to be

included in a restitution order. (Sexton Br. at 38–39.) Where an "offense does not involve damage to or loss or destruction of property . . . the MVRA 'requires only that the restitution ordered by the district court be based on losses caused by the specific conduct that is the basis for the offense of conviction.'" *United States v. Elson*, 577 F.3d 713, 726 (6th Cir. 2009) (quoting

United States v. Akbani, 151 F.3d 774, 780 (8th Cir. 1998)). Under 18 U.S.C. § 3663A(b)(4), the district court must order restitution to "reimburse the victim for . . . other expenses incurred

during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." In *Elson*, the Court concluded that the specific attorney fees involved in the case were "directly related to the offense of conviction," and therefore "recoverable as restitution under the MVRA." *Elson*, 577 F.3d at 728. However, the Supreme Court recently decided *Lagos v. United States*, --- U.S. ---, 138 S. Ct. 1684 (2018), which abrogated *Elson*. In *Lagos*, the Supreme Court held that, based on the statute's language, a restitution award under § 3663A(B)(4) is "limited to government investigations and criminal proceedings" and cannot include "expenses incurred *before* the victim's participation in a government's investigation began." *Id*. at 1688, 1690.

Forcht Bank's declaration included $12,554.14 in legal fees that it accrued, but it is not clear that Forcht Bank accrued those fees within the limits that the Supreme Court set in *Lagos*. The record does not contain any information as to whether Forcht Bank paid those fees as part of the government's investigation and criminal proceedings. Because it is not clear to us how these fees were accrued, it is hard to say that the district court committed any error. To the extent

Sexton's argument challenges the district court's findings as to the amount of loss, this Court has previously held that "a district court is required to make adequate factual findings in calculating the loss amount when there is a 'disputed portion of the presentence report or other controverted matter.'" *United States v. McGlown*, 380 F. App'x 487, 491 (6th Cir. 2010) (quoting *United States v. Darwich*, 337 F.3d 645, 666 (6th Cir. 2003)). However, because Sexton did not dispute the restitution amount, the district court was not required to make more specific factual findings, and because the district court was not required to make more specific factual findings, it did not plainly err as a result of failing to make such findings.

As to the remaining figures in Forcht Bank's declaration, Sexton provides no evidence that the losses were unrelated to the conspiracy. And Sexton cites a number of cases from both inside and outside this Circuit where courts have properly included similar fees in a restitution order. *See, e.g.*, *United States v. Robers*, 698 F.3d 937, 955 (7th Cir. 2012) (permitting the inclusion in the restitution award of line-item expenses like

property taxes, insurance, and accrued interest). We do not think that Sexton has shown an error that is "obvious or clear."

Koeberlein, 161 F.3d at 949.

Because the district court did not commit plain error by ordering $2,637,058.32 in restitution, we affirm the district court's restitution award.

CONCLUSION

For the reasons set forth above, we **AFFIRM** the decision of the district court.

CONCURRING IN PART AND DISSENTING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. I join the majority opinion except for the portion concluding that the Supreme Court's recent decision in *Lagos v. United States*, --- U.S. ---, 138 S. Ct. 1684, 1687 (2018), does not require us to vacate the portion of the restitution award for Forcht Bank's legal fees. According to the majority, the district court did not plainly err because the parties, while at the district court, did not dispute Forcht Bank's $12,554.14 in legal fees.

"The general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Hous. Auth. of City of Durham*, 393 U.S. 268, 281 (1969). A related concept is that a district court's initially correct determination can become wrong because of a change in law, and this scenario mandates that an appellate court conclude that the district court plainly erred. *Henderson v. United States*, 568 U.S. 266, 279 (2013); *see also Johnson v. United States*, 520 U.S. 461, 468 (1997).

In Sexton's case, although the district court's award of restitution for Forcht Bank's legal fees might have been correct before *Lagos*, nonetheless after the Supreme Court's decision, restitution must be tied to a government investigation or to a criminal proceeding. *Lagos*, 138 S.

Ct. at 1687. Because the government has "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense" under 18 U.S.C. § 3664(e), the government needed to prove that Forcht Bank's legal fees stemmed from a government proceeding or a criminal investigation. The government, however, has not met its burden because it is not clear from the district court record that Forcht Bank accrued these legal fees within the limits that the Supreme Court recently set in *Lagos*. Therefore, the district court's restitution award for Forcht

Bank's legal fees is no longer valid.

In light of the new import of *Lagos*, I would remand to permit the government to attempt to meet its burden of proof regarding the restitution to Forcht Bank of its $12,554.14. Otherwise, I concur in full in the majority opinion.

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Central Division at Lexington

UNITED STATES OF AMERICA

v.

Daniel Sexton

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:16-CR-40-DCR-1

USM Number: 20905-032

George Scott Hayworth
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:1349	Conspiracy to Commit Bank Fraud	09/2010	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 2-24 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 19, 2017
Date of Imposition of Judgment

Signature of Judge

Honorable Danny C. Reeves, U.S. District Judge
Name and Title of Judge

June 21, 2017
Date

DEFENDANT: Daniel Sexton
CASE NUMBER: 5:16-CR-40-DCR-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

ONE HUNDRED NINE (109) MONTHS

☒ The court makes the following recommendations to the Bureau of Prisons:
It is recommended to the Bureau of Prisons that the defendant participate in the 500-Hour RDAP Program.
It is recommended to the Bureau of Prisons that the defendant be designated to the facility closest to his home for which he qualifies as a secondary recommendation to his participation in the RDAP.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Daniel Sexton
CASE NUMBER: 5:16-CR-40-DCR-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

FIVE (5) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☒ You shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
6. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Daniel Sexton
CASE NUMBER: 5:16-CR-40-DCR-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Daniel Sexton
CASE NUMBER: 5:16-CR-40-DCR-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall abstain from the use of alcohol.

2. The defendant shall participate in a substance abuse treatment program and shall submit to periodic drug and alcohol testing at the direction and discretion of the probation officer during the term of supervision. Said program may include one or more cognitive behavioral approaches to address criminal thinking patterns and antisocial behaviors. The defendant shall pay for the cost of treatment services to the extent he is able as determined by the probation officer.

3. The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing, which is required as a condition of release.

4. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless he is in compliance with the installment payment schedule.

5. The defendant shall provide the probation officer with access to any requested financial information.

6. The defendant shall not purchase, possess, use, distribute or administer any controlled substance or paraphernalia related to controlled substances, except as prescribed by a physician and shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

DEFENDANT: Daniel Sexton
CASE NUMBER: 5:16-CR-40-DCR-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 12,500.00	$ 2,637,058.32

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
PBI Bank C/O Tracy O. Hatfield 2424 Harrodsburg Road Suite 100 Lexington, KY 40503	$2,211,630.00	$2,211,630.00	84%
Farmers Deposit Bank (now Farmers National Bank) C/O Michael Denbow 400 West Market Street Suite 1800 Louisville, KY 40202	$234,159.00	$234,159.00	9%
Forcht Bank C/O Jessica Newman 2721 Old Rosebud Road Suite 105 Lexington, KY 40509	$110,001.32	$110,001.32	4%
Community Trust Bank C/O Wayne Hancock P.O. Box 2947 Pikeville, KY 41502	$81,268.00	$81,268.00	3%
TOTALS	$ 2,637,058.32	$ 2,637,058.32	100%

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Daniel Sexton
CASE NUMBER: 5:16-CR-40-DCR-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 2,649,658.32 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
101 Barr Street, Room 206, Lexington KY 40507

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
Restitution in the amount of $2,637,058.32 shall be due immediately. This represents a restitution amount of $2,211,630 owed to PBI Bank, a restitution amount of $234,159 owed to Farmers National Bank (now Farmers Deposit Bank), a restitution amount of $110,001.32 owed to Forcht Bank, and a restitution amount of $81,268 owed to Community Trust Bank. This is a joint and several obligation with Jonathan Williams (5:16-CR-00040-DCR-2; ordered to pay $2,637,058.32 on March 10, 2017), Sheila Flynn (5:16-CR-00040-DCR-4; ordered to pay $1,467,674 on March 24, 2017), and any other defendant in this case subsequently ordered to pay restitution by this Court, which would include Joseph Tobin. Any outstanding balance owed upon commencement of incarceration shall be paid in accordance with the Federal Bureau of Prisons' Inmate Financial Responsibility Program. Any outstanding balance owed upon commencement of supervision shall be paid according to a schedule set by subsequent orders of the Court.

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
All property listed in the Forfeiture Allegation of the Indictment, which includes a money judgment in the amount of $2,534,912. This agreed upon amount differs from the restitution amount due to one of the financial institution's inability to sell some of the collateral for as much as originally anticipated.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action No. 5: 16-040-DCR
	)	
V.	)	
	)	
DANIEL SEXTON, et al.,	)	**PRELIMINARY JUDGMENT OF FORFEITURE**
	)	
Defendants.	)	

*** *** *** ***

Based upon the terms of the written Plea Agreements tendered herein and being sufficiently advised, it is hereby

ORDERED and **ADJUDGED** as follows:

1. The United States' motion [Record No. 222] is **GRANTED**. The property listed below is forfeited to the United States of America pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c):

MONEY JUDGMENTS:

a. Daniel Sexton - $2,534,912.00 money judgment which represents the proceeds obtained as a result of the commission of the 18 U.S.C. § 1349 offense for which the defendant pled guilty.

b. Johnathan Williams - $2,394,912.00 money judgment which represents the proceeds obtained as a result of the commission of the 18 U.S.C. § 1349 offense for which the defendant pled guilty.

c. Joseph Tobin - $2,101,095.00 money judgment which represents the proceeds obtained as a result of the commission of the 18 U.S.C. § 1344 offense for which the defendant pled guilty.

d. Sheila Flynn - $1,402,674.00 money judgment which represents the proceeds obtained as a result of the commission of the 18 U.S.C. § 1344 offense for which the defendant pled guilty.

2. The money judgments constitute a debt owed to the United States by the defendants and the United States may take necessary steps in order to satisfy said debt.

3. The United States is authorized to conduct appropriate discovery and to conduct any necessary ancillary proceedings as provided by 21 U.S.C. § 853(n), as to the collection of the money judgment or subsequent assets used to satisfy the judgment, and the rights of third parties who may have an interest in property forfeited herein.

4. The United States District Court shall retain jurisdiction in the case for the purpose of enforcing this Order. Because it does not order the forfeiture of specific property, no notice pursuant to Rule 32.2(b)(6)(A) is required.

5. Pursuant to Criminal Rule of Procedure 32.2(b)(4)(A), this Order of Forfeiture shall become final with respect to the defendants at the time of sentencing and shall be made part of the sentence and included in the judgment.

6. The Clerk of Court shall deliver copies of this Order to all counsel of record, the United States Marshal's Service, and the United States Probation Office.

This 7th day of June, 2017.

Signed By:
Danny C. Reeves DCR
United States District Judge