

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2018

JOHN GREGORY ALEXANDER HERRIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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Federal Defender

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SUBMITTED: July 25, 2019

TABLE OF CONTENTS

	<u>Pages</u>
Order to Show Cause filed January 14, 2019 No. 19-30002, Ninth Circuit Court of Appeals.....	1-2
Order denying initial hearing <i>en banc</i> filed June 5, 2019 No. 19-30002, Ninth Circuit Court of Appeals.....	3
Order dismissing appeal for lack of jurisdiction filed June 26, 2019 No. 19-30002, Ninth Circuit Court of Appeals.....	4
Order denying defendant's Motion to Suppress Evidence filed January 10, 2019, No. CR 16-15-H-SEH, United States District Court for the District of Montana, Helena Division.....	5-6
Transcript of Hearing on Motion to Suppress Evidence held January 10, 2019, No. CR 16-15-H-SEH, United States District Court for the District of Montana, Helena Division.....	7-130
Indictment filed October 26, 2016, No. CR 16-15-H-SEH, United States District Court for the District of Montana, Helena Division.....	131-139
Application for Search Warrant, Bates Nos. 322-327, No. CR 16-15-H-SEH, United States District Court for the District of Montana, Helena Division.....	140-145
Response in Opposition to Defendant's Motion to Suppress filed December 17, 2018, No. CR 16-15-H-SEH, United States District Court for the District of Montana, Helena Division.....	146-163

Email dated December 5, 2018 from Deputy Federal Defender Michael Donahoe to Assistant United States Attorney Tim Racicot	164
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Email dated December 6, 2018 from Assistant United States Attorney Tim Racicot to Deputy Federal Defender Michael Donahoe	165
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 14 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN GREGORY ALEXAND HERRIN,

Defendant-Appellant.

No. 19-30002

D.C. No. 6:16-cr-00015-SEH
District of Montana,
Helena

ORDER

A review of the record suggests that this court may lack jurisdiction over the appeal because the district court's order, denying appellant's motion to suppress, entered on January 10, 2019, is not appealable as a final judgment or an order that comes within the collateral order doctrine. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (stating that finality requirement generally "prohibits appellate review until after conviction and imposition of sentence").

Within 21 days after the date of this order, appellant shall move for voluntary dismissal of the appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, a response may be filed within 10 days after service of the memorandum.

Failure to comply with this order may result in the dismissal of the appeal for failure to prosecute. *See* 9th Cir. R. 42-1.

Briefing is suspended pending further order of the court.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: David J. Vignol
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 5 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN GREGORY ALEXAND HERRIN,

Defendant-Appellant.

No. 19-30002

D.C. No.
6:16-cr-00015-SEH-1
District of Montana,
Helena

ORDER

No judge has requested a vote to hear this case initially en banc within the time allowed by GO 5.2(a). The petition for initial hearing en banc (included in Appellant's reply to the order to show cause at Docket Entry No. 8) is therefore denied.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Paul Keller
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 26 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN GREGORY ALEXAND HERRIN,

Defendant-Appellant.

No. 19-30002

D.C. No.
6:16-cr-00015-SEH-1
District of Montana,
Helena

ORDER

Before: CLIFTON, N.R. SMITH, and FRIEDLAND, Circuit Judges.

We have reviewed the responses to this court's order to show cause why this appeal should not be dismissed for lack of jurisdiction. We conclude that we lack jurisdiction to review the district court's interlocutory order. *See* 28 U.S.C. § 1291; *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989) (stating that finality requirement generally "prohibits appellate review until after conviction and imposition of sentence"). According, this appeal is dismissed.

DISMISSED.

FILED

1/10/2019

Clerk, U.S. District Court
District of Montana
Helena Division

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GREGORY ALEXANDER
HERRIN,

Defendant.

CR 16-15-H-SEH

ORDER

On December 12, 2018, Defendant filed a Motion to Suppress Evidence.¹

The Court held a hearing on the motion on January 10, 2019. Upon the record made in open court,

ORDERED:

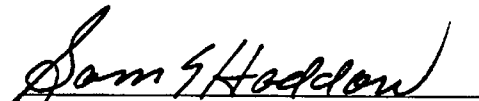
Defendant's Motion to Suppress Evidence² is DENIED.

¹ Doc. 13.

² Doc. 13.

Trial remains set for January 22, 2019, at 8:45 a.m. at the Paul G. Hatfield
Courthouse, Courtroom I, Helena, Montana.

DATED this 10th day of January, 2019.


SAM E. HADDON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Criminal Docket
No. 16-15-H-SEH

JOHN GREGORY ALEXANDER HERRIN,

Defendant.

TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS

Heard in Courtroom Number I
Paul G. Hatfield United States Courthouse
901 Front Street
Helena, Montana
January 10, 2019
10 a.m.

BEFORE THE HONORABLE SAM E. HADDON

UNITED STATES DISTRICT JUDGE

TINA C. BRILZ, RPR, FCRR
Freelance Court Reporter
BRILZ COURT REPORTING, INC.
4956 Smallwood Court
Helena, Montana 59601

Proceedings recorded by mechanical stenography, transcript
produced by computer.

A P P E A R A N C E S :

PRESENT ON BEHALF OF THE PLAINTIFF, UNITED STATES
OF AMERICA:

MR. TIMOTHY J. RACICOT
Assistant U.S. Attorney
OFFICE OF THE U.S. ATTORNEY
P.O. Box 8329
Missoula, Montana 59807

PRESENT ON BEHALF OF THE DEFENDANT, JOHN GREGORY
ALEXANDER HERRIN:

MR. MICHAEL DONAHOE
Assistant Federal Defender
FEDERAL DEFENDERS OF MONTANA
Great Northern Town Center
50 West 14th Street, Suite 300
P.O. Box 250
Helena, Montana 59601-0250

1 The following proceedings were had:

2

3 THE COURT: Good morning, everyone.

4 Be seated, please.

5 Madame Clerk, if you'll call this matter for us, please.

6 CLERK OF COURT: Yes, Your Honor.

7 This is the time the court has set aside for a motion for
8 suppression in Criminal Cause 16-15. This is a Helena Division
9 case before Honorable Sam E. Haddon, the United States of
10 America versus John Gregory Alexander Herrin.

11 THE COURT: The United States is represented in this
12 matter today by Mr. Timothy Racicot of the U.S. Attorney's
13 Office. The defendant is represented by Mr. Michael Donahoe of
14 the Federal Defenders of Montana. The presence of the
15 defendant in the courtroom is noted.

16 And we have before the court a motion to suppress evidence
17 filed on behalf of the defendant.

18 The motion document itself, which is in the court file as
19 Number 13, characterizes the request as a pretrial ruling
20 suppressing any and all evidence showing that the defendant was
21 the individual who stole, converted, or embezzled money from
22 GardaWorld.

23 The essential position of the defendant, as the court
24 understands it, is that the defendant believes that the
25 government will either try to prove that someone, perhaps not

1 identified, stole money from Garda. And that the money that
2 was stolen belonged to the Federal Deposit Insurance
3 Corporation, or to a bank of that organization.

4 And from that premise, the case will proceed on the basis
5 that the government contends that the defendant was the thief
6 who took the money, and that it was his intent to deprive the
7 owner of the money permanently of its use and possession.

8 The defendant responds, in substance, that the government
9 should be precluded from introducing evidence related to the
10 who-stole-the-money issue, because, number one, the defendant
11 did not -- or the government did not charge or indict the
12 defendant for stealing the money in the first instance.

13 And because of that omission, the defendant -- the
14 government is not entitled to introduce evidence related to the
15 theft of the money and who stole it, in substance, because he
16 wasn't indicted for that charge.

17 That the applicable statute of limitations has run on any
18 charge of the theft of the money. And because of the finding
19 favorably to the defendant on those two issues, the evidence
20 becomes, for purposes of the trial, inadmissible. And that any
21 statements made by the defendant after the theft occurred and
22 related to his or the defendant's activities after the theft
23 occurred, are irrelevant and are, therefore, more prejudicial
24 than probative as evidence in the case.

25 The defendant, as the court understands his position,

1 advances alternate theories. One that someone, not necessarily
2 identified, stole the money from Garda. And that the other
3 activities that are sought to be proven do not in any way tie
4 the defendant as the person to the crime of the theft of the
5 money. To which, as noted, the government -- the defendant
6 makes the basic response that, "Well, the defendant wasn't
7 charged as a thief, he wasn't charged with stealing the money."
8 And absent a charge of that substance, that the government is
9 not entitled to introduce evidence related to the circumstances
10 of the theft or of the activities of the defendant after the
11 theft occurred, whether in Las Vegas or other locations. And
12 that that evidence in its entirety should be excluded.

13 The government, of course, responds to all of this as
14 asserted by the defendant with the basic argument, number one,
15 that the government is not required to charge the defendant
16 with the theft of the money; and secondly, that evidence that
17 the defendant was, in fact, the thief is relevant to proof of
18 at least the components of the crime charged, that the money
19 was, in fact, stolen. And secondly, that the defendant was
20 aware or knew that the money had been stolen when the money was
21 moved from Montana to Nevada.

22 The government had laid out in its brief in response to
23 the motion before the court what are said to be a rather
24 extensive set of facts that the government intends to assert or
25 rely upon as evidence in support of its claims against the

1 defendant.

2 The record is also, in the view of the court, clear that
3 the defendant does not directly claim a constitutional rights'
4 violation. And that from that, it follows that if this were to
5 be treated as a motion to suppress, that is, the matter before
6 the court were to be treated as a motion to suppress, that a
7 claim of constitutional violation of the defendant's rights
8 would be a significant or essential component of that
9 assertion.

10 The government responds, in part, at least, on the basis
11 that, "Well, if the court looks at this matter before the court
12 appropriately, it will conclude that this matter is not really
13 a motion to suppress in the classical sense, but it is, in
14 substance, a motion in limitation on grounds -- asserted on
15 grounds that the evidence that the government would intend to
16 produce is both irrelevant and prejudicial to the defendant,
17 more prejudicial than probative, and therefore, not appropriate
18 for admission."

19 The defendant -- the government has reasserted, as a
20 fundamental position, that, as noted, it is not obliged to
21 charge the theft of the money as a component of the offense
22 charged in the indictment. And that the settled law of the
23 Ninth Circuit supports the conclusion that the government is
24 not required to prove who stole the money in the first
25 instance.

1 But, as a part of the government's intended proof, that
2 the fact that the money was stolen is relevant to the issues in
3 the case and the circumstances under which the money went
4 missing and the facts surrounding that are all a part of the
5 totality of the circumstances that the government asserts that
6 it is entitled to prove in support of its case-in-chief.

7 That is not intended, counsel, as a complete summary of
8 the statement of the positions of the parties, but it does
9 provide at least a summary background for where we are today.

10 Which brings us to the -- to a core question which is
11 before the court, and that is, in substance, whether this
12 motion that is before the court is a classical motion to
13 suppress, or whether, all factors considered, it should be
14 taken and evaluated and addressed as a motion in limitation, or
15 a motion in limine. The former position being asserted by the
16 defendant; the latter being, in substance, the position
17 asserted by the government.

18 We have, in the view of the court, at the outset, the
19 question of how do we approach the issues that are presented by
20 the motion and address of those issues?

21 We have, of course, reviewed the briefs filed by the
22 parties. The court has engaged in some substantial, even
23 extensive, additional research on the issues. And I think
24 there are some general principles that we can draw from the
25 case law that support the approach that the court has elected

1 to take.

2 One of those propositions, which quotes from a recognized
3 treatise on the subject of pretrial motions in criminal cases,
4 I quote: "When suppression of evidence is at issue, the burden
5 is initially upon the party seeking suppression to go forward
6 with specific evidence demonstrating that the evidence is
7 tainted."

8 Here, there is not an assertion, per se, that the evidence
9 is tainted; rather, the defendant more broadly states that the
10 evidence is prejudicial and inadmissible, and therefore, for
11 that reason, should be excluded.

12 If the motion were, on the other hand, treated as a motion
13 in limitation, as the government asserts, then the classical
14 approach to address of such an issue would be to place the
15 burden upon the defendant, who is seeking to exclude the
16 evidence.

17 Whether the court addresses this as a motion in
18 limitation, or whether as a motion to suppress, the essential
19 and core issue, in the view of the court, remains the same:
20 Whether or not the statements that are said to be a part of the
21 evidence offered by the government -- or represented to be a
22 part of the evidence offered by the government, whether those
23 statements and the activities related to those events should be
24 excluded.

25 And the court will address the issue as follows:

1 I take it to be valid precedent that the defendant carries
2 the initial burden in going forward with evidence on these
3 issues. And we will proceed on that basis.

4 The defendant may call any witnesses that the defendant
5 seeks to have the court consider. We will proceed with
6 examination and cross-examination of those witnesses. After
7 the defendant's witnesses have been presented, the government
8 will then be entitled to go forward with its evidence, call
9 witnesses for examination and cross-examination as may be
10 appropriate.

11 I will emphasize to everyone, however, that the sequence
12 of presentation of evidence in this matter is not determinative
13 of the court's ultimate responsibility to make a decision.

14 We will take all of the evidence in the order the court
15 has outlined, and the court will then, at that point, when the
16 evidence has been presented, will undertake an analysis of the
17 evidence as a whole, the totality of the circumstances, and
18 will address and make a final ruling on the motion -- excuse me
19 -- on the motion that is before the court.

20 Excuse me, counsel.

21 I think that sets the stage and the background.

22 Mr. Donahoe, you may proceed.

23 MR. DONAHOE: Thank you, Your Honor.

24 We would call Mr. Arnold Ailer.

25 THE COURT: May we have the spelling of the person's

1 name, Mr. Donahoe?

2 MR. DONAHOE: Spell his name, Your Honor?

3 THE COURT: Yes. Please.

4 MR. DONAHOE: Yes, it is: First name Arnold,
5 A-R-N-O-L-D.

6 THE COURT: Yes.

7 MR. DONAHOE: Last name Ailer. A-I-L-E-R.

8 THE COURT: All right.

9 Mr. Ailer, come right up here to where the clerk is
10 standing at the front of the courtroom. She will administer
11 the oath for you, sir.

12 THE WITNESS: Yes, sir.

13 CLERK OF COURT: Please raise your right hand.

14 THE WITNESS: Yes, ma'am.

15

16 ARNOLD AILER, having been called as a witness on behalf of the
17 defendant, being first duly sworn according to law, was
18 examined and testified as follows:

19

20 THE COURT: Mr. Ailer, have a seat over here at the
21 witness chair, please.

22 Mr. Donahoe, you may proceed.

23 MR. DONAHOE: Thank you, Your Honor.

24

25

DIRECT EXAMINATION

BY MR. DONAHOE:

Q Sir, can you tell me where you live and what you do for a living?

A Yes. I live in Missoula, Montana. And I'm a commercial technician for the Charter Cable. Cable guy.

Q And in a previous work life, did you work for GardaWorld?

A Yes, sir.

Q And were you so employed in or around November of 2013?

A Yes, sir.

Q And do you recall meeting with me to discuss your employment there?

A Yes, sir.

Q And you were present with your attorney?

A Yes, sir.

Q And would you identify who your attorney is.

A Mr. Nick Brooke sitting in the back back here.

Q Mr. Nick Brooke. And he's from Missoula?

A Yes, sir.

Q And you've retained that counsel?

A Yes, sir.

Q And you've discussed with your counsel coming forward to testify before the court today?

A Yes, sir.

Q Sir, were you the object of suspicion in the theft of

1 money from GardaWorld that apparently went missing sometime in
2 November of 2013?

3 A Yes, sir. At this point, yes, sir, yeah. I learned that,
4 yes, sir, yeah. Over --

5 Q All right.

6 Tell me what your job was at GardaWorld?

7 A Started out there as a courier, driving a Dodge minivan, a
8 Caravan for picking up Providence medical. It's -- they do the
9 tests for cancer and whatnot and all the blood tests.

10 So I had -- did that for the longest time, and then they
11 got me to driving the armored trucks from there, yes, sir.

12 Q So, did you drive the armored trucks around Missoula?

13 A Yes, sir.

14 Q And what was the purpose of driving around Missoula? What
15 would you do? What were your duties?

16 A You drive around Missoula to make all your stops. They'd
17 have routes, and you'd drive around to the businesses and
18 whatnot and make the pickups and the deliveries.

19 Q Okay.

20 So you'd pick up money, currency, coin, that sort of
21 thing?

22 A Yes, sir.

23 Q And likewise, you'd deliver currency and coin to some
24 places; correct?

25 A Yes, sir.

1 Q And you could maybe stock ATMs?

2 A Yes, sir.

3 Q Okay.

4 Now, on November 20, 2013, did you have some sort of
5 rendezvous with another GardaWorld truck early in the day?

6 A Yes, sir. With the date what we discussed before, yes,
7 sir, it would be -- what they called the fed truck from Helena
8 -- from here, yes, sir. Yep.

9 Q All right.

10 Would you tell me and explain to the Judge concisely what
11 the fed truck is?

12 A As far as I understood it, they brought over all the money
13 that was either for, like, Missoula from the bank here. Yes,
14 sir. Yeah.

15 And then they give us what was supposed to be delivered in
16 Missoula, and then take off. Yes, sir. Yeah.

17 Q And then they'd go on some other route?

18 A Yes, sir.

19 Q Okay.

20 A Yes, sir. Yeah.

21 Q So, you would meet up with this fed truck?

22 A Yes, sir.

23 Q Now, do you recall, as you're here today, actually having
24 that meeting in November of 2013?

25 A I don't remember that day. But I was driving that day,

1 because they showed me the paperwork on it. But as far as
2 remembering the day, no. It would be like any other day
3 working. Yes, sir.

4 Q At some point in time, did you meet with this other truck
5 and accept money from that other truck?

6 A Yes, sir. Yeah. It would have been in the morning.
7 That's the first stop. Yes, sir, yep, for that route, yes,
8 sir.

9 Q And what time would that have been, approximately?

10 A Maybe around 6, I think it was. Because I remember you
11 had to be at the office on that day, like, five something.

12 Q So fairly early in the morning?

13 A Yes, sir.

14 Q Okay.

15 And can you tell me mechanically how this works out that
16 things are transferred from one truck to another?

17 A Yes, sir. It would -- if they were already there, whoever
18 was already there, the other truck would just back up to them,
19 back-to-back, yes, sir.

20 Q So, the doors on each truck open?

21 A Yes, sir. At the back there.

22 Q And do the doors go up and down, or do they go
23 side-to-side?

24 A They would just open out, yes, sir, like the regular door.

25 Q Okay.

1 So, like shutters in a window?

2 A Yes, sir. Yeah. You just open it up, yes, sir (witness
3 indicating).

4 Q Okay.

5 And then the trucks sort of marry together by backing into
6 one another?

7 A Yes, sir.

8 Q Is there a purpose to that?

9 A I guess to be close, yes, sir, as far as I knew.

10 Q When the transfer is made and on this particular occasion,
11 where were you sitting in your truck?

12 A Driver's seat. Yes, sir. I was the driver that day. I
13 would be, yes, sir, in the driver's seat.

14 Q And do you have a helper on your truck?

15 A Yes, sir. You've got the guy that's in the back.

16 Q All right.

17 And does he have a name or a title?

18 A They call him -- what did they say? The jumper or
19 messenger.

20 Q The messenger?

21 A Yes, sir.

22 Q Okay.

23 So who was your messenger on this day we're talking about;
24 do you remember?

25 A Yeah. It was Chris was his name, young fellow. The only

1 reason I remember that was from showing the forms that I was
2 shown there -- was it last Friday? Yes, sir, yep.

3 Q So you had a meeting with the government?

4 A Yes, sir.

5 Q With government counsel?

6 A Yes, sir.

7 Q And you refreshed recollection and remembered that --

8 A Well, they showed me who it was. I said: "Well, yeah.
9 If it was him, that was who I was with that day," yes, sir.

10 Q All right.

11 Do you remember anything about this individual, Chris?
12 Was he a long-term employee? Had he worked with you for a long
13 time. Was he new?

14 A He was newer, but I can't say how long he'd been with us.
15 He was the newest one of the people that worked at the office
16 here in Missoula, but I don't know how long he'd already been
17 -- you know, I don't know his -- I can't remember, you know,
18 how long he'd been there.

19 Q So when this transfer is made from the Helena fed truck to
20 your truck, is there anything that goes on in terms of people
21 communicating with one another?

22 A Well, if you're the driver, you have the little radio
23 handset in your hand. You just kind of keep your eyeballs out
24 looking, you know.

25 Q So that would have been your job?

1 A Yes, sir.

2 Q All right.

3 Does the messenger do anything with the bags? Does he
4 call out numbers? Anything of that nature?

5 A At the end of it when we start to take off, yeah, he calls
6 out how many pieces we got, yes, sir.

7 Q Okay.

8 So this money that's transferred from one truck to
9 another, how is it packaged? Is it in cellophane? Is it in
10 paper bags? Is it -- can you describe that to me.

11 A Plastic bags. I believe it's plastic bags, sealed plastic
12 bags. And then they got the coins in these cardboard boxes.
13 And the coins that got the different colors for the coinage on
14 it; quarters and nickels and dimes and pennies and whatnot.

15 Q Okay.

16 So, do these bags have numbers on them?

17 A Yes, sir. Yeah. They got the serial numbers on them,
18 yes, sir.

19 Q So there's some kind of manifest or inventory concerning
20 what's moving from one truck to the next truck?

21 A Yes, sir.

22 Q All right.

23 Is there a process that you guys go through, your
24 messenger and you as the driver and perhaps the people in the
25 other truck, to ensure that there's an accurate exchange?

1 A Well, as the driver, you just wait for the -- whoever's
2 jumping or messenger to tell you how much pieces you got. They
3 do all that other stuff between them in the back with it --
4 with that other paperwork, yes, sir.

5 As the driver, you just keep track of how many pieces is
6 coming and going is all you do.

7 Q Okay.

8 So I would assume that after -- and correct me if I'm
9 wrong -- after the exchange is made, the doors to each truck
10 are closed, and they go on their separate ways?

11 A Yes, sir.

12 Q Okay.

13 And is that what happened in November of 2013, you went on
14 your way?

15 A Yes, sir. Absolutely, sir. Yep.

16 Q And what would you do after that?

17 A You just do your route. The route for that day.

18 Q All right.

19 Anything unordinary about this particular day?

20 A No, sir. That I can remember, no, sir.

21 Q The fed truck?

22 A No, sir.

23 Q Did you hear later that day that money maybe was
24 erroneously transferred to your truck?

25 A No. No, sir.

1 Q Nobody called you and told you that that day?

2 A That day, that I can remember, no. Like I said, if any
3 calls would come from -- that I know from working there, any
4 calls that would come would go to the manager. And then he
5 would call us. But I don't remember getting any calls that day
6 from anybody.

7 Q Did you subsequently learn that money may have been
8 transferred erroneously to your truck?

9 A No. No, sir.

10 Q Nobody ever told you that?

11 A No, sir.

12 Q Did anybody endeavor ever to question you about that from
13 GardaWorld?

14 A Yes, sir. There was -- well, I don't know if it was for
15 that, or whatever. But, yeah. They had some fellows come --
16 investigator fellows come in to the office there at one time
17 there, yes, sir.

18 Q And they were from the GardaWorld company?

19 A That's what Bruce Reese, the manager, said, yes, sir.

20 Q All right.

21 Bruce Reese was your manager in Missoula?

22 A Yes, sir.

23 Q Okay.

24 And these other folks that apparently worked for
25 GardaWorld that were going to investigate, did they come from

1 afar?

2 A I don't know. They just said they worked for the company.

3 Q Okay.

4 So you don't know their point of origin?

5 A No. No, sir.

6 Q Did you speak with these individuals that wanted to
7 investigate something, apparently, that you were not aware of?

8 A Briefly, yes, sir.

9 Q So, can you tell me about that.

10 A Oh, yeah. No, they just said they wanted to talk about
11 monies missing. I said, well -- I gave them my lawyer's
12 business number. "Yeah. Call him. We can set something up
13 with it."

14 Yes, sir.

15 Q All right.

16 Did you ever subsequently meet with them?

17 A No, sir.

18 Q Did you ever meet with a detective from the Missoula
19 police department named Stacy Lear?

20 A No, sir. No, sir.

21 Q All right.

22 So, did you later learn that money was missing from the
23 truck? A lot of money?

24 A No. Because we just always hear about money missing, like
25 I said, from the manager, Bruce Reese, and Aaron Johnson was

1 the assistant manager there. They would just -- office gossip.
2 They would say: "Ah, we heard this was going on or that was
3 going on."

4 Q All right.

5 So, I'd like to be clear about this. Are you saying it
6 was fairly routine for money to turn up missing?

7 A I wouldn't say routine. It's just every now and then
8 you'd hear about something goings on in Helena or somewhere
9 else. Yes, sir. But I wouldn't say -- it wasn't, like, every
10 day.

11 Q All right.

12 Once in a while?

13 A Yes, sir. Every once in a while, yes, sir.

14 Q So, when these investigators came from GardaWorld and
15 wanted to speak to you, you just made an assumption it was
16 about money that may have been missing, and you really had no
17 inclination to talk to them without a lawyer?

18 A Yes, sir.

19 Q And it just shut down there?

20 A Yes, sir.

21 Q All right.

22 Now, in November of 2013, at any time, did you take any
23 money from GardaWorld unauthorized?

24 A No, sir. No, sir.

25 Q Have you stolen any money from GardaWorld?

1 A No, sir.

2 Q Did you have attempted contact from the police in
3 Missoula, the local police, trying to speak with you about such
4 activity?

5 A Yes, sir.

6 Q And can you tell me about that.

7 A Got a call from -- I don't remember who it was. It was
8 somebody -- I know it was a lady from -- from Missoula Police
9 Department, and that's when I just called my lawyer. I said:
10 "Hey, I got somebody calling me from Missoula Police
11 Department."

12 And he just took it from there.

13 Q Okay.

14 A Yes, sir.

15 Q Fair enough.

16 So, did you ever have a sit-down with that person?

17 A No, sir.

18 Q Nobody ever made inquiry of you directly about any money
19 that was missing from GardaWorld?

20 A No, sir.

21 MR. DONAHOE: I don't have anything further.

22 Thanks.

23 THE COURT: You may examine, Mr. Racicot.

24 MR. RACICOT: Thank you, Your Honor.

25

CROSS-EXAMINATION

BY MR. RACICOT:

Q Good morning, Mr. Ailer.

A Good morning, sir.

Q You talked with Mr. Donahoe about the fed truck that would come from Helena to Missoula. And was that every Wednesday that the fed truck would come from Helena to Missoula and then go on to Kalispell?

A Yes, sir, I believe so, yes, sir.

Q And did you handle the local Missoula route with some frequency that met with the fed truck? In other words, did you work a lot of those Wednesdays where the Garda truck in Missoula would meet the fed truck from Helena?

A Not too much, no, sir. Versus the other routes that I did in Missoula, yes, sir. As far as I can remember, yes, sir.

Q So, most of the initial time, especially that you worked for Garda, you were doing courier services driving a van around picking up materials from hospitals and things like that?

A I met up with the panel people that worked for the -- the Providence people directly. I'd start in Missoula, drive up to Kalispell, meet them up there at the hospital. And they'd hand off big ole blue boxes with the tests in them, and the dry ice. And then I'd drive back to Missoula and then meet another courier, hand that off to them, and then go to Garrison and meet a fellow. Then drive back to Missoula again, and -- yes,

1 sir. That was the route Monday through Friday.

2 Q So, for the larger period of time that you worked for
3 Garda, your route involved meeting people from Providence and
4 other medical installations and picking up the results of
5 medical tests, blood tests, and that sort of thing?

6 A Yes, sir.

7 Q And then later on, and for a shorter period of time that
8 you worked for Garda, you handled the armored truck deliveries?

9 A Yes, sir. And did that, too. Yes, sir.

10 Q And still worked as what you were calling a courier, as
11 well --

12 A Yes, sir.

13 Q -- doing the medical routes?

14 A Yes, sir.

15 Q And one thing, Mr. Ailer, you and I have to be careful not
16 to talk over one another, so the court reporter can get down
17 what I say, and then what you say, and then back and forth;
18 okay?

19 A Yes, sir. Sorry.

20 Q That's okay.

21 Mr. Donahoe asked you if you ever took money from Garda in
22 November of 2013. Did you ever take money from Garda at any
23 time while you were employed for Garda?

24 A No, sir. No, sir.

25 Q Did you ever take money out of an ATM that you were

1 servicing for Garda?

2 A No, sir.

3 Q Did you ever take any other property that you were
4 supposed to courier for Garda and take that property?

5 A No, sir.

6 Q Mr. Donahoe asked you about the trucks backing up close to
7 one another. And the back of those trucks both had double
8 doors; correct?

9 A The -- what we drove here in Missoula had the one door.
10 Had a big ol' door, yes, sir.

11 Q So, you'd open your one big door, they would open their
12 one or two doors if they had two, back the trucks up close
13 together?

14 A Yes, sir.

15 Q Was the stuff that you were transferring, the bags of
16 money and the boxes of coin, heavy?

17 A Coin is, yes, sir.

18 Q Is one of the reasons the trucks were backed up close to
19 one another in order to make that transfer easier, because of
20 the weight that you were transferring back and forth?

21 A I assume so. That would make it easier, yes, sir.

22 Q And was that also maybe to ensure safety and security
23 during the transfer?

24 A Yes, sir. That would make sense, yes, sir.

25 Q As opposed to, say, parking a couple hundred feet away and

1 wheeling handcarts back and forth, or something like that?

2 A Oh, yes, sir. Yes, sir.

3 Q You said that as the driver on this -- whoop, excuse me --
4 on this local route, that as the driver, your job was basically
5 to look around, you know, keep watch, essentially?

6 A Yes, sir.

7 Q And then when the transfer was over, to take note of how
8 many pieces, how many bags of money and boxes of coin your
9 truck had accepted from the other truck?

10 A Yes, sir.

11 Q And it's your understanding that your messenger, working
12 in concert with either the driver or messenger from the fed
13 truck, would actually be checking serial numbers on the bags to
14 try to make sure they got the right stuff?

15 A Yes, sir.

16 Q Okay.

17 So, you had specific bags and boxes you were supposed to
18 get from the fed truck?

19 A Yes, sir. Yes, sir.

20 Q But your job as the driver was just to know the gross
21 number. How many things you were getting?

22 A Yes, sir. The total, yes, sir.

23 Q Mr. Ailer, at the end of the day, these Wednesdays when
24 the fed truck was making its run, you would meet the fed truck
25 again at the end of the day; is that right?

1 A Yes, sir. There at the office.

2 Q And then you would give them things that now they were
3 supposed to take back to Helena?

4 A Yes, sir.

5 Q And those would be things you had picked up from other
6 stops on your route?

7 A Yes, sir.

8 Q For instance, if you're meeting with the fed truck and
9 then one of your other stops is a bank because you're going to
10 service an ATM, you would take whatever money is left in that
11 ATM and put in the new amount of money; correct?

12 A Yes, sir.

13 Q And then you would take that leftover money, and at the
14 end of the day, you would transfer that back to the fed truck,
15 and they would take that back to Helena?

16 A Yes, sir.

17 Q Okay.

18 And do you remember meeting with the fed truck at the end
19 of the day on November 20th of 2013?

20 A No, sir, I do not. No, sir.

21 Q Do you assume that you did, because that was standard
22 procedure for the fed truck run?

23 A Yes, sir. Yeah. You would either -- if you got back
24 before they did, you would just take off on your next courier
25 route. But I can't remember that particular day, no, sir.

1 Q Okay.

2 So you don't remember any -- meeting with them and having
3 any discussion where they're kind of freaked out about the fact
4 that they've misplaced these bags of money; this money is
5 missing; they don't know where it is. You don't remember any
6 conversations to that effect?

7 A No, sir.

8 Q And you also don't remember any phone calls from them
9 earlier in the day after your first meeting with them where
10 they said: "Hey, would you check your truck. We think we gave
11 you the wrong bags," or, "we're missing some bags up here in
12 Kalispell, would you check your truck"?

13 You don't remember any conversation like that?

14 A No, sir. Like I said, they would have to talk to -- any
15 calls we'd ever get would be from Bruce Reese, the manager
16 there. And I don't remember getting any calls from him. So
17 no, sir, I didn't get any calls.

18 Q Do you have any personal knowledge of how many bags of
19 money went missing on November 20th, 2013?

20 A No, sir.

21 Q Do you have any personal knowledge about how much money
22 was in the bags that went missing?

23 A No, sir. No, sir.

24 Q So other than the fact that you've now been discussing
25 November 20th, 2013, with law enforcement and with Mr. Donahoe,

1 did November 20th, 2013, stick out to you in any way?

2 A No, sir. No, sir.

3 Q And when you were -- when the Garda investigator attempted
4 to interview you after November 20th of 2013, did you know it
5 was specifically about that day?

6 A No, sir.

7 Q Do you think back then you would have known that that's
8 what it was about? Would you have heard, as you say, these
9 rumors that money had gone missing and would you know that's
10 why they were there then, and you just don't remember now?

11 A No. Because like I said, Mr. Reese never did talk about
12 just that -- money is missing, you know. And, you know, that's
13 where they found it, or whatever happened with it, that kind of
14 stuff. But I don't remember anything saying dates and anything
15 like that, no, sir.

16 Q And when the Garda investigator attempted to interview
17 you, am I correct that you did not refuse to be interviewed,
18 you just said: "Here's my lawyer's card. If you want to
19 interview me, talk to my lawyer and set it up through my
20 lawyer"?

21 A Yes, sir. Certainly. Yes, sir. Yep.

22 Q And why did you do that?

23 A Well -- at least my family have always been that way, when
24 it comes to -- like I said, you know, if something's wrong with
25 my electrical, I call an electrician. If something's wrong

1 with my plumbing, I call a plumber. When I have people ask me
2 questions that, you know, I don't know what's going on, you get
3 yourself a lawyer, yes, sir.

4 Q So, basically, are you saying that because this involved
5 some kind of investigation, you could maybe get in trouble or
6 either on the job or with law enforcement, you just wanted to
7 make sure that you protected yourself and went through a
8 lawyer?

9 A Yeah. But I wasn't worried about myself, but I'm just
10 worried in context of that, yes, sir, I don't know what's going
11 on. And this seems to be involving something to do with the
12 law, so I'm going to get my lawyer's number. Yes, sir.

13 Q Okay.

14 And Mr. Ailer, at some point around this same time frame,
15 I think it was September of 2013, you had occasion to take a
16 fairly large quantity of cash into a bank to make a bank
17 deposit; is that right?

18 A Yes, sir.

19 Q Tell me about that.

20 A The one that started my family's business again, like we
21 had in Virginia, yes, sir, so I was putting it in there.
22 Because, heck, nowadays you can't do anything without -- it's
23 all online anyway and all that kind of stuff. So, you can't
24 really -- it ain't like it used to be. So you always got to,
25 you know --

1 Q So I'm going to break that down a little bit. Your family
2 had a cleaning business in Virginia?

3 A Cleaning and maintenance business, yes, sir.

4 Q And what kind of cleaning and maintenance would your
5 family do in Virginia?

6 A Residential and commercial. And pretty much any odd-end
7 jobs anybody ever needed done, yes, sir.

8 Q So, cleaning houses; cleaning office buildings, that sort
9 of the thing?

10 A Yes, sir.

11 Q And at this period of time here in Missoula, your family
12 wanted to restart that business?

13 A Yes, sir.

14 Q And you had some money just that you or your family had
15 saved?

16 A Yes, sir, as our savings, yes, sir.

17 Q Was that money money that you had taken from Garda or out
18 of an ATM machine?

19 A No, sir.

20 Q So, you decided to take this money into a bank to open a
21 bank account?

22 A Yes, sir. Business bank account, yes, sir.

23 Q And when you took the money into the bank to open the bank
24 account, what did the bank tell you about the money?

25 A Well, nothing. They opened up my account for me. Yes,

1 sir.

2 Q Okay.

3 And did they do any special paperwork as it related to the
4 fact that you brought in money? Cash money?

5 A No. No, sir. I just filled out a couple little things
6 there for to open up the account, if I remember right. And
7 that was it. They told me I'd get my -- get your card and all
8 that kind of stuff later, you know, with it, like they do when
9 they mail it to you.

10 Q And how much money did you take into the bank to open the
11 account?

12 A I think it was around 25,000. Yes, sir.

13 Q And did you hear anything else from either the bank or law
14 enforcement about that money?

15 A Down the road, that's when that lady called me from the
16 Missoula Police Department. Yes, sir, yeah.

17 Q And what, if anything, did you know about what was
18 happening with that money?

19 A At that point, I had -- I didn't even know when she just
20 said they needed to talk to me pertaining to the money I put in
21 the bank. I was, like, okay. "Well, I'm going to get in
22 contact with my lawyer."

23 Then, like I said, after that I just -- whatever he told
24 me was going on, is what was going on. Yes, sir.

25 Q Okay.

1 And I want to make sure I don't ask you anything that your
2 lawyer told you.

3 But eventually, did you get into any trouble regarding
4 that deposit?

5 A No, sir. They gave me my money back, my family's money,
6 yes, sir.

7 Q So, you didn't get charged with any crime?

8 A No, sir.

9 Q You didn't get arrested or convicted of anything?

10 A No, sir.

11 Q And eventually, you got the money back and you were able
12 to leave it in that account, if you wanted?

13 A Yes, sir. Yes, sir.

14 Q And does your family have that cleaning business?

15 A Yes, sir, they do.

16 MR. RACICOT: That's all the questions that I have.

17 Thank you.

18 THE WITNESS: Oh. Yes, sir.

19 THE COURT: I have one question.

20 Or Mr. Donahoe, do you have a redirect?

21 MR. DONAHOE: No. Thank you, Your Honor.

22 Thank you. Go right ahead.

23 THE COURT: Mr. Ailer, when did this event involving
24 the \$25,000, or thereabouts, of family money take place? That
25 is, that you took it to a bank and put it in the bank?

1 THE WITNESS: I want to say -- I want to say August
2 or September, I believe.

3 THE COURT: Of what year?

4 THE WITNESS: 2013, yes, sir.

5 THE COURT: Was it before this missing-money event
6 occurred on November 20 of '13?

7 THE WITNESS: Oh, yes, sir.

8 THE COURT: Several months before that?

9 THE WITNESS: Yes, sir.

10 THE COURT: All right.

11 That's all I have.

12 You may step down, sir.

13 THE WITNESS: Yes, sir. Thank you.

14 (Witness excused from the witness stand.)

15 THE COURT: Call your next witness, please.

16 MR. DONAHOE: I will call Stacy Lear.

17 Judge, this examination will involve an exhibit I've
18 marked as Defense 501.

19 I've served copies on Mr. Racicot, or a copy. And I've
20 provided copies to the clerk.

21 THE COURT: Well, is there a copy for the court's
22 reference?

23 MR. DONAHOE: There is, Your Honor. Certainly.

24 (Clerk of Court delivering a document to the court.)

25 THE COURT: Thank you.

1 CLERK OF COURT: Come forward, please.

2 Raise your right hand, please.

3

4 STACY LEAR, having been called as a witness on behalf of the
5 defendant, being first duly sworn according to law, was
6 examined and testified as follows:

7

8 CLERK OF COURT: Go ahead and have a seat at the
9 witness stand.

10 DIRECT EXAMINATION

11 BY MR. DONAHOE:

12 Q Ma'am, could you tell me where you live and what you do
13 for a living.

14 A I live in the City of Missoula. And I'm a detective for
15 the City of Missoula Police Department.

16 Q And how long have you been so employed?

17 A Since August of 2006, just over 12 years.

18 Q And were you so employed in or around 2013?

19 A Yes.

20 Q And you were actively working cases in Missoula at that
21 time?

22 A Yes, sir.

23 Q Do you know a person, or did a person come to your
24 attention named Arnold Ailer?

25 A Arnold Ailer, Junior, yes.

1 Q And was he a Missoula resident at the time, do you know?

2 A I can't say for certain, because I was never able to
3 establish a residential address, but he had P.O. Boxes in that
4 area.

5 Q Okay.

6 And what was your contact with Mr. Ailer?

7 A My only actual contact with him, as I recall, is one
8 voicemail and one phone call.

9 Q Okay.

10 So why did he come to your attention, Mr. Ailer?

11 A Initially, in September of 2013, I had been assigned to
12 investigate a report on an allegation of theft in which
13 Mr. Ailer was identified as a suspect.

14 Q And who was the victim of the theft?

15 A Garda International, I think is the name of the company.

16 Q And is that an armored car company?

17 A Correct.

18 Q That works all around Montana; correct?

19 A Yes.

20 Q Yeah.

21 And what was the nature of the concern with Mr. Ailer?

22 A Specifically, in that case from September, approximately
23 \$30,000 had gone missing from ATM pickups between April and
24 August of 2013. And in October 2013, Mr. Ailer had made a
25 suspicious deposit of 20,000 -- \$25,000 cash into a new bank

1 account. And so he was presumed to be the suspect in that
2 case.

3 Q Okay.

4 So, based on a suspicious transaction report, Mr. Ailer
5 became the object of suspicion of the theft of the ATM money?

6 A Correct.

7 Q And was that resolved?

8 A Ultimately, yes.

9 Q And how so?

10 A Prosecution was declined.

11 Q So, you made -- I'll just use the phrase prosecution
12 status report to the county attorney?

13 A Yes. Essentially, I do an investigation, and then I refer
14 the case for charging. Then our county attorney makes the
15 charging decision. And in that case, they declined charges.

16 Q And do you know who the county attorney was at the time?

17 A The county attorney who declined the case?

18 Q Yes.

19 A Okay.

20 That would be Jason Marks.

21 Q And he was an assistant, or a deputy?

22 A I think he was senior deputy county attorney at that time.

23 Q At that time?

24 Okay.

25 So, that resolved that investigation?

1 A Correct.

2 Q And you worked it through as an ordinary case. It was
3 declined. And that was the end of that?

4 A Correct.

5 Q Now, subsequently, did you have -- or desire to have
6 contact with Mr. Ailer concerning other missing money from
7 GardaWorld?

8 A Can you rephrase that question.

9 Q Did you become aware at some time in your duties as a
10 detective that money had gone missing from GardaWorld in
11 November --

12 A Yes.

13 Q -- of 2013?

14 A Yes, sir.

15 Q Did Mr. Ailer surface as a possible suspect, I'll say, in
16 connection with that matter?

17 A Yes.

18 Q And did you endeavor to contact Mr. Ailer to speak with
19 him about that?

20 A I don't think I tried to contact him as a part of that
21 case. Or at least if I did, I can't recall. But I may be
22 mixing it up with the previous case.

23 Q Okay.

24 Did you at some point in time decide as the investigator
25 in this second matter that we're talking about from November of

1 2013, that it might be prudent to take a peek at phone records
2 of Mr. Ailer?

3 A Yes, I did.

4 Q And did you author and submit to the court an application
5 for a search warrant to review such records?

6 A I did.

7 Q And did -- have I discussed that with you --

8 A Yes, sir.

9 Q -- in a previous meeting?

10 Did you have an opportunity to review that?

11 A I did.

12 Q So, tell me what the orientation was of the search warrant
13 application? Were you suggesting that Mr. Ailer might have
14 been a suspect in this second matter?

15 A Yes, I was.

16 Q And why?

17 A On the basis that he -- he was one of the employees who
18 was working when the second case money went missing. That in
19 the previous case I investigated him with, he had provided
20 fictitious addresses and fictitious reasons for why he had come
21 across the money that he had deposited. And also because in
22 the intervening time since the second theft, he had submitted
23 his resignation.

24 So all of those factors together combined to make me think
25 that he may be a suspect in that case.

1 Q And what would have been the purpose -- I mean, I know
2 it's kind of obvious -- but in your mind as an investigator
3 detective, what would have been the purpose of trying to take a
4 peek at the phone records?

5 A Well one of the other issues was that during the second
6 theft on November 20th, he had his personal cell phone with
7 him, which was a violation of policy. So I was looking to see
8 whether or not he may have contacted someone to come take money
9 from him or help him. Or after the fact, if he had discussed
10 having come into a large sum of money with anyone.

11 Q Now, showing you -- or I hope you have it with you there,
12 Defense Exhibit 501.

13 Do you have that?

14 A I don't see any exhibits up here.

15 MR. DONAHOE: Can I approach, Your Honor?

16 THE COURT: Yes. Of course.

17 (Mr. Donahoe approaching witness with a document.)

18 Q (BY MR. DONAHOE) Ma'am, showing you that exhibit marked
19 as 501 for identification purposes, would you turn to the last
20 page and tell me whether that's your signature? Well, I guess
21 the page before that.

22 A (Witness reviewing document.)

23 On page 4, the application, that is my signature.

24 Q That is your signature?

25 A Yes, sir.

1 Q Do you recognize the document?

2 A I do.

3 Q Did you prepare it?

4 A I did.

5 Q And was it submitted to the court?

6 A Correct.

7 Q And was the warrant issued?

8 A Yes.

9 Q Did you obtain the phone records?

10 A I did.

11 Q And was there anything worthwhile there for you?

12 A No.

13 Well, to the extent to which there was nothing in there to
14 indicate that he had come into this sum of money that was
15 missing in this case. Specifically, I recall text message
16 conversations in which he indicated to someone that they needed
17 to be very careful with their Christmas money. They didn't
18 have a lot of money.

19 MR. DONAHOE: Your Honor, I would move the admission
20 of Exhibit 501.

21 MR. RACICOT: No objection.

22 THE COURT: Five oh one is received without
23 objection.

24 Q (BY MR. DONAHOE) So, ma'am, could you turn to the second
25 page; that would be Bates 323.

1 So, if you could focus there on paragraphs 3, 4, and 5.
2 Read that to yourself. Three through 6. And tell me when
3 you're through.

4 A (Witness reviewing document.)

5 Yes, sir.

6 Q All right.

7 So, the basic narrative here, if you stay with me, we're
8 talking about a sum of money that went missing on November 20th
9 of approximately \$390,000?

10 A Correct.

11 Q And the messenger, who the court knows, at least by
12 function, that day on Mr. Ailer's truck was a new guy?

13 A Correct.

14 Q And Mr. Ailer was the experienced driver in his truck?

15 A Correct.

16 Q And based on everything that you knew to include the prior
17 suspicion of the other theft in October, was it your conclusion
18 that -- at least initially, that an erroneous transfer of bags
19 may have been made to Mr. Ailer's truck?

20 A Initially, yes. That was the belief.

21 Q And that was, apparently, a crime of opportunity for
22 Mr. Ailer?

23 A It would have seemed to have been.

24 Q All right.

25 And that was, basically, the gist of the investigation and

1 why you wanted to look at those phone records?

2 A Correct.

3 Q Now, subsequent to all of that work that you did, did you
4 learn later that there had been suspicious activity reports
5 filed in relation to another individual?

6 A Yes.

7 Q And did you -- do you have any particulars in terms of
8 knowledge or memory about those reports?

9 A I recall -- I reached out to an FBI agent in my
10 jurisdiction requesting those reports, I believe on all the
11 employees who could have been involved at the time. And in
12 response, I received records showing that Mr. Herrin had
13 gambled over a hundred thousand dollars in Vegas, I believe,
14 around January 2014. And had also made a deposit, I think, of
15 about \$30,000 into a bank account, and then withdrawn about
16 \$60,000 from a bank account, all within January of 2014.

17 Q Okay.

18 So, similar investigative paradigm to Mr. Ailer; correct?

19 A Correct.

20 Q All right.

21 And as a result of that, did the focus of the
22 investigation shift to the other side of the hill here to
23 Helena?

24 A Correct.

25 Q And did you cease and desist with your investigation?

1 A I did.

2 Q Mr. Ailer was no longer a suspect in your mind?

3 A I had nothing to support him being a suspect in the second
4 case.

5 Q Okay.

6 Did you ever make any connection between Mr. Ailer and
7 Mr. Herrin?

8 A Not that I'm aware of, no.

9 MR. DONAHOE: I have nothing further.

10 Thanks.

11 THE COURT: You may examine, Mr. Racicot.

12 MR. RACICOT: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. RACICOT:

15 Q Good morning, Detective.

16 A Good morning.

17 Q I'm Tim Racicot from the U.S. Attorney's Office in
18 Missoula.

19 Detective Lear, am I correct that when you first began the
20 investigation into what culminated in Mr. Ailer's deposit of
21 cash, Garda suspected that Aaron Johnson might have been
22 involved with the missing sum of money that had accumulated
23 from April to August or September of 2013; correct?

24 A That's correct.

25 Q So when you first talked to the manager of Garda, Bruce

1 Reese, in Missoula, he said: "We think it might be Aaron
2 Johnson who's been taking this money, because Aaron Johnson's
3 been present at the ATM every time the money's gone missing"?

4 A Correct.

5 Q So, was it your understanding that when Garda services
6 these ATM machines, they essentially have to balance up the
7 money that was delivered the last time, the money that the
8 customers have since come into the bank and taken out of the
9 ATM, and the money that's left?

10 A That's correct.

11 Q And when they were trying to make that balance, they were
12 coming up short for several instances over the course of
13 several months in the spring, summer, and early fall of 2013?

14 A Yes.

15 Q And so initially they said: "We think it's Aaron
16 Johnson," and that's sort of what people thought initially
17 until Mr. Ailer went into the bank to make this cash deposit?

18 A That's correct.

19 Q And then it was the circumstances surrounding his cash
20 deposit, including what you characterized as his fictitious
21 reasons for making the deposit and his resignation from Garda
22 that made people think, well, maybe it was Arnold Ailer and not
23 Aaron Johnson?

24 A Yes. Although the resignation did not come until
25 November.

1 Q The resignation from Garda didn't come until later?

2 A Correct.

3 Q Okay.

4 And did you learn he had resigned from Garda to take a job
5 with Charter Communications to lay cable for them?

6 A I don't recall who he went to work for, but I knew he had
7 resigned and already had a job waiting.

8 Q Okay.

9 So didn't just leave and then get a job; he left to go to
10 a new job?

11 A That's correct.

12 Q Did you know that he's still at that job today?

13 A I do not know.

14 Q So, as part of the investigation into this first batch of
15 missing money from ATM machines, you actually prepared a search
16 warrant in that case to seize that money; correct?

17 A I did.

18 Q And that was for purposes of wanting to have that actual
19 cash around to maybe be able to compare bill denominations,
20 serial numbers, that sort of thing?

21 A Correct.

22 Q And eventually, that money was returned to Mr. Ailer when
23 the prosecution was declined?

24 A Correct.

25 Q And then you got another warrant, but that related to the

1 money that went missing off the truck on November 20th of 2013?

2 A Correct.

3 Q And that was for phone records --

4 A Yes.

5 Q -- for Mr. Ailer's phone?

6 A Yes, sir.

7 Q And essentially, the only thing that even sort of relates
8 to money are text messages from Mr. Ailer to someone saying:

9 "Don't spend too much money around the Christmas holiday"?

10 A That's correct.

11 Q Okay.

12 In your search warrant application for those phone
13 records, Mr. Donahoe referred you to paragraphs 3, 4, and 5 in
14 particular, but paragraph 4 is where Mr. Molzhon, spelled
15 M-O-L-Z-H-O-N, who is the messenger on the Missoula truck, said
16 he thought he accidentally accepted those missing bags?

17 A That's correct.

18 Q But didn't know one way or the other; is that correct?

19 A I don't think I could speak to what he knew exactly, but I
20 can tell you later when I received the actual supporting
21 documents from Garda, I found discrepancies between his oral
22 statement, his written statement, and what I had been told in
23 the initial investigation.

24 Q Okay.

25 A So he -- he may have believed that at the time, or he may

1 -- he may have accepted them or not. There's no way to really
2 tell.

3 Q Okay.

4 And that's a good answer to my not-very-good question.
5 But basically, your statement in paragraph 4 seems pretty
6 definitive that Mr. Molzhon said: "I accidentally accepted
7 those bags. Mistakenly accepted those bags."

8 But after you were able to review a broader array of
9 evidence, you were able to determine it might not have been so?

10 A Correct.

11 Q Okay.

12 And in paragraph 5 you make a statement that Mr. Ailer
13 being a four-year Garda employee would be experienced with the
14 route and would have known if they were getting the wrong bags.
15 And again, was that a conclusion based on the evidence you had
16 at the early stage of the investigation?

17 A That's correct.

18 Q And was that based on all of the evidence that's now been
19 presented to you, some of which you're -- and then other
20 evidence that you wouldn't necessarily be aware of, is it fair
21 to say that that was more of a speculative statement based on
22 the evidence you had at that time?

23 A I think it would always be speculative to say what he
24 knew.

25 Q Okay.

1 You mentioned that Mr. Ailer had a personal cell phone
2 with him when he was driving his Garda route on November 20th
3 of 2013.

4 Do you know if any other Garda employees had a personal
5 cell phone with them on that day?

6 A I do not know.

7 Q Do you know if Garda employees generally would take
8 personal cell phones with them on their routes, despite the
9 fact that they were not supposed to by Garda policy?

10 A I do not know.

11 Q There was nothing in your investigation that revealed that
12 one way or another?

13 A No.

14 Q Okay.

15 MR. RACICOT: That's all the questions I have,
16 Detective.

17 Thank you.

18 THE COURT: Mr. Donahoe, you may redirect limited to
19 cross.

20 MR. DONAHOE: Thank you.

21 REDIRECT EXAMINATION

22 BY MR. DONAHOE:

23 Q Ma'am, I just wanted to talk about that question about the
24 policy of the cell phone.

25 Did you determine, at least insofar as your investigation

1 of Mr. Ailer was concerned, that there, one, was a policy of
2 GardaWorld not to carry a cell phone during work time?

3 A I was told that by the Garda investigators. I don't know
4 that I ever received a copy of that policy.

5 Q Okay.

6 So, you never saw it written down?

7 A If I did, I can't recall.

8 Q And if you didn't see it in writing, can you tell me what
9 the policy was? Could one carry a phone and keep it off or in
10 airplane mode, or anything like that? Or was it just a strict
11 ban, physically you cannot have a cell phone in your possession
12 during work time?

13 A (Witness reviewing documents.)

14 According to what I wrote in my search warrant, the
15 employees were restricted by the company policy from having
16 personal cell phones in their possession while on shift.

17 But that, again, was what I was told.

18 Q All right.

19 So that's the determination that you made?

20 A Correct.

21 Q So did you determine that Mr. Ailer had, in fact, violated
22 that policy?

23 A If that policy exists, then their cell phone records do
24 show that he appeared to have had his phone with him that day.

25 Q Okay.

1 So, making the assumption there was such a policy, the
2 records show that he actually had had his phone?

3 A That his phone was certainly in use. And it appeared to
4 be by him based on the context that I saw.

5 Q And there was a text message that said something to the
6 effect: "Don't spend too much money at Christmastime"?

7 A Something like that, yes.

8 Q And to whom was that directed?

9 A I don't know that I knew the name. But it appeared to be
10 a romantic partner, possibly, in California is my recollection.

11 Q Okay.

12 Did you ever undertake to do anything to investigate that
13 other party in California?

14 A I did not.

15 Q Thank you.

16 THE COURT: Did I understand correctly that,
17 Detective Lear, that once you obtained this search warrant and
18 looked at the phone records of Mr. Ailer, your department
19 concluded that there was nothing of value to the department in
20 considering Mr. Ailer as a robbery suspect?

21 THE WITNESS: (No response.)

22 THE COURT: You mentioned the "don't spend money at
23 Christmas," but a lot of people are -- some, at least, may be
24 cautioned to such potential extravagance.

25 THE WITNESS: I can't say that it would make me

1 eliminate him as a suspect solely on that basis.

2 THE COURT: Well, I'll say it differently: Did you
3 find anything in this phone record search that your department
4 conducted that you utilized to take further action against
5 Mr. Ailer?

6 THE WITNESS: No, I did not.

7 THE COURT: Thank you.

8 You may step down, ma'am.

9 (Witness excused from the witness stand.)

10 THE COURT: Your next witness, Mr. Donahoe.

11 MR. DONAHOE: Thank you, Your Honor.

12 I would call Mr. Curtis McAlpin.

13 THE COURT: Sir, come in -- come right up here to the
14 front of the courtroom where the clerk is standing. She will
15 administer the oath for you, sir.

16 CLERK OF COURT: Please raise your right hand.

17

18 CURTIS LYNN McALPIN, having been called as a witness on behalf
19 of the defendant, being first duly sworn according to law, was
20 examined and testified as follows:

21

22 CLERK OF COURT: Go ahead and have a seat in that
23 witness chair.

24 THE COURT: Have a seat here at the witness chair,
25 please, sir.

1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: Would you state your name for the record,
3 please.

4 THE WITNESS: Curtis Lynn McAlpin.

5 THE COURT: Spell your last name, please.

6 THE WITNESS: M-C capital A-L-P-I-N.

7 THE COURT: Thank you, sir.

8 DIRECT EXAMINATION

9 BY MR. DONAHOE:

10 Q Sir, could you tell me where you live and what you do for
11 a living.

12 A I live at 2350 North Mitchell Gulch Road, East Helena,
13 Montana. And right now I am a job coordinator for the Helena
14 Prerelease Center.

15 Q And how long have you been so employed?

16 A About three years.

17 Q And previously, were you employed by GardaWorld?

18 A I was.

19 Q What is GardaWorld?

20 A It is an armored car company.

21 Q And did you have duties of delivering currency and coin to
22 various locations throughout Montana?

23 A Yes, sir.

24 Q On November 20, 2013, did you make a run from Helena to
25 Missoula that you recall?

1 A I did.

2 Q And in that -- was that a Garda vehicle?

3 A Yes.

4 Q And did it have coin and currency that needed to be
5 transported to Missoula and other locations on the other side
6 of the mountain?

7 A Yes.

8 Q What time did you arrive in Missoula that day; do you
9 recall?

10 A I would say it was seven'ish in the morning.

11 Q So, when you arrive in Missoula, what's the first thing
12 you do?

13 A We usually complete the Missoula branch of Garda, and we
14 do a cash and coin transfer.

15 Q Now, prior to coming to court today, did you and I have a
16 sit down for a few minutes with my investigator, Mr. Hopkins?

17 A Yes.

18 Q And do you recall us discussing this transfer on this
19 particular day, November 20, 2013?

20 A Yes.

21 Q And where did it take place? Do you recall telling me?

22 A It's on Front Street in front of First Interstate Bank.

23 Q So you went to First Interstate Bank.

24 Did you have to make a drop at that bank that day?

25 A We did.

1 Q And did you, in your memory, start to make that drop at
2 the bank before the other Garda Missoula truck came to meet
3 you?

4 A Yes. They were not there upon our arrival, so we had to
5 go ahead and make the delivery to the bank.

6 Q So that delivery would consist of what?

7 A Unloading coin and currency and put it on a hand pushcart
8 into the bank. }

9 Q And again, we're talking about First Interstate Bank;
10 correct?

11 A Correct.

12 Q Now, did you have a helper that day?

13 A I did.

14 Q And he's titled a messenger?

15 A Correct.

16 Q And who was it?

17 A Clay Olson.

18 Q And is Mr. Olson still with us?

19 A He passed away.

20 Q And do you know when?

21 A It was a couple years ago, I believe.

22 Q All right.

23 And did you know Mr. Olson?

24 A I've known him for quite a long while.

25 Q And he was a Helena resident?

1 A He was.

2 Q And you guys went to school together?

3 A No. He was several years older. I went to school with
4 his ex-wife.

5 Q I'm sorry. Yeah. That was the story.

6 So that's how you became friends with Mr. Olson?

7 A Right.

8 Q All right.

9 But he was a long-standing friend?

10 A He was more an acquaintance than a friend. I associated
11 with him off and on.

12 Q Through the relationship with the other person?

13 A Right. Uhm-hum.

14 Q Okay.

15 So, back to First Interstate Bank, the material that you
16 took to deliver to the Missoula truck and to other banks that
17 we'll talk about in a second, came from where?

18 A Out of our truck. It came from the Helena branch.

19 Q All right.

20 So, that truck was loaded up here in Helena?

21 A Correct.

22 Q And does it contain Federal Reserve funds?

23 A Yes.

24 Q And when are those funds obtained from Federal Reserve?

25 A Usually, on the over-the-road route, they're obtained the

1 day before.

2 Q All right.

3 So, this truck that you were driving has up till now been
4 identified as the fed truck.

5 A Correct.

6 Q Does that make sense?

7 A Yes.

8 Q And is it likewise sometimes called the OTR truck?

9 A It is.

10 Q And what's OTR stand for?

11 A Over the road.

12 Q So, you were in charge of the over-the-road truck on
13 November 20, 2013?

14 A I was.

15 Q And did you load that truck, personally?

16 A I did that morning.

17 Q And did your helper help you to load that truck?

18 A Yes.

19 Q Was there any other GardaWorld person in Helena who helped
20 you load that truck?

21 A No.

22 Q After these charges were brought -- or actually, before
23 these charges were brought, did you have an opportunity to look
24 at a videotaping of your loading of that truck?

25 A Yes.

1 Q And when did you do that, sir?

2 A Oh, it was several times. It was, I believe, about a week
3 after.. The Garda security came from out-of-state to review the
4 taping -- or the videotape.

5 Q And what was the purpose of reviewing it?

6 A To see if the actual money lost was actually loaded onto
7 the truck.

8 Q All right.

9 When you say "money lost," what money was lost?

10 A There was three bags of what they call fit money. It was
11 for ATMs.

12 Q And do you know approximately how much?

13 A I believe it was 370,000.

14 Q Somewhere in that neighborhood?

15 So, did people have contact with you from GardaWorld
16 wanting to discuss that missing money?

17 A Yes.

18 Q And was part of that discussion involving looking at this
19 videotape?

20 A Correct.

21 Q Did you discern anything or conclude anything on your own
22 from reviewing that tape?

23 A I had checked out 12 packages of ATM money. And I counted
24 12 movements into the truck.

25 Q So, it seemed to you after reviewing the tape, what?

1 A That all the ATM money that was due to be delivered on
2 that route was placed into the truck.

3 Q Now, inside your OTR truck there are lockers; correct?

4 A Correct.

5 Q And did you have a personal policy about storing money in
6 those lockers?

7 A Yes.

8 Q Can you tell me about that, sir.

9 A All the fed money that came out of the Federal Reserve
10 that was packaged in their wrap, was placed on the floorboard
11 of the currency room. And the lockers are on the driver's side
12 and the passenger's side.

13 I personally always -- always put the Kalispell delivery
14 ATM money in locker 13. I never deviated from that. Ever.

15 Q Now, when you say the Kalispell ATM money, is that the
16 money that went missing?

17 A Correct.

18 Q So, when you met up with the truck in Missoula to make the
19 exchange in front of First Interstate Bank, was the locker
20 money accessed at that time?

21 A No.

22 Q Do you recall, personally, as a matter of personal
23 knowledge, putting that ATM money in locker 13?

24 A You know, I never really deviate from that when I load the
25 truck. I've been on that truck for six years. I've always put

1 on that particular route, Kalispell's in locker 13. It very
2 rarely ever deviated from that.

3 Q All right.

4 And don't take this as a challenge in an offensive way,
5 but are you working here on your habits, or on your memory? In
6 other words, do you remember putting the money into the locker
7 13 that day?

8 A Not a hundred percent, no.

9 Q But you do recall, at least from looking at the videotape,
10 putting the correct number of bags, loading the correct number
11 of bags from Helena into the OTR truck, initially?

12 A Yeah. We counted 12 out of the vault, and I counted 12
13 movements into the truck.

14 Q And that would have included those 12 bags, the ATM money
15 earmarked for Kalispell?

16 A Missoula and Kalispell.

17 Q Missoula and Kalispell? Okay.

18 Would you have any occasion to look in the locker when you
19 were making the transfer from the OTR truck, your truck, to the
20 Missoula truck?

21 A No.

22 Q So that -- those funds or those bags would have remained
23 in that locker and would have never been accessed until you got
24 to Kalispell?

25 A Correct.

1 Q Was there anything that struck you in memory as unusual
2 about the transfer from your truck to the Missoula truck on
3 November 20th, 2013?

4 A Other than they were later than average. And we decided
5 to make the transfer -- or the delivery to the bank prior to
6 our delivery to them.

7 Q Okay.

8 So I want to talk about that a little bit.

9 That would have been a slight deviation from normal
10 protocol?

11 A There's no set protocol. Normally, the Missoula truck is
12 there just shortly after we're there, so it's usually pretty
13 quick. But if we did a transfer, then we'd start our
14 deliveries.

15 Q All right.

16 But in this particular instance that particular day, you
17 have specific memory of starting the First Interstate drop
18 before the Missoula truck arrived?

19 A Correct.

20 Q Now, mechanically, how would that have worked?

21 A The truck, or --

22 Q Well, in other words, were you in progress of making this
23 First Interstate Bank drop, and then the Missoula truck showed
24 up?

25 A Yes.

1 Q So, did you terminate that delivery to First Interstate
2 Bank, and then start to engage to the Missoula truck?

3 A Correct.

4 Q So, can you describe to me in pictorial form, in words,
5 what that looked like?

6 A We had came out of the bank, we'd made our delivery. We
7 were coming out with returns. And we threw our coin -- throw
8 our currency into the truck, threw our return coin into the
9 truck. Then proceeded on. Getting the Missoula truck,
10 basically, back-to-back.

11 And then, I was on the bumper transferring what we needed
12 from the inside to the Missoula truck.

13 Q So, after that interruption, was there further activity
14 after that Missoula truck job transfer was done, was there
15 other activity that had to occur inside First Interstate Bank?

16 A Yeah. We had to go back in and get all the paperwork
17 signed and make sure the piece count was right. And could you
18 -- get ready to continue our route.

19 Q All right.

20 So, in your memory, there definitely was an interruption
21 in the First Interstate Bank delivery?

22 A Correct.

23 Q Would the back of the truck, your truck, have been open
24 for the First Interstate delivery?

25 A We had to open it to pull the material out.

1 Q Was there any time, once you pulled your materials out,
2 that that truck, your truck, was left unattended while you were
3 inside First Interstate Bank?

4 A The vehicle was secured, and we both exited the vehicle.

5 Q So, the two of you, you and your helper, had gone into
6 First Interstate Bank?

7 A Correct.

8 Q And the truck was freestanding? Was it running?

9 A Yes.

10 Q And was there anybody in the truck?

11 A No.

12 Q Had the Missoula truck yet arrived?

13 A No.

14 Q So, the truck was unattended for how long?

15 A Well, total, it was almost a half-an-hour from start to
16 finish.

17 Q All right.

18 I -- you got to break that down for me, sir.

19 From start to finish of the loading the Missoula truck?

20 A No. The Missoula truck come -- came in between.

21 Q In the middle of that half-an-hour?

22 A Yeah. I would have to look at the route sheet, because it
23 would show the time I arrived at the bank and the time that
24 Missoula showed up.

25 Q All right.

1 But that would -- so, that's good enough.

2 Those records would give you a pretty good estimate of how
3 long your truck was unattended?

4 A Correct.

5 Q Okay.

6 I get that.

7 Is it policy of GardaWorld to have the truck unattended?

8 A No.

9 Q Was it unattended for more than ten minutes?

10 A Yes.

11 Q After you loaded up the Missoula truck, you stopped the
12 First Interstate delivery, the Missoula truck did what?

13 A After they came, backed into our truck, after we put our
14 returns in, and then we proceeded with the transfer of what
15 they needed to conduct their route.

16 Q So then, they take off. Is that --

17 A Correct.

18 Q To put it in the vernacular.

19 A Correct.

20 Q And they're going to go do their day's work?

21 A Correct.

22 Q And what did you do on their departure, on the Missoula
23 truck's departure?

24 A Well, we secured the doors.

25 We organized what we just threw in. We -- the truck is a

1 cubical. And we needed to -- quarters go on one side. Pennies
2 and nickels go on one side; dimes go on one side. And we
3 needed to clear a path so we could conduct our business in
4 there.

5 Q Okay.

6 But at some point, you went back into First Interstate
7 Bank?

8 A Correct.

9 Q And was the truck unattended once again?

10 A I believe so.

11 Q All right.

12 So, on two occasions at this initial Missoula stop, your
13 first stop of the day, the truck was left unattended?

14 A Correct.

15 Q And I guess we could figure out the times later.

16 So, after you were concluded in First Interstate Bank,
17 what did you do next?

18 A We marked our total pieces out. Put it on our log sheet,
19 the time we made our departure, and headed to our next stop.

20 Q Now, at any time during that whole process in Missoula,
21 did you have occasion to open locker 13 to look at that money?

22 A No.

23 Q And in your view, as we sit here today, that money was in
24 that locker? You had put it in there?

25 A Correct.

1 Q So, after all business in Missoula is concluded, where do
2 you go?

3 A Depending on which week it was, we head up towards
4 Kalispell. One week, we'll go to Polson; the off week, we
5 would go to St. Ignatius and Ronan.

6 Q All right.

7 So -- and we could figure that out, probably, by
8 documentation.

9 But the gist of it is, is that you have further duties,
10 and you head north?

11 A Correct.

12 Q And what's your ultimate destination?

13 A Our last stop is Kalispell. Or last town is Kalispell.

14 Q And depending on the week, you're going to make two or
15 three stops in between Missoula and Kalispell?

16 A Correct.

17 Q At any time in your memory and of personal knowledge, do
18 you remember your truck being unattended between Missoula and
19 Kalispell on November 20th?

20 A I -- I would say yes. I believe we stopped in Polson.
21 And I had -- Clay was brand new on the truck. Never been on it
22 a day before.

23 Q This is Mr. Olson?

24 A Correct.

25 You could not send an unknown guy into anywhere.

1 You know, Garda pretty much set us up to fail from the
2 get-go.

3 Q Now, ultimately, I guess we can just fast-forward.

4 You arrive in Kalispell; correct?

5 A Correct.

6 Q Your OTR truck, your fed truck, you and Mr. Olson, and you
7 have business that you have to conduct in Kalispell; correct?

8 A Correct.

9 Q At some point, was it necessary for you to access the
10 money in locker 13?

11 A Yes.

12 Q And what happened when you went to do that that day?

13 A Opened up locker 13, and it was empty.

14 Q And what did you do?

15 A I didn't panic, but I was rather concerned. It was rather
16 disconcerting that it wasn't there.

17 Q Did you contact anybody?

18 A Yes. I called our branch manager, Craig Stevens, and
19 advised him that the OTR ATMs for Kalispell were not in the
20 truck.

21 Q And how did you do that? Did you do that with a cell
22 phone?

23 A Yes.

24 Q Was it your cell phone?

25 A No. It was the Garda's cell phone, truck's cell phone.

1 Q So, a business cell phone --

2 A Yes.

3 Q -- that's provided to you? And it goes on the run with
4 you?

5 A Yes.

6 Q Were you given any instructions?

7 A Told us to completely, thoroughly go through the truck to
8 make sure that it wasn't somewhere misplaced. We searched the
9 truck high and low. Could not find it.

10 Q All right.

11 So, did you ultimately conclude business up in Kalispell?

12 A Yes.

13 Q And then where did you go?

14 A Went back to Missoula, picked up the returns that the
15 Missoula branch had from their deliveries, and we head back to
16 Helena.

17 Q All right.

18 When you went back to Missoula, was there discussion about
19 this money from locker 13?

20 A Yeah. Prior, I had called them to make sure that it
21 wasn't inadvertently misdelivered. And we did that when we
22 couldn't find the money on the truck. And just make sure that
23 they didn't have it. And they stated that they didn't have it.

24 So we picked up our returns, and came back to Helena.

25 Q All right.

1 So, just for clarification purposes, when you say
2 "misdelivery," are we talking about what you and I just here
3 today discussed, your previous rendezvous with the Missoula
4 truck that morning?

5 A Right.

6 Q So, the theory being, or the notion being that perhaps the
7 bags were loaded onto Mr. Ailer's truck?

8 A When I was looking back at the possible -- any possible
9 scenario where that money could have went, I had to, okay, was
10 it misdelivered or not appropriately loaded on the truck? So I
11 made sure about the Helena branch check the currency bins. I
12 went ahead and called Missoula, made sure it wasn't
13 misdelivered to them.

14 And then, I just basically just checking any possible
15 thing that could have happened.

16 Q Sure. Just using logic; right?

17 A Uhm-hum.

18 Q So, if we go back to you looking at the video, that was,
19 likewise, part of your logic: "Did we put it on the truck?
20 Let's check the video"?

21 A Uhm-hum.

22 Q Correct?

23 A Correct.

24 Q So there could have been something that went awry in
25 Helena? You posed the question to yourself; correct?

1 A Yeah. Yeah.

2 Q And then you posed the question: There could have been an
3 erroneous transfer in Missoula; correct?

4 A Correct.

5 Q And then a third option was what?

6 A Thievery.

7 Q That somebody --

8 A Entered the truck while it was unattended, and took the
9 funds.

10 Q And through the course of that day, how many times do you
11 figure that truck was left unattended?

12 A Probably five times.

13 Q Varying degrees of time?

14 A Right.

15 Q Amounts of time?

16 Have you ever had occasion -- how long did you work for
17 GardaWorld?

18 A Approximately six years.

19 Q And in the course of your experience there as an employee,
20 did you ever lock your keys in the truck?

21 A Once.

22 Q And what did you do?

23 A Myself and the defendant, we made one call to a locksmith,
24 see if they would open up the truck. They refused to do so.
25 And we had to kind of figure it out. I had left the driver's

1 side vent open for airflow to go in. And we managed to get a
2 -- I can't remember if it was a mop handle or a broom handle,
3 pushed it through the screen mesh, and hit one of the rocker
4 switches on the control panel that unlocked one of the doors.

5 Q Okay.

6 So, you're going to have to break that down a little bit.
7 There's an access point outside the vehicle?

8 A Yes.

9 Q And what's that called?

10 A You have doors on the passenger -- on the driver's side,
11 there's one driver door. The passenger's side had two doors.
12 One is the main door that goes into the cab. And right behind
13 that is a turret door. It is -- what they -- a drum, which you
14 just spin around. You push a button on the wall inside there,
15 and it opens up the door outside.

16 And then, there was a back door.

17 Q So you were able to gain access with some kind of broom
18 handle or stick?

19 A Right. Each door is opened from the outside either with a
20 key, other than the turret door, and the front driver and
21 passenger door could be opened with a master key. And the
22 turret door has to be hit with a rocker switch that's on a
23 control panel on the dashboard.

24 Q So, you, obviously, have one of the keys when you're
25 operating the truck?

1 A Either myself or the messenger does.

2 Q Right. And where's the other key?

3 A The master key is usually kept in the branch manager's
4 office.

5 Q And that would be in --

6 A Helena.

7 Q -- in Helena? Okay.

8 So, on this particular occasion, though, you did gain
9 access to the truck?

10 A Yes.

11 Q Did that ever occur on another occasion?

12 A Not when I was on the truck.

13 Q No?

14 And whose idea was it to access this stick?

15 A Well, between Mr. Herrin and I, we came up with it. I
16 don't know who thought of it. But -- the access was gained.
17 And that was several years ago. I don't remember who came up
18 with the thought plan.

19 Q All right.

20 And just for clarification, this discussion you and I just
21 had about getting into that truck when the keys were locked in
22 there, was not on November 20, 2013?

23 A It was on the Missoula route. You know, the exact date, I
24 thought it was October, but I know I worked a certain amount of
25 time after that.

1 Q So, it was October of that year?

2 A It was -- it was either October or November. Because I
3 know I worked up until right before Christmas, and they
4 terminated my employment.

5 Q And that's where I was going to go next.

6 Were you spoken to about this missing money?

7 A Several times.

8 Q And did you openly and freely discuss the situation with
9 GardaWorld?

10 A Yes.

11 Q With the investigators?

12 A And the -- I want to say the district manager out of
13 California, I believe.

14 Q Okay.

15 So, somebody even a little higher up?

16 A Yes.

17 Q And you made yourself available for interview?

18 A Absolutely.

19 Q And told them everything you knew?

20 A Yes.

21 Q Perhaps everything we discussed here today?

22 A Yes.

23 Q You had nothing to hide?

24 A Nothing at all.

25 Q Did you take the money --

1 A No.

2 Q -- on November 20th, 2013?

3 A Did not.

4 Q Were you ever accused of that?

5 A Yes.

6 Q By whom?

7 A The individual that came in from another district. I want
8 to say Gonzo or Gonzalez, or --

9 Q Right. And was that in confrontational style?

10 A It was more of an interrogation than an interview. He
11 demanded his money.

12 Q And you denied having it?

13 A I did.

14 Q And you denied taking it?

15 A I did.

16 Q And you deny taking it today?

17 A I do.

18 Q Did you ever determine to your own satisfaction what
19 happened to this misplaced money?

20 A No.

21 Q Thank you, sir.

22 MR. DONAHOE: I have nothing further.

23 THE COURT: Mr. Racicot, you may examine.

24 MR. RACICOT: Thank you, Your Honor.

25

CROSS-EXAMINATION

1
2 BY MR. RACICOT:

3 Q Good morning, Mr. McAlpin.

4 A Good morning.

5 Q Mr. Donahoe asked if you took the money on November 20th
6 of 2013, and you said no.

7 Did you ever take money from Garda?

8 A No.

9 Q Did you ever take money out of an ATM that you were
10 servicing on behalf of Garda?

11 A I've assisted other branches on servicing ATMs.

12 Q But did you ever take money that you were supposed to be
13 acquiring in the course of your employment and take it for your
14 own use and benefit?

15 A No.

16 Q When you locked the keys in the OTR truck and had to find
17 another way in, do you recall where you were?

18 A I was at the First Interstate Bank in Kalispell.

19 Q And you said the defendant, Mr. Herrin, was working with
20 you that day?

21 A Yes.

22 Q That was not the day that all the money went missing,
23 though; correct?

24 A That's correct.

25 Q And you talked with Mr. Donahoe about using a mop or broom

1 handle to get into the truck by hitting one of the rocker
2 switches and that unlocked one of the doors.

3 Where is the roof vent that you had to -- or the vent that
4 you had to put the handle through?

5 A There's two roof vents in the cab. We got into the
6 driver's side roof vent.

7 Q So, do you need a ladder or something to get up on the
8 roof? How do you do that?

9 A You would climb up the front bumper of the truck, up the
10 hood to the cab of the truck, and then position yourself on the
11 box. And I believe the vent was facing backward. On certain
12 days, depending on the weather, you would have one facing
13 forward; one facing backward.

14 Q One of these roof vents?

15 A Right. So you get a cross-vent or draft inside the cab.
16 The heat and the air conditioning was horrible in the truck.
17 So we used -- for the ventilation. And I believe the one on
18 the driver's side was facing backward towards the rear of the
19 truck. And we were able to put the broom handle in.

20 The rocker switches are on the middle of the dashboard in
21 between the seats, and there's probably 15 to 18, 20 maybe,
22 different rocker switches. And we were able to hit one of them
23 and pop a door.

24 Q So you were able to put that handle, broom or mop handle,
25 through that vent and hit one of those rocker switches to

1 unlock one of the doors?

2 A Correct.

3 Q And that's what happened with you and the defendant that
4 day in Kalispell?

5 A Correct.

6 Q You talked with Mr. Donahoe about, basically, trying to
7 hypothesize how the money might have gone missing. And so you
8 called back to Helena and said: "Did we leave it in the
9 vault?"

10 Correct?

11 A Correct.

12 Q And then you said: "Well, later on, we'll check the video
13 and see if we seemed to be making the right number of motions
14 to load the bags on the truck"; correct?

15 A Yeah. That was after this Garda security or branch
16 manager pulled the video out of the -- their armored bay.

17 Q Right. That was more during the investigative phase?

18 A Correct.

19 Q And then, going back to the day that the money goes
20 missing, you figure: "Well, we better call Missoula. We met
21 the Missoula truck, we'll call them and see if they have it"?

22 A Correct.

23 Q Now, does that seem unusual to you, because you would
24 have, in all likelihood, put those bags in locker 13 and never
25 opened it again till you got to Kalispell?

1 A Correct.

2 Q So, no matter how unusual it might have been, you wanted
3 to make sure that for some reason, you didn't forget to put
4 them in locker 13 that day, and then accidentally give them to
5 the Missoula truck?

6 A Correct.

7 Q However extraordinary the options are, you're just trying
8 to run through all of the options that would lead you to the
9 ultimate conclusion, which is somebody took it?

10 A Correct.

11 Q Okay.

12 You searched your truck?

13 A Yes.

14 Q Now, you talked about these 12 -- you see yourself making
15 12 motions with ATM bags when you're loading the truck?

16 A Correct.

17 Q But the truck has a lot more than just 12 bags on it;
18 correct?

19 A Oh, yes.

20 Q How many items, approximately, are you going to be hauling
21 over on the fed truck day to Missoula and, ultimately,
22 Kalispell?

23 A Over 500 pieces.

24 Q Over 500 pieces total?

25 A Correct.

1 Q So that's bags of money, boxes of quarters, dimes,
2 nickels, and pennies, et cetera?

3 A Correct.

4 Q Is it heavy?

5 A That truck ran heavy all the time.

6 Q Are the boxes of coin heavy?

7 A Very.

8 Q And then, you're picking things up. Other than from the
9 Missoula truck at the first stop, generally, when you're
10 dropping things off, you're also picking things up?

11 A Yeah. We pick up bank returns.

12 Q Leftover money from ATMs, leftover coin?

13 A Yeah. The coin from every -- every delivery we make, the
14 bank sends out a shipment to be redeposited, coin and currency.

15 Q So even as throughout the day you're unloading some of
16 these 590 pieces, you're also acquiring additional pieces?

17 A Correct.

18 Q So it's -- not to be coy -- but garbage in/garbage out
19 sort of throughout the day?

20 A Absolutely.

21 Q Other than with that first Missoula truck?

22 A Correct.

23 Q Because you settle up with them at the end of the day?

24 A Correct.

25 Q So, you talked about this instance with Mr. Herrin in

1 Kalispell, that's on the OTR truck, the fed truck day?

2 A Yes.

3 Q Did you work that route with Mr. Herrin very often?

4 A Yeah. We worked that -- the Billings route and the
5 Missoula route for quite a long while. He was my co-driver.

6 Q And where you put things in the truck, that's sometimes
7 called "staging the truck"; correct?

8 A Correct.

9 Q And so, you were sort of in charge of staging the fed
10 truck for the run from Missoula to Kalispell?

11 A Correct.

12 Q Did the people that work with you on the fed truck after
13 they worked with you a while, have a pretty good idea of how
14 you staged your truck?

15 A Yes. It never deviated.

16 Q So they would have a pretty good idea, whoever was on that
17 route with you with any frequency, where you put those
18 Kalispell ATM bags, in locker 13?

19 A Correct.

20 Q You talked with Mr. Donahoe about the truck being
21 unattended by both you and Mr. Olson about five times on
22 November 20th, 2013.

23 In addition to the first stop at First Interstate Bank
24 which got interrupted by the Missoula truck, there was three
25 additional instances just in Missoula where your truck was

1 unattended; correct?

2 A Correct.

3 Q And it was for approximately, give or take, 30 minutes
4 each of those incidents; correct?

5 A Correct.

6 Q Now, that's against company policy; right?

7 A Correct.

8 Q Why did you and Mr. Olson violate company policy by
9 leaving the truck unattended?

10 A They cut our manpower from three to two. And expected us
11 to do the same amount of work in the same amount of time with
12 less manpower, and they gave me a new guy and a weak guy.

13 Q Would you leave the truck unattended, even when you worked
14 with other people, just for the sake of efficiency?

15 A Just Mr. Herrin.

16 Q When you worked with Mr. Herrin?

17 A Yeah.

18 Q You mentioned you're dealing with upwards of 600 pieces,
19 590-some pieces of stuff, either coin or money.

20 Are you under kind of a time crunch that day to get all of
21 that stuff delivered and all the other stuff picked up?

22 A Yes.

23 Q And was that a dictate that came down to you from
24 management that you need to get this route done in a certain
25 amount of time?

1 A That, and we have a commercial driver's license, and we
2 are only allowed to drive and operate so many hours in a
3 24-hour period.

4 Q So you only have so many hours that you can operate per
5 regulations regarding your CDL?

6 A Correct.

7 Q And there's also this sort of overriding company policy
8 saying: "We want you to get all this work done as quickly as
9 possible."

10 So was this fed truck run a hustle? Were you moving to
11 try to get this done?

12 A Every time.

13 Q And did that create the opportunity to make mistakes?

14 A Yes.

15 Q And did it create in your mind, at least, the necessity to
16 leave that truck unattended for at least some stops?

17 A Yes.

18 Q And were those stops, when you're making a particularly
19 large volume of drop-offs to the bank or the other business?

20 A Yes.

21 Q You mentioned the truck had a cell phone, a business cell
22 phone assigned to it.

23 Was there a company policy that prohibited employees from
24 having their personal cell phone with them on a truck?

25 A Yes.

1 Q In other words, not supposed to be on your person or with
2 you at all; correct?

3 A Correct.

4 Q Did people violate that policy?

5 A Constantly. I, as well.

6 Q Pardon?

7 A I, as well.

8 Q You did, as well?

9 So people would take their personal cell phones with them
10 even though they weren't supposed to?

11 A Yes.

12 MR. RACICOT: That's all the questions that I have.

13 Thank you.

14 THE COURT: Redirect, Mr. Donahoe.

15 MR. DONAHOE: Thank you.

16 REDIRECT EXAMINATION

17 BY MR. DONAHOE:

18 Q Just a couple, sir, based on the cross.

19 So, the access to the lockers -- are the lockers locked?

20 A Yes.

21 Q All right.

22 And who has the key to the locker?

23 A Usually, the messenger.

24 Q So, on this day, you would have put the money, as you
25 testified previously, in the locker, but Mr. Olson would have

1 had the key?

2 A I believe I had the key that particular day, because --

3 Q That particular day?

4 A Uhm-hum.

5 Q Is there a reason you remember that?

6 A Because Mr. Olson didn't know how to use the control panel
7 to get into the lockers.

8 Q All right.

9 So, if you broke in the truck -- if somebody broke in the
10 truck, they'd have to have the key to the locker?

11 A Normally. I believe you could open up one locker,
12 possibly two, before it got time-locked out. And time-lock, I
13 believe, was seven minutes.

14 Q All right.

15 So, what "does that mean to me with locker 13?

16 A Okay. On the wall --

17 Q In the truck?

18 A -- in the truck, in the currency department, there is a
19 control panel on the passenger side which has a key slot, and
20 that's for the master key to go into. And then you would turn
21 it till the power came on, so you could operate the control
22 panel to open up lockers.

23 Q I see.

24 A You would push the number of the locker, hit "enter," it
25 would unlock the locker. You turn a knob, pull the money out.

1 Then you shut it, relock it.

2 It automatically locks. And cancels that particular
3 order.

4 Q Okay.

5 So but, you would need a key to get that access.

6 A Yes.

7 Q All right.

8 So, if you broke in the locker, you would need the key to
9 have that access to the locker? If you broke into the truck,
10 rather?

11 A Mostly, yes. I know there's occasions you can make one
12 command, maybe two commands, before it would time-lock out, so
13 you would have to put the key in. Then you would have to wait
14 for the time-lock to clear itself.

15 Q Now, about the time of the broom handle incident, was it
16 the summer of 2013, or the fall of 2013?

17 A It was probably the fall or summer.

18 Q It was either one?

19 A Right. It was warm enough where I had the vent open.

20 Q It could have been sooner, then?

21 A Uhm-hum.

22 Q It could have been summer?

23 A Pardon me?

24 Q It could have been summer?

25 A Yes. It was when Mr. Herrin was on the truck with me.

1 Q Did the messenger door on the fed truck become broken?

2 A The -- the truck inadvertently -- at times, nothing
3 worked. You know, it breaks down; gets repaired. I couldn't
4 -- I would say it worked. Because we used the turret to get
5 out the door on a number of occasions. And we keep the
6 handcart inside the turret door.

7 Q Okay.

8 Thank you, sir.

9 THE COURT: Mr. McAlpin.

10 THE WITNESS: Yes, sir.

11 THE COURT: On the day in question, November 2013,
12 you were the driver of this truck that's been called the fed
13 truck and the OTR truck, the same truck?

14 THE WITNESS: Yes.

15 THE COURT: And you started driving where? What
16 location?

17 THE WITNESS: I left Helena.

18 THE COURT: You left Helena with the truck early in
19 the morning?

20 THE WITNESS: Roughly, 4:30.

21 THE COURT: All right.

22 And you make a stop in Missoula?

23 THE WITNESS: Correct.

24 THE COURT: First stop?

25 THE WITNESS: Correct.

1 THE COURT: And it was there that you described how
2 you picked up bags of money that were headed for Kalispell?
3 Right?

4 THE WITNESS: We -- the first stop?

5 THE COURT: Right. Go ahead.

6 THE WITNESS: I guess I'm -- I'll explain from the
7 start. We stop at the bank. And Missoula truck was not there,
8 so we went ahead and made our first delivery.

9 THE COURT: All right. I understand that.

10 At some point, you meet up with the Missoula truck?

11 THE WITNESS: Correct.

12 THE COURT: Missoula truck offloads bags from it to
13 you?

14 THE WITNESS: No.

15 THE COURT: No?

16 THE WITNESS: I offload my property to their truck.

17 THE COURT: All right.

18 You take all what you brought with you and put it on the
19 Missoula truck?

20 THE WITNESS: Just what they needed.

21 THE COURT: All right.

22 How does it happen that you are carrying bags of -- that
23 were not still with the truck when you got to Kalispell?

24 THE WITNESS: You know, I put the -- I know I put the
25 money in locker 13, the ATM money.

1 THE COURT: All right.

2 Where did you do that?

3 THE WITNESS: At the Helena Garda branch.

4 THE COURT: All right.

5 You put this money that later was found to be missing, you
6 put it into your truck in Helena before you left Helena early
7 in the morning?

8 THE WITNESS: Correct.

9 THE COURT: And you believe that you put those bags
10 into locker 13?

11 THE WITNESS: Correct.

12 THE COURT: And how many bags did you put into locker
13 13?

14 THE WITNESS: I believe there was four.

15 THE COURT: Four? All right.

16 When you get to Kalispell, are all four bags gone? Or is
17 there one of the four still in locker 13?

18 THE WITNESS: You know, I don't rightly remember. I
19 want to say there was maybe one.

20 THE COURT: Well, I believe you stated earlier that
21 locker 13 was empty when you got to Kalispell.

22 THE WITNESS: Yeah. I'm going by what I looked at
23 the delivery.

24 THE COURT: Okay.

25 Well, let's be more specific.

1 THE WITNESS: Yes.

2 THE COURT: I would like your best recollection today
3 of what the situation was with locker 13 when you got to
4 Kalispell.

5 THE WITNESS: I remember that I didn't see anything
6 in there.

7 THE COURT: All right.

8 All right.

9 And you had put whatever you deposited into locker 13, you
10 had done that in Helena before you ever left?

11 THE WITNESS: Correct.

12 THE COURT: All right.

13 You get to Missoula.

14 Does anyone that you were aware of have any access to
15 locker 13 or do anything with locker 13 when you were in
16 Missoula?

17 THE WITNESS: Nobody that was with me.

18 THE COURT: Nobody that was with you? All right.

19 But as I understand, the truck was unattended for some
20 period of time in Missoula; correct?

21 THE WITNESS: Correct.

22 THE COURT: Where were you stopped when that
23 happened?

24 THE WITNESS: It was First Interstate Bank on Front
25 Street.

1 THE COURT: All right.

2 THE WITNESS: Wells Fargo. I can't remember -- it's
3 off of -- I want to say maybe Brooks.

4 THE COURT: Well, let me be more specific: How many
5 times did the truck stop in Missoula before you left Missoula
6 in which the truck was unattended?

7 THE WITNESS: At least three times.

8 THE COURT: All right.

9 Are you aware of anyone having access to locker 13 when
10 the truck was unattended during those three stops?

11 THE WITNESS: They -- my first thought was someone
12 had the other master key that was kept in the branch manager's
13 office. That would be the only way to get into it. There's
14 only two keys.

15 THE COURT: I understand that.

16 But are you aware of anyone having had access to locker 13
17 at the three stops in Missoula?

18 THE WITNESS: No.

19 THE COURT: You make an additional stop en route to
20 Kalispell in Polson. Am I right?

21 THE WITNESS: I believe so, yes.

22 THE COURT: Was the truck left unattended for a
23 period of time when it was in Polson?

24 THE WITNESS: Yes.

25 THE COURT: What was the total time that the truck

1 was unattended before you ever left Missoula?

2 THE WITNESS: Possibly, a half-an-hour.

3 THE COURT: All right.

4 Then you drive north to Polson.

5 Is that the first stop after you leave Missoula?

6 THE WITNESS: I believe that particular day was
7 Polson. We only have, like, three stops between Missoula and
8 Kalispell.

9 THE COURT: All right.

10 And one of those was Polson?

11 THE WITNESS: Correct.

12 THE COURT: And you believe that was the first stop
13 after you left Missoula?

14 THE WITNESS: I believe so.

15 THE COURT: Was the truck left unattended in Polson?

16 THE WITNESS: Yes.

17 THE COURT: For what period of time?

18 THE WITNESS: Roughly, a half-an-hour.

19 THE COURT: All right.

20 Did you stop again before you got to Kalispell?

21 THE WITNESS: I don't believe we did.

22 THE COURT: And the truck was, I believe you said,
23 unattended in Polson for about a half-an-hour?

24 THE WITNESS: Correct.

25 THE COURT: And then you get to Kalispell and open up

1 locker 13; right?

2 THE WITNESS: Correct.

3 THE COURT: And that's when you find that locker 13
4 is, as you've described it, missing or perhaps with two -- or
5 three or four bags gone?

6 THE WITNESS: Correct.

7 THE COURT: All right.

8 Now, you and Mr. Herrin devised a method of getting into
9 the truck when it had been locked on one occasion when you
10 locked the keys in the truck; right?

11 THE WITNESS: Correct.

12 THE COURT: Do you recall where you were physically
13 when that event occurred?

14 THE WITNESS: Parked in front of First Interstate
15 Bank in Kalispell.

16 THE COURT: And you and Mr. Herrin devised a method
17 by which someone got onto the roof of the truck and used a
18 broom handle to unlock a door?

19 THE WITNESS: Correct.

20 THE COURT: And that would gain access to the
21 interior of the truck?

22 THE WITNESS: Correct.

23 THE COURT: And this event, you think, occurred in
24 the summer or fall of 2013, but in any event, before November
25 20 of '13?

1 THE WITNESS: No. It only happened the one time.

2 THE COURT: All right.

3 Was it before or after this truck was found to be missing
4 the cargo when you got to Kalispell?

5 THE WITNESS: Before.

6 THE COURT: Before that?

7 THE WITNESS: Yes.

8 THE COURT: All right.

9 And you and Mr. Herrin were working together on the truck
10 the day that this method of gaining access was worked out and
11 carried out?

12 THE WITNESS: Correct.

13 THE COURT: And I believe you said that once you got
14 inside the truck, that there would be a time period in which
15 one could gain access to some of the lockers before a time-lock
16 would shut everything down?

17 THE WITNESS: Yes.

18 THE COURT: And you described that as about seven
19 minutes?

20 THE WITNESS: It would lock you out for seven
21 minutes. You could open one or two lockers.

22 THE COURT: All right.

23 If you got in, you could open one or two lockers before
24 the shutdown system took over and shut everything down.

25 THE WITNESS: Correct.

1 THE COURT: Is that right?

2 THE WITNESS: Correct.

3 THE COURT: So a person who knew where to go or what
4 to do could gain access to one or two lockers during that brief
5 period of time after gaining access to the truck?

6 THE WITNESS: Correct.

7 THE COURT: And then the shutdown process would lock
8 everything?

9 THE WITNESS: Correct.

10 THE COURT: You've answered my questions.

11 Thank you, sir.

12 You are excused.

13 You may step down.

14 (Witness excused from the witness stand.)

15 THE COURT: Call your next witness.

16 MR. DONAHOE: Mr. Jeff Stacey.

17 This is it, Your Honor.

18 And this witness should be fairly brief.

19 THE COURT: Counsel, as someone wiser than I said,
20 the Lord made a lot of time. You may take as much as you
21 require.

22 MR. DONAHOE: Thank you.

23 I know you're generous with your time.

24 THE COURT: Mr. Stacey, come in, sir.

25 Walk up here to where the clerk is standing. She will

1 administer the oath for you.

2 CLERK OF COURT: Please raise your right hand.

3

4 JEFF STACEY, having been called as a witness on behalf of the
5 defendant, being first duly sworn according to law, was
6 examined and testified as follows:

7

8 CLERK OF COURT: Go ahead and have a seat.

9 THE COURT: Have a seat over here at the witness
10 chair.

11 DIRECT EXAMINATION

12 BY MR. DONAHOE:

13 Q Sir, could you tell me where you live and what you do for
14 a living.

15 A I live in Bozeman, Montana. And I work for a construction
16 company.

17 Q And in a previous life, did you work for GardaWorld?

18 A Yes.

19 Q Did you work with Mr. Herrin?

20 A Yes.

21 Q Did you roommate with Mr. Herrin for a spell?

22 A I did.

23 Q And can you tell me from when to when?

24 A I believe it was from December of 2000 -- 2013/2014 to the
25 -- I believe the April -- I'm sorry. I think I goofed my dates

1 up.

2 It was, I believe, from December to April.

3 Q Of the following year?

4 A Yes.

5 Q So into '14?

6 A Correct.

7 Q Okay.

8 And did you guys just share rent and expenses? Was that
9 the extent of the relationship, or did you hang out together?

10 A No. That was pretty much it.

11 Q Just sharing expenses?

12 A Yes.

13 Q Okay.

14 Did you work shifts together at GardaWorld?

15 A Yes.

16 Q And did you drive the OTR truck?

17 A Not the big truck, no. I worked on the truck, but I never
18 drove it.

19 Q Okay.

20 Were you a messenger or driver?

21 A I was a messenger.

22 Q Okay.

23 And so, you did serve as messenger on the OTR truck?

24 A Yes.

25 Q Do you know how many occasions?

1 A Hundreds.

2 Q Just time and again?

3 So, how long did you work for GardaWorld?

4 A Just shy of 11 years.

5 Q At some particular time, did you have discussion with

6 Mr. Herrin about money that was missing --

7 A Yes.

8 Q -- from one of the trucks?

9 A Yes.

10 Q And when was that, sir?

11 A It was in 2013 after the money had come up missing. We
12 were working a Great Falls route.

13 Q And can you tell me what the nature of that discussion
14 was? What -- you know, the content of it?

15 A Yeah. It was -- the content was, basically, how we felt
16 the money could have been taken.

17 Q So you were kind of hypothesizing, floating theories about
18 how the money could have turned up missing?

19 A Exactly.

20 Q And what were some of the ways that you came up with?

21 A Some of the ways is if somebody had a key, they could
22 possibly have, if somebody on the truck possibly could have
23 taken it that was working that day. And also, there was a way
24 to do it with a broom handle if you were -- if you knew the
25 method.

1 Q So pretty much the gamut of how this money may have gotten
2 out of that truck; is that correct?

3 A Yes.

4 Q And when I say "this money," I'm talking about money that
5 was taken or became misplaced in or around November of 2013?

6 A Yes.

7 Q And you were aware of that?

8 A I was.

9 Q Was that common knowledge in your shop?

10 A That the money was missing?

11 Q Yeah.

12 A Yes.

13 Q So, employees knew? It wasn't a secret; right?

14 A Correct.

15 Q Were you questioned about it personally?

16 A Later on, yes.

17 Q So you worked the OTR truck?

18 A Yes.

19 Q And inside the truck, there are lockers?

20 A Yes.

21 Q Can you tell me how those lockers function?

22 A Yeah. There is two rows of lockers, one on each side of
23 the truck. There's a number pad up above with a key.

24 Q So, a keypad?

25 A A keypad, yes.

1 Q Okay.

2 A With a key. Basically, you -- you go up and you put the
3 key into the lock, and then you put the locker number and press
4 enter. It will allow you to open, potentially, up to three
5 lockers without the key.

6 Q Just by using the key pad?

7 A Yes.

8 Q And so, if somebody gained access to the truck with a
9 broom handle or a mop, something of that nature, you could just
10 use the keypad and pop open one of those lockers?

11 A Yes. Potentially.

12 Q All right.

13 Why do you say "potentially"? There's a qualification
14 there. What is it?

15 A There is. And what it is is every now and then when you'd
16 go to open a locker, even without the key -- or even with the
17 key, I'm sorry, sometimes it would give you a five-minute
18 delay.

19 So yeah, you could still get in, but you'd be delayed five
20 minutes. It's supposed to do it after three lockers, but
21 sometimes it would do it after one. Or sometimes it would do
22 it without you opening any lockers.

23 Q So it's an automatic no access?

24 A Correct.

25 Q And it happens randomly?

1 A Seemingly so, yes.

2 Q Okay.

3 So sometimes it would kick in after you had already opened
4 three lockers, but sometimes it would kick in after you had
5 opened one?

6 A Sometimes it would do it even if you hadn't opened any.

7 Q Okay.

8 So kind of hit or miss?

9 A Right.

10 The key is supposed to override that, but --

11 Q But if you broke into the truck and you had the key,
12 chances are you'd have more clear access to the lockers?

13 A Yes. You -- theoretically, you should have access to all
14 of the lockers.

15 Q Okay.

16 Did your discussions with Mr. Herrin about this misplaced
17 or missing money involve Mr. Herrin admitting to you that he
18 took the money?

19 A It did not.

20 Q Did he ever imply, he, Mr. Herrin, in conversation with
21 you, that he took the money?

22 A He did not.

23 MR. DONAHOE: Thank you, sir.

24 I have nothing further.

25 THE COURT: You may cross-examine.

1 MR. RACICOT: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. RACICOT:

4 Q Good morning, Mr. Stacey.

5 A Good morning.

6 Q Mr. Donahoe asked you about working the OTR truck.

7 The OTR truck would make runs to Missoula that ended in
8 Kalispell and then back. But it would also make runs to
9 Billings and back and to Great Falls and other places and back;
10 correct?

11 A Correct.

12 Q And then, you also worked on other trucks that would make
13 runs either in town or out-of-town, as well?

14 A Correct.

15 Q So did you ever work the fed truck, OTR route, the
16 Wednesday run from Helena to Missoula and then up to Kalispell
17 and back?

18 A Yes.

19 Q And when you would make that run, did you make that with
20 the crew leader at that time, Curt McAlpin?

21 A Yes.

22 Q Were you aware of how Curt McAlpin would stage his truck?
23 Where he would put various things that were being dropped off
24 at various times?

25 A Yes.

1 Q This method of gaining entry to the truck, you could take
2 a broom handle, or something like that, put it through the roof
3 vent on the truck, and access the panel of rocker switches
4 between the driver and passenger seat?

5 A Yes, you could.

6 Q And use that handle to hit one of those rocker switches
7 which would open one of the doors?

8 A Yes.

9 Q Did you ever do it?

10 A Yes.

11 Q Did you do it more than once?

12 A I don't recall if I did it more than once. I know I did
13 it at least once, though.

14 Q Could I get you to lean a little closer to that
15 microphone?

16 A Yeah.

17 Q Thank you.

18 What can you tell me about the time that you did it? Tell
19 me the circumstances, if you would.

20 A We were locked out. I don't recall which bank, so I think
21 somebody had left the key inside the truck, and we both closed
22 the door.

23 Q Let me stop you. Who's "we"? Who were you with?

24 A I believe that was with John, actually.

25 Q You think you were with Mr. Herrin?

1 A Yeah.

2 Q Okay.

3 Do you remember what town you were in?

4 A I want to say Great Falls.

5 Q When you did the Great Falls run, did you have to continue
6 north of Great Falls? Did you ever go as far as Havre?

7 A Yes.

8 Q But you think you were in Great Falls on this occasion
9 where the truck got locked?

10 A I believe it was, yeah.

11 Q Okay.

12 So go ahead. What happened?

13 A We were locked out. We were able to get a broom handle
14 from one of the banks. We were able to climb on top of the
15 truck and manually open the vent. Somebody had already drilled
16 a hole through the mesh on top of the vent from doing this
17 method prior. We were able to stick the handle down and open
18 one of the doors and gain entry to the truck.

19 Q So there was a mesh screen, like you'd have maybe on a
20 screen door?

21 A No. It was a metal -- metal mesh.

22 Q Metal mesh?

23 A Yep.

24 Q But there was a hole in that?

25 A Yes.

1 Q Was this method of gaining entry into the truck common
2 knowledge?

3 A Yeah. I don't know how widespread it was known. But yes,
4 there was more than a few people that knew about it.

5 Q Was it something you knew about before you confronted the
6 issue of the locked truck that day in Great Falls?

7 A I had heard about it, yes.

8 Q So, in other words, it wasn't something you had to
9 brainstorm while you were there in Great Falls?

10 A Correct.

11 Q Where did you hear about it from, if you know?

12 A I honestly can't recall.

13 Q You said "we" -- you know, got the broom from the bank.
14 "We" got up on to the truck.

15 Do you remember who did what as between you and
16 Mr. Herrin?

17 A I don't. I don't remember if I did or he did.

18 Q Okay.

19 But it worked?

20 A Yes.

21 Q You got into the truck?

22 A Correct.

23 Q And got the keys that had been locked inside?

24 A Yes.

25 Q As it relates to these lockers inside the truck needing

1 the key or not needing the key, sometimes it worked and
2 sometimes it didn't, did you get a sense that was a truck
3 malfunction? Or that there was some rhyme or reason to it?

4 A No. It didn't -- it didn't make a lot of sense to me why
5 it would be like that. But, you know, I don't know. I wasn't
6 -- maybe they programmed it to be like that to maybe keep
7 people from attempting to open lockers when they weren't
8 supposed to.

9 Q Okay.

10 But to your knowledge, in theory, if you have a master
11 key, you could put that into the keyhole that's next to the
12 control panel, and then you can type in the numbers for the
13 lockers that you want to access on the control panel and access
14 all of the lockers if you want?

15 A Yes.

16 Q In theory?

17 A In theory, yes.

18 Q And in theory, if you don't have a key, you can still type
19 in the numbers for up to three lockers, I believe is what you
20 stated, and open up to three lockers before you would get timed
21 out?

22 A Yeah. I don't recall being able to open more than three.
23 I'm only basing this on my personal knowledge with it, is that
24 it seemed like after three it would always lock you out.

25 Q But you had personal experiences where you did not have

1 the master key, and you were still able to access one or more
2 lockers, something short of four?

3 A Yes.

4 Q And then you had experiences where you had the key, and
5 you couldn't necessarily access all of them?

6 A Correct.

7 Q Do you remember if you were working on November 20th of
8 2013?

9 A I believe I was working the city route that day.

10 THE COURT: What does that mean?

11 THE WITNESS: That means I worked in Helena.

12 THE COURT: In Helena? All right.

13 That's helpful.

14 Thank you.

15 THE WITNESS: And I didn't leave the city.

16 Q (BY MR. RACICOT) And if you worked the city route, would
17 you have any interaction at all with the fed truck?

18 A I would not.

19 Q And Mr. Donahoe asked you about being interviewed and you
20 said you were later.

21 Am I correct you were not interviewed by Garda
22 investigators or Garda management as part of the internal
23 investigation?

24 A I was not.

25 Q You were interviewed later, if I'm correct, by federal law

1 enforcement officers during the course of their investigation
2 into this case?

3 A Correct.

4 Q And that was sometime later; is that right?

5 A Yes.

6 MR. RACICOT: That's all the questions I have.

7 Thank you.

8 THE COURT: Mr. Donahoe, you may redirect.

9 MR. DONAHOE: Thank you.

10 REDIRECT EXAMINATION

11 BY MR. DONAHOE:

12 Q So, sir, this Great Falls event, when did it happen,
13 again?

14 A I don't have an exact date for when it happened.

15 Q Would it have been before this missing money that we're
16 discussing here today?

17 A Yes.

18 Q Okay.

19 Now, at some point, did that truck, the OTR truck, the
20 messenger door become broken?

21 A I don't know if necessarily the door became broken, but
22 there was a -- when you go in the side door, there's a drum,
23 essentially, it's like a mantrap you have to go into and spin
24 it around. I think that was broken for a while.

25 Q Okay.

1 So, in the Great Falls event, when the broom handle was
2 used, did the door pop and you got into the truck?

3 A Yes.

4 Q And you had immediate access to the back?

5 A Yes. On this particular occasion.

6 Q Did it ever happen where you guys had to take something
7 apart because the messenger door was broken?

8 A Yes.

9 Q All right.

10 Is that the same event as what we were talking about in
11 Great Falls?

12 A It is not. This is another event.

13 Q All right.

14 So, there was yet a third event, correct, of access to the
15 truck, or a second event?

16 A A second event, yes.

17 Q Okay.

18 When did that happen?

19 A I don't recall the date.

20 Q All right.

21 In relation to the first one that you described in Great
22 Falls, where you popped the door open, this -- did this second
23 one occur before or after?

24 A I want to say after. But I don't know for sure.

25 Q Okay.

1 And tell me what was taken apart?

2 A There's a side bin, so to speak, in that truck that's
3 opened with a switch. We call it the bread box. There's a
4 sliding door that would allow access to only one side, either
5 the outside or the inside. On this particular time when the
6 drum was broken, we were able to get the bread box open. And
7 there's two sliders, or two guides, I'm sorry, on the sides.
8 We were able to take the screws or bolts out of that to take
9 that slider off.

10 Q All right.

11 When you say "we," that would be who?

12 A It was Mr. Herrin and I.

13 Q All right.

14 And this second event, you don't remember whether it was
15 before or after the first Great Falls event, did that involve a
16 lot of time, or a short period of time to access into the
17 truck?

18 A Through the bread box?

19 Q Yes.

20 A It was a pretty significant amount of time.

21 Q More than an hour?

22 A I would say yes.

23 Q So what about the first time? How long did that take?

24 A I -- I don't recall.

25 Q All right.

1 Mr. Racicot asked you things about being familiar with
2 Mr. McAlpin's staging habits.

3 A Yes.

4 Q Do you recall that?

5 A Yes.

6 Q All right.

7 And how would he stage money that needed to go to
8 Kalispell for ATMs?

9 A He would -- he would utilize certain lockers, like he'd
10 have Missoula ATM transfer in one locker, we'd have --
11 essentially, whatever we needed to -- at certain towns, he'd
12 put in certain lockers. Kalispell would always go in one
13 locker.

14 Q Okay.

15 So -- and were the lockers numbered?

16 A Yes.

17 Q Do you recall the locker that the Kalispell money would go
18 into?

19 A I don't.

20 Q Okay.

21 But you do recall, at least, that money for various stops
22 would be segregated into different lockers?

23 A Yes.

24 Q And the messenger door was broken beginning when?

25 A I couldn't tell you.

1 Q Just --

2 A That was before I was working regularly on the truck. So
3 I don't know how long it was broken.

4 Q Okay.

5 But just so I have this right: If the messenger door is
6 broken, you'd have to go through the bread box?

7 A If you're utilizing that method, yes.

8 Q Okay.

9 If you go through the bread box, that takes more time?

10 A A significant amount.

11 Q A significant amount of time?

12 A Yeah.

13 Q Okay.

14 Now, so it sounds like -- is it a fair statement that
15 there's more than one way to access these trucks if the keys
16 are locked in there? Or they're unattended?

17 A For the people on the truck to access it, it's fairly
18 limited, but yes, there is more than one way.

19 Q And is it common knowledge in the shop how to do this for
20 the drivers and the messengers?

21 A Like I said, I don't know how widespread it is, but yes,
22 other people know about it.

23 Q Other people did know about it?

24 A Yep.

25 Q Thank you, sir.

1 MR. DONAHOE: I have nothing further.

2 THE COURT: You may step down.

3 THE WITNESS: Thank you.

4 THE COURT: Do you have other witnesses, Mr. Donahoe?

5 MR. DONAHOE: No, Your Honor.

6 Thank you.

7 THE COURT: Mr. Racicot, what's the timeline on the
8 government's presentation of evidence?

9 MR. RACICOT: We don't have any witnesses to call,
10 Your Honor.

11 THE COURT: Very well.

12 It's five minutes past noon. We'll take a 15-minute
13 recess. The court will reconvene at that time, and I will
14 attempt to address the issues raised by the motion.

15 We're in recess till 25 past.

16 (The proceedings in this matter were recessed at
17 12:08 p.m. and reconvened at 12:27 p.m.)

18 THE COURT: Be seated, please, all.

19 We are back in open court session.

20 Counsel for both parties are present.

21 The defendant is present.

22 And the evidence record on this motion has been closed,
23 the defendant having presented four witnesses who gave
24 testimony. The government having stated it has no witnesses to
25 present on this particular issue.

1 So we'll deem the matter, insofar as the record is
2 concerned, submitted.

3 Counsel, I'll be pleased to hear summary argument on both
4 sides as you care to present it. Keep in mind, please, that
5 the court has read the briefs and has conducted what it
6 considers to be appropriate additional research directed to the
7 issues.

8 But you are welcome to proceed. I have no particular
9 preference as to order of presentation, keeping in mind, as I
10 said earlier, the court will approach the issues on the basis
11 of the totality of the record that's before it.

12 MR. RACICOT: Thank you, Your Honor.

13 Judge, we would just highlight a couple of points that we
14 referenced in our briefing that I know the court has reviewed,
15 and that's first and foremost that there is prosecutorial
16 discretion in which offense to charge in a case of this type.
17 And interstate transportation of stolen property and all of the
18 transportation of property statutes relate as much to receiving
19 of stolen property as to the initial taking. And that in this
20 case, we charged receiving and transportation. The best
21 analogy I could think of that's not contained in our brief
22 would relate to the possession and transport of stolen motor
23 vehicles across state lines. There is no federal offense that
24 I'm aware of specifically addressed to stealing a vehicle. But
25 if I steal a vehicle here in Helena, and I drive it across

1 state lines, I can be prosecuted federally for the
2 transportation of that stolen property, even though I couldn't
3 be charged for it -- for the actual underlying theft.

4 Here, there's arguments that Mr. Herrin could have been
5 charged with the underlying theft, but he wasn't. We believe
6 that's within our discretion to make that determination, so
7 long as we're not discriminating against any class of
8 defendant, which there's been no indication that we are.

9 Then in our view, as we've said in our brief, it becomes
10 an issue of the evidence and whether it's relevant under 401,
11 whether it's unduly prejudicial under 403. We think there's
12 pattern instructions the court can give the jury at the time of
13 trial to help focus their review of proof, including pattern
14 instruction 3.10 that addresses the fact that the defendant is
15 not on trial for any conduct or offense that is not charged in
16 the indictment.

17 So the jury will not be asked to find the defendant guilty
18 or not guilty of actually taking the money off the truck.
19 They'll be asked to determine whether the government met its
20 burden of proof as to the elements of interstate transportation
21 of the stolen property. We think that argument dovetails with
22 the Ninth Circuit decisions in Helberg and Desmond, which are
23 cited in our briefs. And we just don't think the defendant's
24 argument as it relates to the Fifth Amendment and being charged
25 under the Fifth Amendment by the way of grand jury for the

1 actual theft is relevant here, because he will not be exposed
2 to double punishment. He will not be punished for actually
3 taking the money, because the jury won't be asked to determine
4 whether he actually took the money. Any evidence that did he
5 would be relevant only to proving, one, that the money is
6 stolen; and two, that he knew it at the time he transported it
7 across state lines, which are two of the elements of interstate
8 transportation of stolen property.

9 And with that, Your Honor, unless you have questions, I'd
10 be happy to stand on our briefs.

11 THE COURT: Nope. I don't have questions.

12 MR. RACICOT: Thank you.

13 THE COURT: Mr. Donahoe.

14 MR. DONAHOE: Thank you.

15 Your Honor, thank you for the opportunity to make some
16 closing remarks here.

17 So, I'm going to pick up where the government began, and
18 they seem to be just fastened, apparently, to this idea of
19 prosecutorial discretion. And I would ask the court to
20 conceive of this as prosecutorial obligation.

21 I think it's apparent from what the court heard today,
22 that the orientation of this case, from the government's point
23 of view, is that Mr. Herrin took the money.

24 There's evidence of truck break-ins, accessibility to the
25 trucks, keys, possession of keys. Your Honor now has, I think,

1 a context to look at this indictment and think to yourself:

2 "Well, was it Mr. McAlpin that took the money?"

3 He denies that, and he's never been charged with it.

4 Nor was it anyone else that apparently had contact with
5 these funds that took the money.

6 There's some testimony that seems to indicate that perhaps
7 the correct number of bags were loaded by looking at this video
8 cam, but even that hasn't been established.

9 Frankly, Your Honor, I think at this point, what we have
10 here is money that has been misplaced. If the government
11 doesn't want to say that Mr. Herrin did it, I guess we're fine
12 with that. And that would take a large part of the
13 government's case, in terms of evidence, and set it to the
14 side. Because there would be no apparent relevance for it.

15 At the beginning of the hearing, Your Honor summarized in
16 some detail its understanding of the papers that have been
17 filed so far.

18 And alighted on the fact that the government had made the
19 argument that this should be cast as a motion in limine and not
20 as a motion to suppress, because there's no alleged
21 constitutional violation.

22 There clearly is alleged a constitutional violation, as a
23 violation of the grand jury clause in the Fifth Amendment,
24 Fifth and Sixth Amendments, together with and looked at through
25 the lens of the statute of limitations statute, which I bring

1 to Your Honor's attention, states expressly: "Except as
2 otherwise expressly provided by law, no person shall be
3 prosecuted, tried, or punished."

4 The government in its remarks says: "Well, he won't be
5 punished for taking the money." But there's two other clauses
6 or two other words that are really stand out in this phrasing
7 in the statute of limitations statute 3282, "prosecuted or
8 tried."

9 It has to be the government's view that it intends to put
10 on bank records, casino records, statements, apparently, that
11 Mr. Herrin made, banking activities, deposits, all directed to
12 the goal to show that the money, and I want to use that phrase,
13 "the money," that was run through his accounts and perhaps used
14 for gambling in Las Vegas and so on, is "the money" that was on
15 the truck.

16 But there's not going to be any physical evidence
17 whatsoever that will connect Mr. Herrin -- "the money" that
18 went through his accounts to "the money" that was apparently
19 misplaced from this truck.

20 So, for all those reasons, and for all the reasons in the
21 papers, we respectfully request that the court enter an order
22 that says that any effort by the government to offer evidence
23 that Mr. Herrin was the taker of the funds, ought to be
24 excluded.

25 Thank you, Your Honor.

1 THE COURT: Thank you, counsel.

2 We will, with those arguments, deem this matter submitted
3 to the court for decision.

4 I appreciate the specificity with which both sides have
5 addressed their perception of the issues.

6 And we will endeavor to address the issues as presented as
7 specifically as possible.

8 Let's start with the evidence that was presented today.
9 Defendant, at the court's direction, assumed the responsibility
10 to present evidence related to the issues. Four witnesses were
11 called and testified and were examined.

12 And it is the court's observation, and it's fair to say
13 that the testimony that was encompassed in those four
14 witnesses, largely focused upon the factual events that
15 surrounded the missing money that occurred on -- in November of
16 2013.

17 The legal issues, as raised, essentially, in the briefs
18 and argued in the briefs, were not the focus of particular
19 evidence.

20 And those legal issues remain for the court's analysis and
21 decision, essentially, on the basis of the record, which while
22 it may be impacted to some extent by the testimony presented
23 here today, is largely directed to an analysis of the charges
24 made.

25 The defendant argues that he has made a constitutional

1 claim. However, upon analysis, it appears that it remains to
2 be concluded and is concluded by the court that the arguments
3 advanced are, essentially, arguments related to the
4 admissibility of evidence.

5 But regardless of whether the court takes the motion as a
6 motion to suppress the record which is sought to be excluded,
7 or had the court approaches the question as one of exclusion of
8 evidence, the issue really remains for the court to decide, and
9 that is, whether the evidence surrounding the events of the day
10 in question should be excluded.

11 That is, it is essentially the defendant's position that
12 all of that evidence, whatever may have -- be shown to have
13 factually occurred on the date of I think it was November the
14 13th, that that evidence is irrelevant, inadmissible, and
15 prejudicial to the defendant, and should not be admitted.

16 The government, on the other hand, contends that this
17 evidence has relevancy. And that the -- keeping in mind that
18 the government, from its perspective, does not have to prove
19 the issue of who stole the money as a part of the crime
20 charged, that the evidence the government seeks to introduce is
21 not only relevant, but that it has probative value, and should
22 be allowed to be introduced at the trial, because it touches
23 upon and deals with both the question of who took the money and
24 whether or not the defendant intended to deprive the true owner
25 of the money with its use and possession on a permanent basis.

1 This issue is framed in -- at least in part, by the Ninth
2 Circuit pattern instructions, particularly pattern instruction
3 8.189, 2018 edition, the charge being interstate transportation
4 of stolen property.

5 And I paraphrase: "The defendant is charged in the
6 indictment with the transportation of stolen property in
7 interstate commerce, in violation of Section 2314 of Title 18
8 of the United States Code.

9 "In order for the defendant to be found guilty of that
10 charge, the government must prove each of the following
11 elements beyond a reasonable doubt:

12 "First: That the defendant transported, transmitted,
13 transferred, or otherwise moved stolen property," in this
14 instance, the funds taken from the Garda truck, "between the
15 states, as it's charged, of Montana and Nevada."

16 Second element: "At the time of the property, the money,
17 crossing the state line boundary, the defendant knew that it
18 was stolen.

19 "Third: That the defendant intended to deprive the owner
20 of the money temporarily or permanently.

21 "Fourth, that the money or property was of a value of
22 \$5,000 or more."

23 And finally, as an element in the standard stock
24 instruction: "The government need not prove who stole the
25 money."

1 Those are the elements of this crime as it is charged in
2 the indictment.

3 And as I said earlier, the question directly for the court
4 is: Does the court appropriately allow this evidence, which
5 the government has outlined in its brief, to be introduced if
6 otherwise admissible at time of trial?

7 The manner in which the issue is presented, arguably,
8 could be said to have isolated the claim made by the defendant
9 to one that does not charge a constitutional rights violation.
10 I make no final determination on that issue, because it is the
11 court's determination, regardless of the standard applied, and
12 whether the review of this court's decision be for abuse of
13 discretion, or whether it be by de novo review, that the
14 evidence should be admitted. And that is the ruling of the
15 court.

16 What happened on the day of the loss of the money that
17 preceded the loss, the events of the day, the investigation
18 that followed, and the evidence that presumably will be found
19 to be admissible at trial of activities of the defendant that
20 followed the loss of the money, are -- and it is the court's
21 determination, relevant to the proof of the crime that was
22 charged. That is, the taking of the money that had been
23 stolen. Not specifically that the defendant took it. And that
24 it is relevant to proof of the charge made by the government.
25 The government simply does not have to prove that the defendant

1 was the thief, although there may be evidence that would tend
2 to support that conclusion, yet to be developed at time of
3 trial.

4 But the ruling of the court is the motion to suppress or
5 the motion in limine, however characterized, is denied.

6 To the extent that the defendant has raised issues that
7 may be appropriate for address by the instructions to be given
8 by the court at the completion of the trial process, those
9 questions are, in the view of the court, premature at this
10 point, and will be addressed at an appropriate time, including,
11 if not before, at the time of settlement of instructions at the
12 completion of trial.

13 Therefore, the motion, as framed, whether characterized as
14 a motion to dismiss or to suppress or as a motion in limine, is
15 denied.

16 The evidence may be presented to the extent that the court
17 finds it otherwise to be admissible under the Rules of Evidence
18 to be applied.

19 That is the ruling of the court.

20 The case will proceed to trial as scheduled.

21 There is one other matter, counsel, that I feel obliged to
22 bring to your attention. And that is that the scheduling order
23 in this case that was issued required that by January 4 of this
24 year, that a -- either a plea agreement, if there were a plea
25 negotiation effected, or a notice of intent to go to trial were

1 to be filed.

2 No side, either side, complied with that order of this
3 court.

4 I have nothing before the court to -- other than the
5 absence of a filing, to provide the notice to the court that
6 was required by the court's scheduling order.

7 I don't have any statement to that effect by the
8 defendant. And I have no response statement or any other
9 statement from the United States on that issue either.

10 Consequently, counsel, it's my order that on or before
11 close of business on Friday of this week, that's on November --
12 January 11, that each of you shall file and submit to this
13 court a written explanation of your reasons or reason for not
14 complying with the court's scheduling order in this case.

15 And for the information of everyone, the court does not
16 issue scheduling orders with the expectation or belief that
17 counsel can or will be free to simply ignore them.

18 So I expect the filings to be -- as ordered to be made.

19 That concludes the matters before us today.

20 We are in recess.

21 MR. DONAHOE: Judge, can I be heard on something
22 before you leave there?

23 THE COURT: If it's not related to the rulings of the
24 court, yes.

25 MR. DONAHOE: It's not. Well, it is, I guess,

1 tangentially, but it would be my intention, and I just don't
2 want to electronically file it without the court knowing, I'm
3 going to appeal this order to the Ninth Circuit.

4 THE COURT: Well, counsel, that's -- whatever your
5 prerogatives are under the --

6 MR. DONAHOE: Well, I just didn't want to not
7 disclose that.

8 THE COURT: Well, I appreciate your bringing that to
9 the attention. The court will act as it deems appropriate
10 based upon whatever is filed, of course.

11 MR. DONAHOE: Okay.

12 THE COURT: All right.

13 We are in recess.

14 (The proceedings in this matter were adjourned at
15 12:49 p.m.)
16
17
18

19 C E R T I F I C A T E
20

21 I certify that the foregoing is a correct transcript from
22 the record of proceedings in the above-entitled matter.

23 /s/ Tina C. Brilz, RPR, FCRR

24 Dated this 18th day of January, 2019.
25