No.

In The

Supreme Court of the United States

RICHARD MOSELEY, SR.,
Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

AMY ADELSON
(Counsel of Record)
Law Offices of Amy Adelson, LLC
43 W. 43d St., Suite 96
New York, NY 10036
aadelson@lawdea.com
(212) 889-4009

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether the Court should decide an important question involving the over-federalization of criminal law: namely, whether a defendant is provided fair warning in accordance with due process when a federal statute, in this case, the "unlawful debt" provision of the RICO statute, is applied to create a federal crime of conduct otherwise lawful under federal law through a novel interpretation of disputed state conflict-of-law principles.

II. Whether the Court should clarify its case law on the Confrontation Clause to decide if formalized complaints, often consumer complaints made to state regulatory agencies, are testimonial if made with the primary purpose of invoking the coercive power of the state.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

All parties appear in the caption of the case on the cover page.

United States v. Richard Moseley, Sr., No. 1:16-cr-79, U. S. District Court for the Southern District of New York., Judgment entered July 2, 2018.

United States v. Richard Moseley, Sr., No. 18-2003, U. S. Court of Appeals for the Second Circuit. Judgment entered November 3, 2020.

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The opinion of the United States Court of Appeals for the Second Circuit is published at *United States v. Moseley*, 980 F.3d 9 (2d Cir. 2020); and is set forth at App. 1.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 3, 2020. (App.1) This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V, provides, in pertinent part:

No person shall…be deprived of life, liberty, or property, without due process of law.

The United States Constitution, Amendment VI, provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right …to be confronted with the witnesses against him….to a speedy and public trial, by an impartial jury…

18 U.S.C. 1962(a), provides, in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through ... collection of unlawful debt.

18 U.S.C. §1961(6) provides, in pertinent part:

> [U]nlawful debt" means a debt (A) ... which is unenforceable under State or Federal law in whole or in part as to principal or interest

> because of the laws relating to usury, and (B) which was incurred in connection with ... the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate ....

STATEMENT OF THE CASE

By second superseding indictment filed September 28, 2017, defendant Richard Moseley Sr. was charged with conspiracy to collect unlawful debts (18 U.S.C. §1962(d)); unlawful collection of debts (18 U.S.C. §1962(c) and §2); conspiracy to commit wire fraud (18 U.S.C. §1349); wire fraud (18 U.S.C. §1343 and §2); aggravated identity theft (18 U.S.C. §§1028A(a)(1) and (b), and §2); and false TILA disclosures (15 U.S.C. §1611 and 18 U.S.C. §2). (A-31)

On November 15, 2017, Moseley was convicted of the six counts following a two-week jury trial presided over by the Honorable Edgardo Ramos. (A-1838)

On June 12, 2018, Moseley was sentenced to 96-months incarceration on each of the RICO and wire fraud counts and 12 months on the TILA count, to run concurrently, followed by 24 months on the identity theft count, to be served consecutively, for a total of 120 months. (A-1895,1906-07) A $49 million forfeiture order specified assets to be forfeited. (Doc.181; A-1849,1907) Pursuant to a settlement order in a Missouri civil action commenced by the Consumer Protection Finance Board ("CFPB"), *Consumer Financial Protection Bureau v. Moseley, et al.* No. 14-00789 (W.D. Mo.), Moseley agreed that the CFPB-seized assets (A-992) (the same as those specified in the forfeiture order) would be transferred to the United States Attorneys' office for restitution.

Mr. Moseley began serving his sentence in July 2018 and has been in custody ever since.

On November 3, 2020, the United States Court of Appeals for the Second Circuit affirmed his conviction and sentence.

Statement of the Facts

Richard Moseley, 73-years old at the time of trial and never before in legal trouble, was in the commercial real estate business for over thirty years. (A-968-77,1000) He became involved in the payday lending business in 2003 after his son, Richard Moseley, Jr. ("Jr."), introduced him to Joel Tucker, a businessman with payday lending experience. (A-998-03,701-02) [1]

Paydays loans are non-recourse loans, typically and, in this case, ranging from $100 to $300. (A-1002-03) A borrower in need of immediate cash applies online for a loan; if approved, the borrower's bank account is credited with the principal amount and a finance charge – typically about $30 for every $100 loaned – is debited from the account. Every two weeks, if the borrower does not repay the loan, the bank account is debited the same finance charge. At any time, a borrower can contact the lender and pay off the loan, eliminating any further finance charges. (A-244-45,248-49,294-99,374-75,1001-02)

[1] On June 5, 2018, Tucker was indicted for packaging fake payday loan portfolios. *United States v. Tucker*, 18-cr-00153 (W.D.Mo.). On July 16, 2020, he plead guilty to three counts of the indictment. (Dkt. #39)

After talking with Tucker, Moseley decided to invest in the payday loan business, utilizing Tucker's software and his business model – incorporating a consumer service company in Missouri and separate lenders (the "Moseley entities") in jurisdictions without limits on interest rates. Relying on Tucker's expertise and recommendation, he hired Carmen Hernandez, Tucker's manager, to help him set up and run the business. (A-239-40,244,473-74,501,1003-04,1012-14,1027)

To apply for a payday loan with one of Moseley's entities, a potential borrower linked on a website, unrelated to Moseley, known as a lead generator, and filled out an on-line form providing, among other things, his social security number, address, banking and employment information, and the amount he sought to borrow. A third company, in this case, E-Data, owned by Tucker, purchased the leads and then auto-populated the borrower's information into a loan application and sent it to the borrower and to potential lenders, including a Moseley entity. (A-267-68,271-72,292-93,303-04,359,412,527-30,652-63,667-68,708,1007-09) If the Moseley entity approved the loan, a third-party processor transferred the money to the borrower's account and the Moseley entity sent an account summary to the borrower, detailing the terms of the loan. (A-288,570-71,672-73) In addition, five days before each finance charge due-date, the Moseley entity sent the borrower an account summary explaining the terms of the loan, its due date, and how to pay down or off the loan. (A-301-02,314-16,355,569-71,1652-54, 1671-72, 1925,1926)

As is typical of payday loans, Moseley charged a $30 fee for each $100 of the borrower's total loan amount. Unless the borrower repaid the loan, this fee was automatically debited from the borrower's bank account every two-weeks, essentially "refinancing"' the loan. If the borrower repaid the loan quickly, he could avoid further refinancing fees. However, if the borrower did not affirmatively take steps to pay off the loan, it was automatically refinanced, which could result in interest rates higher than those allowed under some state laws.

The RICO Counts

Moseley adopted Tucker's business model, incorporating two categories of companies: loan-servicing companies, located in Kansas City, Missouri, and lenders, incorporated in jurisdictions without interest caps. The loan agreements included a choice-of-law-provision stating that the law of these jurisdictions governed the agreement. (A-254,419-20,506,1004-08,1016,1042)

Initially, in 2003, Moseley incorporated in Nevada, which Tucker told him had no interest cap. (A-1004-06,1020-21,1032) In 2006, on Tucker's recommendation, he adopted an off-shore model and incorporated his lenders in Nevis, a jurisdiction which had no interest caps, and also formed a new Missouri customer-service company. (A-1059-61,1064-68,1090-91,1114) In 2012, Moseley switched his operations to newly-incorporated lenders in New Zealand, which also had no interest cap, and formed a new Missouri customer-service company. (A-255-62,1114,1135-38,1242-43,1270-74,1279-80,1303-04)

In July 2013, the Moseley entities ceased doing business. (A-256,368,1296) In September 2014, the CFPB commenced a civil action against Moseley and his entities seeking injunctive relief and recovery of funds. *CFPB v. Moseley, Sr., et al*, **4**:14-cv-00789-SRB (W.D. Mo). Virtually all of Moseley's assets were seized, and a receiver was appointed to manage the business affairs. In August 2018, Moseley settled that lawsuit for $69,623,528, to be satisfied by paying $49 million to the United States Attorney to be used for restitution. (Dkt. 214)

Moseley consulted with lawyers about how to set up the business, what to include in the loan agreements to address the problem with varying state interest rates, and how to comply with the Truth in Lending Requirements.[2] Moseley testified to his frequent communications with lawyers to ensure the legality of his businesses. Numerous documents were admitted that supported Moseley's testimony, reflecting that Moseley's lawyers wrote letters defending his payday loan operations when he received complaints from state regulators or individuals and even cited case law to support the position that the choice-of-law provisions in the loan agreements were

[2] The Receiver of the Moseley entities sued one of Moseley's law firms, Katten, Muchin, Rosenman, alleging malpractice and breach of fiduciary duty. *McNamara v. Katten Muchin Rosenman*, W.D. Mo., 16-cv-012013-SRB (Dkt.. 82). The government intervened and successfully moved to stay the civil lawsuit pending resolution of the criminal action. (Dkt. 42,44) On September 19, 2019, while Moseley's appeal was pending, the case was settled under seal, and, in November 2019, was dismissed. (Dkt. 222, 225,226)

valid and that the interest rates being charged were lawful under the law of the jurisdiction agreed to in those choice-of law provision.[3]

The government never introduced the testimony of a single lawyer to contradict Moseley's testimony.

Moseley's loans were legal in Nevada, Nevis and New Zealand – the jurisdictions spelled out in the contractual choice-of-law provisions. Payday lending was not itself a federal crime or illegal in many states, including Missouri. Nonetheless, positing that the choice-of-law provisions in Moseley's lending agreements were a nullity – a legal issue of first impression – the United States Attorney for the Southern District of New York charged Moseley with violating the unlawful debt provisions of RICO, 18 U.S.C. §1961(6) and 1962(a), because he lent to New York State borrowers and, if the loan was refinanced many times, the interest rate could be usurious under New York civil and criminal law.[4]

The most critical issue in the case was whether the contractual choice-of-law provisions were enforceable. If they were, there was no RICO violation. Over Moseley's objection, and acknowledging that there was no case "directly on point" and that it was not "necessarily a home run in that regard" (A-163), the district court held that the choice-of-law provisions were inconsistent with New York's public policy.

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[3] Moseley's entire trial testimony was included in the multi-volume Appendix filed with the Second Circuit.

[4] *See* N.Y. Gen. Oblig. Law §§ 5-501, 5-511; N.Y. Banking Law § 14-a(1); N.Y. Penal Law § 190.40.

The court, again over objection, then instructed the jury on the usury laws of New York (and a few other states). This, in effect, left the jury only the question of intent because the jury was also instructed that the existence of just one unlawful debt constituted a substantive RICO violation and there was no dispute that there was at least one New York loan where the refinancing charges exceeded New York's allowable interest rates.

On appeal, Moseley challenged the conclusion that the contractual choice-of-law provisions were unenforceable and the application of New York law as governing the RICO issue. He also argued that the district court's unprecedented interpretation of state conflicts-of-law created a RICO crime without providing Moseley with fair notice that his conduct violated federal law, in violation of his due process rights.

The Second Circuit affirmed the conviction, deciding, that, as a matter of public policy, New York would not enforce choice-of-law provisions that violated its usury laws. Then, purporting to apply New York conflicts law – which the Second Circuit acknowledged was itself in conflict – the Court held that New York would apply a "center of gravity" approach and, under that approach, would apply New York law to a loan received by a New York borrower. (App.10-13)

The Second Circuit rejected Moseley's due process claim. Disregarding that RICO had *never* been applied to criminalize payday lending that included contractual choice-of-law provisions that were expressly designed to govern the loan's interest rates, the Court held that it was "foreseeable" that the choice-of-law provisions would

be deemed unenforceable in New York. Then, ignoring the other complex and disputed conflicts principles that dictated its decision, the Court determined that Moseley had fair warning that he violated RICO because the language of the statute was "straightforward." (App.13)

The Wire Fraud Claims

After E-Data auto-populated the loan agreements and sent them to the potential borrowers and to a Moseley entity, borrowers were contacted by telephone and Moseley's employees would explain the terms of the loans, including the finance charges, before directing the third-party processor to deposit the loan proceeds into the borrower's bank account. The cooperating witnesses, Hernandez, and her daughter, Amanda Sanchez, who had also worked for Tucker, testified that Moseley at some point permitted his employees to bypass direct phone contact with potential borrowers who could not be reached by phone. According to these witnesses, Moseley allowed his employees to instead leave voice mails for the potential borrowers and, if they did not hear back from the borrower, to authorize the loan the next day.

Moseley denied authorizing this practice. Moseley's entities extended about 650,000 loans during the time period of the indictment, yet only five borrowers testified at trial that their loans were unauthorized, testimony that was seriously undermined during cross-examination when each admitted that he or she had inputted more information into the website than he or she had claimed on direct

examination or had received calls from a Moseley entity trying to resolve the complaint or had otherwise exaggerated the alleged wrongdoing.

The jury heard far more compelling evidence never subjected to cross-examination. Over a Sixth Amendment Confrontation Clause objection, the court allowed the government to introduce dozens and dozens of written borrower complaints, most of which had been submitted to state regulators and then forwarded to Moseley's entities. These complaints included the borrowers' often detailed, self-serving version of what he or she claimed had happened. The borrowers acknowledged in their complaints that they were seeking the assistance of the state regulatory agency in having their loans canceled and their monies returned. Many of the complaints were under penalty of perjury or otherwise certified to be true.

According to the district court, admitting this hearsay was permissible because, theoretically, the complaints were being introduced only to show that Moseley had knowledge of them. This rationale hardly withstood constitutional scrutiny. Knowledge was demonstrated by the cooperating witnesses who testified that they told Moseley about the complaints; by office emails forwarding the complaints to Moseley; and by Moseley himself, who admitted he knew about the complaints but was assured by Hernandez that they were unfounded. In any event, Moseley's knowledge of the complaints could have been shown without admitting the *substance* of the complaints, but the government insisted that it was critical for the jury to consider the "factual richness" of the complaints. In other words, it was critical

for the jury to evaluate the *content* of the complaints, whether or not the borrowers' allegations, never tested under the crucible of cross-examination, were true.

The Second Circuit rejected Moseley's claim that the admission of the borrower complaints violated his Confrontation Clause rights. The Court held the complaints were not "testimonial" because the "borrowers complained intending to seek relief from the onerous terms of Moseley's loans – not to provide evidence for eventual use in Moseley's prosecution." (App.15)

REASONS FOR GRANTING THE PETITION

1. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER A DEFENDANT'S DUE PROCESS RIGHT TO FAIR WARNING IS VIOLATED WHEN HIS CONVICTION FOR VIOLATING THE "UNLAWFUL DEBT" PROVISION OF RICO IS PREMISED ON THE APPLICATION OF NOVEL STATE CONFLICT-OF-LAW PRINCIPLES AND NO FEDERAL STATUTE HAS BEEN VIOLATED

Moseley was convicted of violating and conspiring to violate RICO, 18 U.S.C. §1962(c) and (d), by conducting the affairs of an enterprise – dubbed the "Moseley Payday Lending Organization" – though "collection of an unlawful debt." RICO defines an "unlawful debt," in pertinent part, as:

> a debt (A) … which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with …the business of lending money … at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. §1961(6).

This RICO provision was intended to address the "evils of loansharking." *Durante Bros. & Sons, Inc. v. Flushing Nat. Bank*, 755 F.2d 239, 250 (2d Cir.), *cert.*

denied, 473 U.S. 906 (1985). Whatever one thinks of payday lending, it is not "loansharking." Moseley's decision to invest in and operate a payday lending business preceded by seven years the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat 1376, and by eight years the establishment of the CFPB. At the time, there were no federal statutes specifically governing payday lending and no federal agency supervising the practices.

There is no federal usury law. Yet Moseley was convicted of violating RICO, a federal crime. His prosecution and conviction represent a classic case of the increasing "federalization of criminal law" – the expansion of federal criminal jurisdiction to cover conduct otherwise addressed by state and local governments, a practice harshly criticized for, among other problems, promoting arbitrary prosecutorial discretion and the unequal treatment of similar offenders. *See, e.g.,* Stephen F. Smith, F*ederalization's Folly*, 56 San Diego L. Rev. 31 (Winter 2019); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law,* 46 Hastings L.J. 1135 (1995); Brian W. Walsh, *Doing Violence To The Law: The Over-Federalization Of Crime*, 20 Fed. Sent. R. 295, 297, 2008 WL 4702670 (June 2008); Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S. Kerr, *Congressional policy and the federalization of local crime*, 1 Crim. Proc. § 1.2(d) (4th ed.).

This Court should grant review in this case because, as shown below, the RICO prosecution and conviction for Moseley engaging in the otherwise lawful business of payday lending – a practice regulated by the states – precisely illustrates how the

federalization of criminal law can result in the abuse of prosecutorial discretion and the violation of a defendant's due process rights to fair warning.

Throughout the indictment period, payday lending businesses were regulated only by the states. The legality of payday loans varied from state to state, and payday loans were not illegal in more than half the states. *See* Consumer Federation of America*, Pay Day Loan Consumer Information: Legal Status of Payday Loans by State*, *available at* https://paydayloaninfo.org/state-information. Many states *welcomed* payday lenders, including Missouri, where Moseley lived and set up his customer-servicing companies. *See* Pew Charitable Trusts, *State Payday Loan Regulation and Usage Rates*, *available at* https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates.

Even after payday loans were regulated by Dodd-Frank and the CFPB, it was not uniformly agreed that payday loans are intrinsically harmful. *See* Turnkey-lender.com, *New Payday Rules, New Era for Savvy Lenders* (December 27, 2018), available at https://www.turnkey-lender.com/blog/ 2018-new-payday-rules-new-era-for-savvy-lenders/. Potential borrowers faced with immediate cash problems have expressed mixed views on whether paydays loans should be available despite their high interest rates. Dubner, Stephen, *Are Payday Loans As Evil As People Say?*, Freakonomics Radio podcast, April 15, 2016, *described at*

https://www.advanceamerica.net/news/consumer-issues/freakonomics-asks-are-payday-loans-really-as-evil-as-people-say.

Today, years after Mosley's conviction, payday loans still are not illegal under federal law. A CFPB revised rule went into effect on July 7, 2020 that, among other things, eliminated regulations that required that payday lenders ensure that their borrowers have the ability to pay and withdrew a prior determination that "consumers do not understand the material risks, costs, or conditions of covered loans," and "do not have the ability to protect their interests in selecting or using covered loans." Rule available at https://files.consumerfinance.gov/f/documents/cfpb_payday_final-rule-2020-revocation.pdf. *See* 12 CFR Part 1041.

In this case, to create a federal crime in the absence of a federal usury statute, the government had to establish that Moseley extended a loan that was usurious in a state and twice the enforceable interest rate in that particular state. But Moseley lent to borrowers in many states, many of which did not have interest caps that would render the loans unenforceable. RICO itself does not define which state's laws govern a loan agreement. To charge and convict Moseley of RICO, the government had to rely on state conflicts-of-law principles – often disputed or themselves in conflict – to establish what state's laws would govern this unprecedented criminal prosecution.

Moseley's loan agreements, approved by counsel, included a "choice-of-law" provision as to what law would govern the agreement. If those choice-of-law provisions were honored, there were no unlawful debts. A federal crime could be

created only through an intricate series of steps: (1) the choice-of-law provisions had to be deemed unenforceable; (2) Moseley had to be charged in a state where the interest rate was twice the enforceable rate under that state's law; (3) Moseley had to extend a loan to a borrower from that state; and (4) the federal court had to decide that that that state's law applied. (A-73)

Then, to uphold this federal criminal conviction, the Second Circuit had to engage in a sequence of questionable rulings on notoriously thorny and unresolved conflicts-of-law principles. *See generally,* Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. Davis L. Rev. 925, 972 (April 2004). The Second's Circuit's' tortured analysis – time and again recognizing that there was no governing precedent – glaringly exposes the due process problems with applying RICO to Moseley's conduct.[5]

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[5] First, the Second Circuit invalidated the choice-of-law provisions in Moseley's lending agreements as violative of New York's fundamental public policy, despite acknowledging there is no New York Constitutional provision relevant to usurious practices or any dispositive precedent on the issue. (App.10-13)

Second, though the federal courts previously had interpreted New York as applying the conflicts principle known as the "rule of validation," *Speare v. Consolidated Assets Corp.*, 367 F.2d 208, 210 (2d Cir. 1966), which applies the usury law of the forum having a relation with the transaction that is *most favorable* to the transaction, the Second Circuit rejected prior federal law and decided that New York would apply a "center of gravity" approach. (App.12)

Third, again acknowledging the inconsistency in the case law, the Court decided the most significant contacts were in New York because some borrowers resided in New York and their loan proceeds were deposited and repaid in New York. (App. 12-13)

This Court should grant review of Moseley's RICO conviction to decide a question of paramount constitutional importance: when does a federal criminal statute employed in an unprecedented fashion provide adequate notice that conduct that has not expressly been criminalized by any federal statute nonetheless constitutes a federal crime.

The Fifth Amendment provides that "[n]o persons shall …be deprived of life, liberty, or property, without due process of law." Due process demands that a criminal statute provide "fair warning" of what specific conduct the statute prohibits. *McBoyle v. United States*, 283 U.S. 25, 27 (1931). *See also Marks v. United States*, 430 U.S. 188, 191 (1977) ("notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty"); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) ("no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed"), *quoting United States v. Harriss*, 347 U.S. 612, 617 (1954).

"[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither that statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citations omitted). The "touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id*. at 267. *See also Johnson v. United States*, 576 U.S. 591

(2015) (Armed Career Criminal Act violates Due Process because it fails to give fair notice of what conduct presents a serious risk of physical injury, inviting arbitrary enforcement).

The "fair warning" requirement is inextricably intertwined with the question of whether a law is too vague to pass constitutional muster. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

In *United States v. Davis,* __ U.S. __,139 S. Ct. 2319 (2019), this Court held unconstitutionally vague the residual clause of the definition of "violent felony" in the statute providing for mandatory minimum sentences when a person is convicted of being a felon in possession of a firearm. As the Court explained:

> Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them.
>
> ***
>
> …. Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide.

139 S.Ct. at 2325. (citations omitted)

Until Moseley, no payday lender relying on contractual choice-of-law provisions had ever been prosecuted under RICO on the exceedingly case-specific

theory the government employed in this case: that *if* the choice-of-law provision was excised from the contract, and *if* a payday loan was usurious in *any* borrower's state, the defendant violated RICO by engaging in unlawful debt collection.[6] We submit that this Court should take this case to decide whether an unprecedented use of a criminal statute that transforms conduct not otherwise illegal under federal law into a federal crime through unprecedented applications of complex state conflict-of-law principles is consistent with due process.

This case presents a perfect opportunity for this Court to address what limits should be placed on the over-federalization of crime. Moseley did not have fair warning – either from existing case law or from RICO's vague "unlawful debt" language – that payday lending would be deemed criminal under a new interpretation of this rarely invoked RICO provision.[7]

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[6] In 2016, the DOJ commenced two other criminal prosecutions involving tribal nations engaged in the payday lending business: *United States v. Hallinan*, No. 16-130 (E.D.Pa), *conviction affirmed*, 787 Fed. Appx 81 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2674 (2020) and *United States v. Tucker*, No. 16-cr-91 (S.D.N.Y.), *conviction affirmed sub nom United States v. Grote*, 961 F.3d 105 (2d Cir. 2020). Neither involved contractual choice-of law principles. Both raised entirely different federal, not state, issues about the interplay between tribal sovereignty and United States law.

[7] Despite distaste for payday lending, payday loans are not *malum in se*. That Moseley knew that the interest rates he charged would violate some state laws does not translate into notice that his conduct constituted racketeering under federal law. Indeed, even in New York, criminal usury is a class E felony, which provides for a maximum sentence of four years. N.Y. Penal Law § 70.00 (McKinney.) It is not racketeering.

What happened here is precisely what *Davis* warned against: it handed "responsibility for defining [the] crime" to prosecutors in the Southern District of New York, whose prosecution depended entirely on convincing federal courts to apply disputed conflict of laws principles in an unprecedented way to create a federal crime out of conduct not unlawful under any federal law.[8]

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CONSUMER COMPLAINTS SUBMITTED TO REGULATORY AGENCIES WITH THE PRIMARY PURPOSE OF SEEKING GOVERNMENTAL ASSISTANCE IN OBTAINING A REMEDY TO A PERCEIVED WRONG CONSTITUTES TESTIMONIAL STATEMENTS SUBJECT TO THE CONFRONTATION CLAUSE.

The borrower complaints that were admitted into evidence, often sworn to or otherwise certified to be true, were submitted by the borrower to a state regulatory agency – *e.g.* the State Attorney General or a Department of Consumer, Banking or Finance Investigation – with the primary purpose of procuring the government's assistance in obtaining relief. The complaints themselves, many highly emotional and characterizing the loans as "illegal" or as "scams," asked the regulatory agency to investigate Moseley's entities and to help them in voiding their loan obligations. These out-of-court declarations were not subject to cross-examination and Moseley never had the opportunity to confront these borrowers face to face. Whether

[8] If this Court grants certiorari to review the RICO conviction, and reverses the conviction on due process grounds, it should remand the entire case to the Second Circuit to review whether the spillover effect of the prejudicial RICO evidence so tainted the other counts of conviction that they too must be vacated. The Second Circuit did not address this issue, raised on appeal, because it affirmed the RICO conviction.

consumer complaints of this sort constitute "testimonial" statements subject to the Confrontation Clause is an issue left unresolved by this Court's recent Confrontation Clause jurisprudence but seriously in need of clarification.

The Confrontation Clause of the Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." It bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004). Testimony is "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51, *quoting* 2 N. Webster, *An American Dictionary of the English Language* (1828). An "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* Statements contained in "formalized testimonial materials, such as affidavits" are testimonial. *Id* at 52. So too are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52.

Crawford announced a new rule of criminal procedure. *Danforth v. Minnesota*, 552 U.S. 264 (2008). Since *Crawford*, as this Court itself has recognized, the Court has not offered an "exhaustive definition" of what constitutes a "testimonial" statement and has "labored to flesh out" what that means. *Ohio v. Clark*, 576 U.S.

237, 243-44 (2015). The Court itself is divided over how to determine what statements are testimonial and the lower courts have grappled with whether a statement is so "formalized" or so intended to be used as evidence that that its admission without confrontation constitutes a Sixth Amendment violation.

The Court's cases have fallen into two categories: those dealing with statements made to law enforcement personnel or their proxies and forensic analyses. In *Davis v. Washington*, 547 U.S. 813 (2006) and its accompanying case, *Hammon v. Indiana*, 547 U.S. 813 (2006), the Court, "without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation," concluded that statements are:

> nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822-23.

Employing this test, the Court determined that a 911 call made during an ongoing emergency was non-testimonial but a statement by a victim of domestic violence during a later police interrogation was testimonial.

This distinction was murky at best and, in *Michigan v. Bryant*, 562 U.S. 344 (2011), the difficulties in its application became apparent. While a majority of the Court held that a statement by a dying gunshot victim was nontestimonial because the use of a gun may have posed an ongoing emergency and the victim's dying

declaration enabled the police to meet that ongoing emergency, Justice Thomas, concurring in the judgment, criticized the "primary purpose test" as unable to produce consistent or predictable results, instead proposing a standard that considered whether the out-of-court statement was sufficiently formal and solemn to substitute for testimony. *Id*. at 378 (Thomas, J., concurring). And Justice Scalia, joined in part by Justice Ginsburg, dissented, arguing that the focus should only be on the declarant's intent, not the interrogator's. *Id*. at 383-85 (Scalia, J., dissenting)

Most recently, *in Ohio v. Clark*, 576 U.S. 237, 248 (2015), this Court held that a three-year old's statements to his teachers identifying his mother's boyfriend as his abuser were not testimonial because the teachers had noticed the abuse and because it was doubtful that such a young child would understand that the statements could be used to prosecute the abuser. Though unanimous, Justice Scalia, joined by Justice Ginsburg, concurring, again emphasized that the focus must be on the declarant's intent and that it was improbable that a child of that age made the statement with the primary purpose of "invok[ing] the coercive machinery of the State." *Id*. at 251 (Scalia., J., concurring).

Clark involved a statement made to a teacher and not an agent of law enforcement. The Court expressly declined to adopt a "categorical" rule that statements to non-law enforcement officers are never testimonial. *Id*. at 246. Justice Thomas, concurring, went further, opining that statements to private persons should

be assessed no differently, focusing on whether they "bear sufficient indicia of solemnity to qualify as testimonial." *Id.*at 254-55.

The Court's other cases have addressed forensic reports. *See, e.g., Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) (sworn certificates of analysis by state forensic laboratory that material seized by police constituted cocaine were testimonial); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (unsworn forensic laboratory report certifying defendant's blood alcohol level was testimonial); *Williams v. Illinois*, 567 U.S. 50 (2012) (expert's testimony about a diagnostic laboratory report on the male DNA profile derived from the victim's vaginal swabs and opining that the DNA profile in that report matched the defendant's DNA profile in a state database not testimonial).[9]

The Court's decisions have left open several critical questions. Though the Court has said its case law should not be read to imply that "statements made in the absence of interrogation are necessarily nontestimonial," *Davis*, 547 U.S. at 822, n.1, it has not definitively resolved whether interrogation is a pre-requisite to invoking constitutional protection. Moreover, while the focus remains on the primary purpose of the out-of-court declaration, the Court also has not definitively resolved whether a

[9] *Williams* illustrated the difficulty in applying this Court's analysis. While a plurality concluded that forensic reports are not testimonial if they are not prepared for the primary purpose of accusing a "targeted individual," *id.* at 84-85, four dissenting Justices concluded that even a report prepared for investigatory purposes without a specific target in mind can qualify as testimonial when it is "made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial." *Id.,* at 121, (Kagan, J., dissenting)

statement is testimonial if it is made to non-law enforcement personnel "with the understanding that it may be used to invoke the coercive machinery of the State"). *Bryant*, 562 U.S. at 381 (Scalia J. dissenting).

The Court's jurisprudence on the Confrontation Clause has hardly been clear or consistent. Justice Gorsuch, joined by Justice Sotomayor, in dissenting from the denial of certiorari in yet another forensic case, lamented the lack of clarity in the Court's cases, writing:

> This Court's most recent foray in this field …yielded no majority and its various opinions have sown confusion in courts across the country….

Stuart v. Alabama, 139 S. Ct. 36 (2018) (citations omitted).

Other courts have agreed. *See, e.g., United States v. Norwood,* 982 F.3d 1032, 1060 (7th Cir. 2020) (reviewing the complex and inconsistent law on whether statements made by children to medical personnel should be deemed testimonial); *United States v. Walker*, 776 F. App'x 75, 79 (3d Cir.), *reh'g granted, judgment vacated pending further briefing,* 936 F.3d 183 (3d Cir. 2019) (the "Court's Confrontation Clause jurisprudence, even as to forensic testing, could benefit from further clarification"); *Lui v. Obenland*, 2019 WL 4060887, at *5 (W.D. Wash. 2019), *report and recommendation adopted as modified,* 2019 WL 4058947 (W.D. Wash. 2019) (a majority of the Court has never agreed on a test for expert witnesses, making it very difficult for courts to effectively follow), *aff'd,* 828 F. App'x 391 (9th Cir. 2020). *See generally* Leslie Cahill, *Witnesses in the Confrontation and Self-Incrimination Clauses: The Constitution's Fraternal Twins*, 46 Am. J. Crim. L. 157, 164–65 (2019)

(*Clark* did not mitigate *Crawford*'s increasingly fragile foundation); Michael S. Pardo, *Confrontation After Scalia and Kennedy* 70 Ala. L. Rev. 757 (2019).

Both the federal and state courts have grappled with what constitutes a testimonial statement and have come to widely different conclusions. *See, e.g.*, cases cited in Comment *Note: Construction and Application of Supreme Court's Ruling in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine*, 30 ALR 6th 1 (originally published in 2008).

When the issue involves consumer complaints, courts have avoided the constitutional question by carefully circumscribing what is put before the jury to make sure that, unlike here, the actual substance of the complaints is not admitted. *See, e g., United States v. Adams*, 612 Fed. Appx. 565, 571 (11th Cir. 2015), *cert. denied*, 577 U.S. 1091 (2016) (where no Sixth Amendment objection made below, finding no plain error when an investigator testified to the nature of the complaints but not to specific statements made by the complainants); *United States v. Gordon*, 2019 WL 4303046, *11 (D. Maine 2019) (excluding consumer complaints to Better Business Bureau as too subjective to be reliable and often "driven by emotion not fact"); *United States v. Perez*, 336 F.2d 1003, 1007 (2d Cir. 1964) (government witnesses permitted to testify about consumer complaints but the complaints themselves were not admitted).

This Court had not addressed the question reserved in *Clark*: what standard applies when the out-of-court statement is not made to law enforcement, but rather to a regulatory or other governmental body, yet still is intended to invoke the "coercive machinery" of the State. The Second Circuit dodged the question as well, addressing only whether the borrower intended the complaint to be used in a criminal prosecution against Moseley, disregarding whether it was intended for other evidentiary purposes.

The borrower complaints in this case were formalized declarations made to state regulatory agencies, often under penalty of perjury, with the "primary purpose" of creating evidence so that the State could aid the consumer in seeking relief. Whether and when consumer complaints of this sort should be treated as "testimonial" and thus inadmissible under the Confrontation Clause unless the declarant appears in court and can be subjected to cross examination is an important question, likely to recur in this and other contexts. It is an issue this Court should address.

CONCLUSION

Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

Amy Adelson
(Counsel of Record)
Law Offices of Amy Adelson, LLC.
43 West 43d St
Suite 96
New York, NY 10036
212-889-4009
Attorney for Petitioner
aadelson@lawdea.com

Dated: January 19, 2021

APPENDIX A

980 F.3d 9
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Richard MOSELEY, Sr.,
Defendant-Appellant.

Docket No. 18-2003
|
August Term, 2019
|
Argued: January 6, 2020
|
Decided: November 3, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of New York, Edgardo Ramos, J., of violating Racketeer Influenced and Corrupt Organizations Act (RICO), violating Truth in Lending Act (TILA), wire fraud, and identity theft, in connection with defendant's operation of illegal payday-loan scheme. Defendant appealed.

Holdings: The Court of Appeals, Carney, Circuit Judge, held that:

[1] under New York's center-of-gravity test for choice-of-law issues, New York's usury laws, rather than Missouri's usury laws, applied to non-negotiated loan agreements;

[2] use of RICO's unlawful debt provisions, to prosecute defendant for making usurious payday loans, did not violate the due process guarantee of fair warning;

[3] evidence established defendant's awareness of unlawful nature of payday loans; and

[4] evidence established violation of TILA's "total of payments" disclosure requirements.

Affirmed.

West Headnotes (33)

[1] **Criminal Law** Construction and Effect of Charge as a Whole
Criminal Law Review De Novo

The Court of Appeals reviews a claim of error in jury instructions de novo, reversing only where, viewing the charge as a whole, there was a prejudicial error.

[2] **Contracts** Agreements relating to actions and other proceedings in general

Under New York law, absent fraud or violation of public policy, contractual selection of governing law is generally determinative so long as the State selected has sufficient contacts with the transaction.

[3] **Contracts** Agreements relating to actions and other proceedings in general

While parties to a contract are generally free to reach agreements on whatever terms they prefer, New York courts will not enforce choice-of-law agreements where the chosen law violates some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal.

[4] **Contracts** Agreements relating to actions and other proceedings in general

Under New York law, courts do not lightly invoke the public policy exception to enforcement of contractual choice-of-law

provisions; rather, the exception should be reserved for those foreign laws that are truly obnoxious.

[5] **Contracts**🔑Agreements relating to actions and other proceedings in general
Courts🔑Previous Decisions as Controlling or as Precedents

To identify a fundamental New York public policy that might overcome the contracting parties' stated choice of law, courts look to the State's Constitution, statutes, and judicial decisions.

[6] **Contracts**🔑Agreements relating to actions and other proceedings in general

New York's civil usury statute and criminal usury statute were an expression of the State's public policy, i.e., the legislature's belief that usury was a matter of serious public concern, for purposes of determining the applicability, to loan agreements in defendant's payday-loan scheme, of New York's public policy exception to enforcement of contractual choice-of-law provisions. N.Y. Penal Law § 190.40; N.Y. Banking Law § 14-a(1); N.Y. General Obligations Law § 5-501.

[7] **Usury**🔑Constitutional and Statutory Provisions

New York's criminal and civil prohibitions of excessive interest rates embody a fundamental public policy. N.Y. Penal Law § 190.40; N.Y. Banking Law § 14-a(1); N.Y. General Obligations Law § 5-501.

[8] **Contracts**🔑Agreements relating to actions and other proceedings in general

When courts determine whether New York would enforce choice-of-law provisions set out in an allegedly usurious loan agreement, corporations conducting their business transactions should be treated differently from individual consumers seeking personal credit.

[9] **Usury**🔑Constitutional and Statutory Provisions
Usury🔑Loans or Advances of Money

New York's public policy favors enforcement of its usury laws to protect those of its residents who enter into consumer debt contracts, and thus, in consumer loan contracts, choice-of-law provisions specifying foreign jurisdictions without usury laws are unenforceable in New York as being against its public policy.

[10] **Contracts**🔑What law governs

New York applies the center-of-gravity approach to choice-of-law issues, under which courts lay emphasis upon the law of the place which has the most significant contacts with the matter in dispute, with courts looking to five generally significant contacts: the places of contracting, negotiation and performance; the location of the subject matter of the contract; and the domicile of the contracting parties.

[11] **Contracts**🔑What law governs

Under New York law, public policy considerations may bear on the choice-of-law analysis, where the policies underlying

conflicting laws in a contract dispute reflect strong governmental interests.

[12] **Usury**🔑What Law Governs

Under New York's center-of-gravity test for choice-of-law issues, New York's usury laws, rather than Missouri's usury laws, applied to non-negotiated loan agreements for payday loans, from payday loan business in Missouri; contacts with New York arose from the New York domiciles of many borrowers, loan proceeds were received in New York and were repaid from New York, and contacts with Missouri were thin and were not evident to borrowers, who had no way of knowing that the business was located in Missouri.

[13] **Constitutional Law**🔑Retroactive laws and decisions; change in law

Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. U.S. Const. Amend. 5.

[14] **Constitutional Law**🔑Retroactive laws and decisions; change in law

For due process to disallow the first use of a longstanding statute, to prosecute defendants engaged in a particular type of conduct, the construction of the statute must be both unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. U.S. Const. Amend. 5.

[15] **Constitutional Law**🔑Retroactive laws and decisions; change in law

The first use of a longstanding statute, to prosecute defendants engaged in a particular type of conduct, does not violate due process when the law gives sufficient warning so that people may conduct themselves so as to avoid that which is forbidden, and thus does not lull the potential defendant into a false sense of security, giving him no reason even to suspect that his conduct might be within the statute's scope. U.S. Const. Amend. 5.

[16] **Constitutional Law**🔑Particular Offenses
Racketeer Influenced and Corrupt Organizations🔑Constitutional and statutory provisions
Racketeer Influenced and Corrupt Organizations🔑Collection of unlawful debts

Use of unlawful debt provisions of Racketeer Influenced and Corrupt Organizations Act (RICO), to prosecute a payday lender for making usurious loans, did not violate the due process guarantee of fair warning; the provisions were straightforward, and it was foreseeable to defendant that New York's choice-of-law principles would not allow enforcement of loan agreements' choice of the laws in jurisdictions without interest rate limits. U.S. Const. Amend. 5; 18 U.S.C.A. §§ 1961(6), 1962(c).

[17] **Racketeer Influenced and Corrupt Organizations**🔑Weight and sufficiency

Assuming that a conviction under Racketeer Influenced and Corrupt Organizations Act (RICO) for collection of unlawful debt, based on violation of New York's usury laws, required proof of defendant's knowledge of unlawful nature of his actions, evidence established defendant's awareness of unlawful nature of

payday loans; defendant admitted at trial that he knew that he was lending at rates more than twice the rate allowed in New York, he acknowledged that he incorporated lending entities abroad to attempt to avoid the strictures of state usury laws, and he received numerous complaints from state attorneys general, including New York State Attorney General, informing him that he was lending in violation of state usury laws that applied regardless of lending entity's jurisdiction of incorporation. 18 U.S.C.A. §§ 1961(6), 1962(c).

[18] **Criminal Law** Construction in favor of government, state, or prosecution

On an appellate challenge to the sufficiency of the evidence, the Court of Appeals reviews the record evidence in the light most favorable to the government.

[19] **Criminal Law** Reasonable doubt

On an appellate challenge to the sufficiency of the evidence, the Court of Appeals must affirm if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

[20] **Finance, Banking, and Credit** Price, Balance, Rate, and Charges in General
Finance, Banking, and Credit Weight and sufficiency

Evidence established payday lender's violation of TILA's "total of payments" disclosure requirements; typical loan document included just one finance charge in addition to loan principal amount, despite defendant's knowledge and intention that, unless borrower acted, no payment was actually scheduled and borrower would pay much more than a single finance charge, and total number of payments had no upper limit except those arbitrarily imposed by defendant's business. Truth in Lending Act § 128(a)(5, 6), 15 U.S.C.A. § 1638(a)(5, 6); 12 C.F.R. § 226.18(g, h).

[21] **Criminal Law** Reception and Admissibility of Evidence

Evidentiary rulings are reviewed for clear abuse of discretion.

[22] **Criminal Law** Reception and Admissibility of Evidence

On appellate review of evidentiary rulings for abuse of discretion, manifest error must be shown before the Court of Appeals will consider taking any further action.

[23] **Criminal Law** Then-existing state of mind or body

Introduction of evidence of customer complaints, to show the defendant's culpable state of mind, does not constitute use of the complaints to prove the truth of the matters asserted in them, as would constitute hearsay. Fed. R. Evid. 801(c)(2).

[24] **Criminal Law** Evidence as to fact of making declarations and not as to subject-matter

A statement is not hearsay where it is offered

not for its truth, but to show that a listener was put on notice of illegal acts. Fed. R. Evid. 801(c)(2).

[25] **Criminal Law** Evidence as to fact of making declarations and not as to subject-matter

Use of borrowers' complaints about illegal practices by defendant's payday lending business, to show that defendant had been put on notice of the potential illegality of those practices, did not constitute use of the complaints to prove the truth of the matters asserted in them, as would constitute hearsay, in prosecution for violating Racketeer Influenced and Corrupt Organizations Act (RICO) based on collection of unlawful debt. 18 U.S.C.A. §§ 1961(6), 1962(c); Fed. R. Evid. 801(c)(2).

[26] **Criminal Law** Cross-examination and impeachment

The purpose of the Confrontation Clause is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about out-of-court statements taken for use at trial. U.S. Const. Amend. 6.

[27] **Criminal Law** Out-of-court statements and hearsay in general

The Confrontation Clause applies only when the out-of-court statement is testimonial. U.S. Const. Amend. 6.

[28] **Criminal Law** Out-of-court statements and hearsay in general

Borrowers' complaints to defendant payday lender were not testimonial, for Confrontation Clause purposes, in prosecution for violating Racketeer Influenced and Corrupt Organizations Act (RICO) based on collection of unlawful debt; borrowers were seeking relief from onerous loan terms, in contrast to providing evidence for eventual use in defendant's prosecution. U.S. Const. Amend. 6; 18 U.S.C.A. §§ 1961(6), 1962(c).

[29] **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused

Allowing introduction of full texts of borrowers' complaints to defendant payday lender, including potentially emotional details about hardships brought on by defendant's schemes, was not unfairly prejudicial, in prosecution for violating Racketeer Influenced and Corrupt Organizations Act (RICO) based on collection of unlawful debt; complaints were probative of defendant's notice of potential illegality of his practices, and borrowers testified at trial about their anguish. 18 U.S.C.A. §§ 1961(6), 1962(c); Fed. R. Evid. 403.

[30] **Sentencing and Punishment** Degree of Proof

The relevant loss amount, for purposes of determining offense level under Sentencing Guidelines, at sentencing for fraud or theft, must be established by a preponderance of the evidence. U.S.S.G. § 2B1.1.

[31] **Criminal Law** Sentencing

Calculation of relevant loss amount, for

purposes of determining offense level under Sentencing Guidelines, at sentencing for fraud or theft, is reviewed for clear error. U.S.S.G. § 2B1.1.

[32] Sentencing and Punishment Value of loss or benefit

The Sentencing Guidelines do not require that the sentencing court calculate the amount of loss with certainty or precision, for purposes of determining the offense level under the Guidelines, at sentencing for fraud or theft. U.S.S.G. § 2B1.1.

[33] Sentencing and Punishment Amount and degree of loss or injury

Calculation of loss amount, relating to defendant's payday loan scheme, as $49 million was not clearly erroneous, for purposes of determining offense level under Sentencing Guidelines, at sentencing for violating Racketeer Influenced and Corrupt Organizations Act (RICO) based on collection of unlawful debt; defendant's business netted $69 million in profits during relevant time period, and an employee testified under oath that borrower authorization was obtained in only 30% of loans. 18 U.S.C.A. §§ 1961(6), 1962(c); U.S.S.G. § 2B1.1.

***13** Appeal from the the United States District Court for the Southern District of New York (Ramos, *J.*)

Attorneys and Law Firms

DAVID ABRAMOWICZ (Edward Imperatore, Anna M. Skotko, on the brief) Assistant United States Attorneys, Of Counsel, for Audrey Strauss, Acting United States Attorney for the Southern District of New York, New York, NY, for Appellee United States of America.

AMY ADELSON (Daniela Elliott, Of Counsel, on the brief), Law Offices of Amy Adelson LLC, New York, NY, for Defendant-Appellant Richard Moseley, Sr.

Before: KEARSE, CARNEY, and BIANCO, Circuit Judges.

Opinion

CARNEY, Circuit Judge:

Defendant-Appellant Richard Moseley, Sr., appeals from a judgment of conviction and sentence entered on July 2, 2018, by the United States District Court for the Southern District of New York (Ramos, *J.*), in connection with Moseley's operation of an illegal payday-loan scheme. A jury found that Moseley violated the Racketeer Influenced and Corrupt Organizations Act (RICO), the Truth in Lending Act (TILA), and federal wire fraud and identity theft statutes from 2004 through 2014, a period when his payday-loan business engaged in the following conduct: it lent money to borrowers in New York and other states at interest rates exceeding—by many multiples—the maximum legal interest rates allowed in those states; in its loan documents, it failed to meet TILA disclosure requirements; and it issued loans to borrowers without their consent and then falsely represented that borrowers had, in fact, consented to the loans. The district court sentenced Moseley primarily to 120 ***14** months in prison and ordered Moseley to forfeit $49 million. On appeal, Moseley attacks both his convictions and his sentence. With regard to the RICO counts, he contends that the district court erred as a matter of law by instructing the jury that, as to his business's loans to New York borrowers, New York usury laws governed the transaction rather than the laws of the jurisdictions specified in the loan agreements, which set no interest rate caps. With regard to his TILA conviction, he maintains that his loan agreements disclosed the "total of payments" borrowers would make, as TILA requires, and that the evidence was insufficient to show that these disclosures were inaccurate. Moseley also raises several other arguments, challenging his convictions and his sentence. On review, we conclude that Moseley's arguments are unpersuasive. Accordingly, we AFFIRM the judgment of the district court.

BACKGROUND

I. Moseley's Offense Conduct[1]

Beginning in approximately 2004 and continuing through 2014, Moseley ran a form of what is generally known as a payday-loan business,[2] utilizing several domestic and foreign entities, including entities incorporated in Nevada, the Federation of Saint Kitts and Nevis (together, "Nevis"), and New Zealand.[3] Throughout this period, Moseley and his employees administered the enterprise solely from offices physically located in Kansas City, Missouri. In September 2014, the Consumer Financial Protection Bureau shut the business down on the basis of the illegalities later prosecuted here against Moseley individually.

Moseley's business offered small-dollar, short-term, unsecured loans in amounts up to $500. Instead of charging a traditional interest rate, Moseley's business charged "fees" that functioned, in effect, as interest payments. Utilizing the Internet as its platform, Moseley's business directly credited the borrower's bank account with the loan principal using the borrower's private banking information. For each "loan period" (that is, the term before repayment was due or the loan was "refinanced," App'x 570), Moseley charged a $30 fee (the "finance charge") for each $100 of the borrower's total loan amount. These fees were automatically debited by Moseley's business from the borrower's bank account and credited to Moseley's entity at the end of the first loan period. But, unlike the debited fees, repayment of the principal would ***15** not automatically occur. Instead, unless the borrower affirmatively acted to pay off the principal by the end of the two-week loan term, the loan would be "refinanced" and the term automatically extended. For each such extension, an additional and equal fee would be debited against the borrower's account and credited to Moseley's business.

In fact, absent an affirmative act by the borrower to pay off the principal, Moseley would continue debiting the account as described. This meant that a $100 loan could—and on occasion did—cost the borrower $30 in fees charged every other week, or approximately 26 times over the course of a year: in other words, it could lead to total finance charges of $780 on the original $100 loan, in effect an approximate yearly interest rate of 780%. Moseley's business would credit none of these fees toward repayment of the loan principal.

Although some borrowers did put a halt to the debiting by paying off their loans, continued fee collection in amounts totaling far more than the principal was far from uncommon in Moseley's operation. For example, at one point in 2013, the business records reflect 2,513 active accounts for borrowers living in New York. Approximately 24% of those accounts (600 of them) had been debited for at least 12 fee payments. Moseley generally would allow his staff to "zero out" an account—that is, to stop future debiting—only after 40 or 45 separate finance charges had been paid. App'x 760-61.

While lucrative to him, the business's extremely high effective annual interest rates posed a legal problem. Many states cap the legal interest rate at a level far below the effective rates Moseley sought to charge. New York law, for example, sets the civil usury rate at 16% for unlicensed lenders and treats all usurious contracts (that is, contracts violative of that rate) as void. *See* N.Y. Gen. Oblig. Law §§ 5-501, 5-511; N.Y. Banking Law § 14-a(1).[4] It sets the criminal usury rate at 25 %—that is, at a rate exceeding 25 %, lending becomes a crime in New York. N.Y. Penal Law § 190.40.

Therefore, as part of a strategy to avoid such caps, in his early years of operation Moseley incorporated entities in Nevada, and, after 2006, offshore, in Nevis and New Zealand. None of the three jurisdictions has usury laws. Moseley then edited the loan agreements that he provided his borrowers online to include a choice-of-law provision specifying that the law of one of these three jurisdictions governed the transaction.

Moseley received numerous borrower complaints while his business operated and drew substantial regulatory scrutiny from state attorneys general beginning at least as early as 2010. In response, he engaged in various techniques to disguise the fact that the enterprise's actual operations and personnel were located solely in Missouri, and to evade regulatory action. These moves included, for example, marking "return to sender" on mail sent to and received by the Missouri office to imply that Missouri was not the operation's locus and misrepresenting the administrative staff's location in conversations with borrowers who complained by phone.

Concurrently with these operations and evasions, and as part of a separate scheme, Moseley also issued loans to borrowers without their consent and began to debit "fees" related to these unauthorized loans. This worked as follows.

***16** A potential borrower in search of a short-term cash infusion would enter certain personal information online in a "lead generator" website maintained by a third party engaged by Moseley's business. (A "lead generator" website is one in which a potential customer may express

an interest—as relevant here, in receiving a loan—but has not been provided the loan's terms and is not actually agreeing to receive one.) Upon getting that expression of interest, the "lead generator" third party would then forward the prospective borrower's information to Moseley's business and its role in the transaction would be complete.

Moseley would then have his employees attempt to contact the potential borrower by phone and try to obtain borrower approval for making a loan. If phone contact was made, the employee explained the loan's terms by phone to the potential borrower, who could then accept or decline the offer. If the potential borrower did not answer the phone, employees would leave a voicemail message about the offer and the loan would be approved and made anyway, even absent the borrower's consent. (This was possible only because individuals provided banking information at the get-go, in their inquiry to the "lead generator," without having established a business relationship or entered into an agreement.) In any event, Moseley's business would then deposit the loan principal into the "borrower's" account and begin deducting fees.

In testimony provided at trial, one of Moseley's employees estimated that, of the business's total loans, it had never made direct contact with approximately 70% of eventual borrowers. Although all borrowers eventually received loan documents by email, the e-signatures on those documents were falsified.[5]

Finally, the disclosures contained in Moseley's loan agreement documents fell short of complying with applicable federal consumer protection laws. Among other requirements, the TILA and its implementing regulations mandate that the lender disclose to the borrower, when originating the loan, the "total of payments": that is, how much *in total* the borrower is "scheduled" to pay to close out the loan and cover all related liabilities. *See* 15 U.S.C. § 1638(a)(6); 12 C.F.R. § 226.18(h). Moseley's "Loan Note and Disclosure" documents included a text box labelled "Total of Payments" that it described to the borrower as "[t]he amount you will have paid after you have made the scheduled payment." *See, e.g.*, Supp. App'x 58. The figure displayed in this text box was the sum of the loan principal and a single finance charge (or "fee"). The "total of payments" disclosure did not indicate in any way to the borrower, however, that *no* repayment of the principal was actually "scheduled" to occur—that is, that *no* payment toward principal would occur automatically on a certain date or dates. Nor, conversely, did it indicate that indefinitely recurring finance charges *were* "scheduled" to occur. Rather, text in fine print below the disclosure box advised that the single payment of loan principal and a single finance charge whose sum it displayed would become "scheduled" only if ***17** the borrower signed a specified separate form and "fax[ed] it back to our office at least three business days before your loan is due." *Id.* The "total of payments" disclosure was thus inaccurate for any borrower who did not affirmatively and timely act—by sending a facsimile—to pay off her loan principal.

These three courses of conduct—the entities' attempts to evade usury laws; their approval of loans without obtaining borrowers' knowing consent; and their posting of misleading TILA disclosures—formed the factual basis for Moseley's prosecution and conviction. The government focused on New York-domiciled borrowers for purposes of the RICO prosecution, but had no geographic focus for the borrowers of concern in the wire fraud, identity theft, and TILA charges.

Our decision in this case follows closely on the heels of another decision issued by our court earlier this year, which also concerned the prosecution under RICO, TILA, and on other charges of defendants involved in a nationwide payday-loan operation. *United States v. Grote*, 961 F.3d 105 (2d Cir. 2020). Although the scheme undergirding that prosecution concerned lenders who sought to immunize some of their unlawful operations under the mantle of tribal sovereign immunity, not (as here) through choice-of-law clauses specifying jurisdictions without usury laws, the two operations were similar in many respects and raise some related legal questions, as will become apparent. *See id.* at 110-13.

II. Procedural History

In 2016, Moseley was indicted on RICO, wire fraud, identity theft, and TILA charges in the Southern District of New York. He pleaded not guilty and went to trial in October 2017 on the six counts listed in the Superseding Indictment.[6]

During the three-week long trial, Moseley's defense consisted primarily of claimed ignorance: he argued to the jury that he did not know that the actions his business took were illegal. Moseley testified in his own defense. At the trial's conclusion, the jury deliberated and found Moseley guilty on all counts. Moseley's Rule 29 and Rule 33 post-trial motions were denied.

In June 2018, the district court sentenced Moseley primarily to an incarceratory sentence of 120 months and

ordered that he forfeit $49 million, tied to his business's issuance of loans without borrower consent.

Moseley timely noticed his appeal.

DISCUSSION

We first discuss Moseley's challenges to his RICO convictions (for RICO conspiracy and substantive violations); then, his attack on his TILA conviction; and finally, his additional arguments assailing the various aspects of the district court proceedings.

I. RICO Counts

Moseley cites three separate bases for his contention that we should reverse his RICO convictions. He argues: (A) the district court erroneously disregarded contractual choice-of-law provisions when ***18** fashioning the jury instructions; (B) the prosecution violated Moseley's due process right to fair warning by charging him under RICO; and (C) the evidence was insufficient to establish that he had the requisite guilty mental state. For the reasons that follow, we reject all three contentions.

As background for the discussion, the following information will be useful. Moseley's RICO convictions rest on 18 U.S.C. § 1962(c). In relevant part, section 1962(c) reads:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through ... collection of unlawful debt.

18 U.S.C. § 1962(c). Section 1961(6) of title 18 defines "unlawful debt" for RICO purposes as follows:

> "[U]nlawful debt" means a debt (A) ... which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with ... the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate ....

Id. § 1961(6). As is evident, the statute's definition of "unlawful debt" invokes state as well as federal laws related to usury to provide substance to the concept of "unlawful[ness]."

Based on these provisions, we have held that convicting a defendant of an "unlawful debt" RICO violation in connection with a usurious loan to a borrower domiciled in New York requires proof of five elements: "[1] that a debt existed, [2] that it was unenforceable under New York's usury laws, [3] that it was incurred in connection with the business of lending money at more than twice the legal rate, [4] that the defendant aided collection of the debt in some manner, and [5] that the defendant acted knowingly, willfully and unlawfully." *United States v. Biasucci*, 786 F.2d 504, 513 (2d Cir. 1986).[7] This summary has been our guide since *Biasucci* was decided, in 1986.

In 2020, however, we reviewed the fifth requirement—scienter—in *Grote*, 961 F.3d 105, and we observed that our discussion in *Biasucci* displayed some internal inconsistencies. As just quoted, our court stated in *Biasucci* that the defendant must have acted "knowingly, willfully and unlawfully" to be convicted. *Biasucci*, 786 F.2d at 513. In reaching its conclusion in that case, the *Biasucci* court asserted that "RICO imposes no additional *mens rea* requirement beyond that found in the predicate crimes." *Id.* at 512. It then based its decision that the RICO statute was satisfied there by resting on proof of the predicate crime in that case, New York Penal Law § 190.40, "Criminal Usury in the Second Degree." *Id.* Although the statutory text refers to a "knowing[ ]" act, section 190.40 has been construed not to require knowledge of the unlawfulness of the proscribed receipt of excessively high interest. *See Grote*, 961 F.3d at 118 n.4.[8] The *Biasucci* ***19** court thus applied—as we described it in *Grote*—a "standard that did *not* require a showing of willfulness or of awareness of the unlawful nature of the conduct." *Id.* at 118 (emphasis added).

In light of our commentary in *Biasucci*, the *Grote* court observed that we appear to have adopted the following syllogism: (1) the scienter requirement for RICO unlawful debt collection is drawn from the underlying usury statutes, and (2) a RICO prosecution may be based on the violation of a civil usury statute that lacks a scienter requirement entirely, therefore (3) a criminal RICO violation may carry no scienter requirement at all. *Id.* at 118-19. As we further pointed out in *Grote*, this anomalous result appears to contradict the Supreme Court's "presumption in favor of a scienter requirement" for criminal statutes. *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2011, 192 L.Ed.2d 1 (2015).

Ultimately, the *Grote* court declined to identify the requisite mental state for the unlawful debt RICO violation, taking refuge in the circumstance of that case that, even applying a heightened willfulness standard (that is, a requirement that a knowingly unlawful and willing act be proven), "the jury [found] (based on overwhelming evidence of that fact) that the Defendants were aware of the unlawful nature of the lending scheme." *Grote*, 961 F.3d at 117.

We do the same, and assume without deciding that, to secure a conviction under RICO for unlawful debt collection in New York, the government had to prove Moseley's knowledge of the unlawful nature of his actions. *See id.* ("[W]e express no view on whether willfulness or awareness of unlawfulness was required for conviction under [RICO]."). As we discuss below, the assumed requirement poses no barrier to the convictions obtained by the government in Moseley's case.

A. Challenge to the jury instructions

As to the legality of the rates charged by his business, Moseley contends that the district court erred by instructing the jury that New York usury laws applied to his payday loans to borrowers domiciled in New York. He argues that the jury instructions were incorrect because they gave no effect to the choice-of-law provisions set out in the loan agreements. As noted above, these specified variously that their terms and enforcement were to be governed by the laws of the jurisdictions of Nevada, Nevis, and New Zealand, none of which has usury laws.[9] The following provision is illustrative:

> Governing Law: Lender and Borrower hereby stipulate and agree that this transaction is made pursuant to the laws of Nevis and that Nevis law shall control the rights, duties, and obligations of the parties hereto without regard[ ] to Nevis choice of law provisions.

See, e.g., Supp. App'x 58; *see also* App'x 1535, 1947 (Nevada), 1932-33 (New Zealand).

Rejecting Moseley's request for an instruction that the jurors "must apply the usury law of the state or nation agreed upon in the lending agreement," App'x 62-63, the district court instructed the jury as to applicable interest rates only that, "In New York, the enforceable rate of interest on consumer loans is no more than 25 ***20** percent per year, and loans above that rate are unenforceable." App'x 1773.

[1]We review "a claim of error in jury instructions *de novo*, reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003). To evaluate Moseley's argument, we first ask whether the loan agreements included an effective choice-of-law provision; we conclude that they did not. Having discarded the contractual provisions, we then conduct a routine choice-of-law analysis and determine that New York usury law governs consumer loans made to the state's residents. We therefore find no error in the district court's challenged instruction.

1. The import of the loan agreements' choice-of-law provisions

We must first assess whether, in the operative loan documents, the lender and borrowers agreed to an effective choice-of-law provision designating the jurisdiction whose law would govern their business relationship. Moseley agrees with the government that, as to New York borrowers, New York law governs the question whether the agreements' choice-of-law provision was effective.

[2] [3] [4]We have described New York's general rule for assessing the effectiveness of contractual choice-of-law provisions as follows: "New York law is unambiguous in the area of express choice of law provisions in a contract. Absent fraud or violation of public policy, contractual selection of governing law is generally determinative so long as the State selected has sufficient contacts with the transaction." *Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 592 (2d Cir. 1996).[10] As to contracts that violate public policy, the New York Court of Appeals has accordingly explained that, "While parties are generally free to reach agreements on whatever terms they prefer, courts will not enforce [choice-of-law] agreements where the chosen law violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 368, 12 N.Y.S.3d 606, 34 N.E.3d 357 (2015); *see also Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 7 N.Y.3d 624, 627, 825 N.Y.S.2d 692, 859 N.E.2d 498 (2006) (analyzing whether "New York's public policy against such contracts [that include provisions specifying that a subcontractor will not be paid unless the contractor has been paid] is so fundamental that it should override the parties' choice of law"). Further, courts are cautioned not to invoke this

"public policy exception" lightly; rather, it should be "reserved for those foreign laws that are truly obnoxious." *Brown & Brown*, 25 N.Y.3d at 368, 12 N.Y.S.3d 606, 34 N.E.3d 357.

[5] [6]To identify a fundamental New York public policy such as might overcome the parties' stated choice of law, we look to "the State's Constitution, statutes and judicial decisions." *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 202, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985). Here, to begin with, the parties identify no provision of the New York Constitution as relevant to usury or lending practices. The New York legislature, however, has enacted both a civil usury statute, which prohibits ***21** charging usurious rates, *see* N.Y. Gen. Oblig. Law § 5-501, N.Y. Banking Law § 14-a(1), and a criminal usury statute, which makes it a felony to charge interest at a rate higher than 25% per annum, *see* N.Y. Penal Law § 190.40. These are—at the least—a notable expression of the state's public policy.

Not long ago, we recounted some of the history of these usury laws and their enforcement:

> New York's usury prohibitions date back to the late 18th century. New York enacted the current cap—16 percent interest on short-term loans made by non-bank, unlicensed lenders—decades ago [in 1979]. ... New York regulatory authorities, both at the behest of successive Attorneys General and now the Superintendent of Financial Services, have pursued businesses that lent money at interest rates above the legal limit.

Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs., 769 F.3d 105, 110-11 (2d Cir. 2014). These laws have long been on the statute books and, as observed in *Otoe-Missouria Tribe of Indians*, they appear to be well enforced. That New York regulates usury at all holds some significance, but its legislation of a felony usury offense strikes us as particularly persuasive in demonstrating that the New York legislature considers usury to be a matter of serious public concern.

[7]New York judicial opinions have consistently recognized the state's prohibition of excessive interest rates as embodying a fundamental public policy. In 1977, the New York Court of Appeals analyzed the circumstances under which a closely held corporation (perhaps the surrogate for an individual borrower) may invoke usury as a defense in a suit for payment, notwithstanding the general preclusion found in N.Y. Gen. Oblig. Law § 5-521 for corporations taking this tack. In its discussion, the Court of Appeals reflected on the rationale behind New York's usury laws:

> The purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation. Law-making authorities in almost all civilizations have recognized that the crush of financial burdens causes people to agree to almost any conditions of the lender and to consent to even the most improvident loans. Lenders, with the money, have all the leverage; borrowers, in dire need of money, have none. ... [New York law] protect[s] impoverished debtors from improvident transactions drawn by lenders and brought on by dire personal financial stress.

Schneider v. Phelps, 41 N.Y.2d 238, 243, 391 N.Y.S.2d 568, 359 N.E.2d 1361 (1977).

Consonant with this view, New York state courts of first instance have universally agreed that the usury laws reflect an important public policy. *See Am. Exp. Travel Related Servs. Co. v. Assih*, 26 Misc.3d 1016, 893 N.Y.S.2d 438, 446 (Civ. Ct. 2009) ("New York has a strong public policy against interest rates which are excessive and this is a policy the courts must enforce."); *N. Am. Bank, Ltd. v. Schulman*, 123 Misc.2d 516, 474 N.Y.S.2d 383, 387 (Civ. Ct. 1984) ("This Court would find ... that the policy underlying our state's usury laws is in fact of a fundamental nature."); *Guerin v. New York Life Ins. Co.*, 271 A.D. 110, 116, 62 N.Y.S.2d 805 (1st Dep't 1946) ("Usury is a question of supervening public policy ...."). Moseley cites no New York state case law to the contrary.

[8]As Moseley correctly notes, however, several federal district courts in New York faced with usury defenses have enforced choice-of-law provisions specifying non-New York jurisdictions. In every such ***22** case, however, the debtors were corporations—the antithesis of the type of needy and unsophisticated consumers both at issue here and of concern to the New York Court of Appeals in *Schneider v. Phelps*.[11] The distinction bore heavily in many of these seemingly contrary decisions. *See, e.g.*, *Walter E. Heller & Co. v. Chopp-Wincraft Printing Specialties, Inc.*, 587 F. Supp. 557, 560 (S.D.N.Y. 1982) ("Nor should Illinois' law be deemed violative of public policy, since usury is not a favored defense [in New York], particularly in the circumstances here where a corporation rather than a helpless consumer is involved."); *see also RMP Capital Corp. v. Bam Brokerage, Inc.*, 21 F. Supp. 3d 173, 186 (E.D.N.Y. 2014); *Superior Funding Corp. v. Big Apple Capital Corp.*, 738 F. Supp. 1468, 1471 (S.D.N.Y. 1990). Thus, these cases do not advance Moseley's argument. Moreover, we agree with these decisions that when courts determine whether New York would enforce choice-of-law provisions set out in a contract,

corporations conducting their business transactions should be treated differently from individual consumers seeking personal credit. *See Madden v. Midland Funding, LLC*, 237 F. Supp. 3d 130, 149-50 (S.D.N.Y. 2017) (because New York usury laws constitute "fundamental public policy," applying New York usury law to a consumer credit card agreement despite a choice-of-law provision specifying Delaware).

[9]Accordingly, we identify a longstanding public policy in New York in favor of enforcing its usury laws to protect those of its residents who enter into consumer debt contracts. In consumer loan contracts, choice-of-law provisions specifying foreign jurisdictions without usury laws are unenforceable in New York as against its public policy.

2. Choosing applicable law in the absence of a choice-of-law provision

If his contracts' choice-of-law provisions specifying Nevada, Nevis, and New Zealand law are unenforceable, Moseley offers an alternative to applying New York law in his loan transactions: he insists that under New York conflict-of-law rules, the usury law of *Missouri*, not New York, should govern. As discussed, New York criminal usury law sets a firm 25% cap for unlicensed lenders; Missouri law is more lenient, allowing loans in conformance with the specifics set forth in the margin.[12] Missouri was not mentioned in the agreements, but Moseley's business operations were located there, and so he has a colorable ***23** argument that Missouri law applies, regardless of the borrowers' locations.

[10] [11]New York applies the so-called "center of gravity" approach to choice-of-law issues. Under this approach, "the courts ... lay emphasis ... upon the law of the place which has the most significant contacts with the matter in dispute." *Auten v. Auten*, 308 N.Y. 155, 160, 124 N.E.2d 99 (1954). In adjudicating the choice of law for a contract dispute, the New York Court of Appeals looks to "five generally significant contacts": "the place[s] of contracting, negotiation and performance; the location of the subject matter of the contract; and the domicile of the contracting parties." *Matter of Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 227, 597 N.Y.S.2d 904, 613 N.E.2d 936 (1993). "The traditional choice of law factors—the places of contracting and performance—are given heavy weight in this analysis." *Tri-State Emp. Servs., Inc. v. Mountbatten Sur. Co.*, 295 F.3d 256, 261 (2d Cir. 2002). As is particularly relevant here, public policy considerations such as those discussed above may also bear on the analysis in cases "where the policies underlying conflicting laws in a contract dispute ... reflect strong governmental interests." *Matter of Allstate*, 81 N.Y.2d at 226, 597 N.Y.S.2d 904, 613 N.E.2d 936.

In support of his claim for Missouri law, Moseley argues first that the so-called "rule of validation" should apply. This is a reference to our comment, in dictum drawn from a 1966 decision, that New York "seems to follow a special [choice-of-law] rule with regard to usury, applying the law of any state connected with the transaction which will validate it, to give effect to the parties' apparent intention to enter a lawful contract." *Speare v. Consol. Assets Corp.*, 367 F.2d 208, 211 (2d Cir. 1966). After we decided *Speare*, however, at least one New York appellate court disavowed adherence to such a rule and suggested persuasively that our observation misapprehended New York law. *A. Conner Gen. Contracting Inc. v. Rols Capital Co.*, 145 A.D.2d 452, 453, 535 N.Y.S.2d 420 (2d Dep't 1988) (noting that "the Court of Appeals has not articulated a special rule for usury cases" and holding that the standard rule applies). We therefore disregard the dictum in *Speare* and follow *A. Conner* here as the most recent definitive statement of New York law.

[12]Thus, applying the "center of gravity" test to determine, under New York law principles, which jurisdiction's law governs the loan agreement, we conclude that a New York court would find that New York usury law applies. We tally the contacts as follows:

The contacts with New York are provided by the New York domiciles of many borrowers and the subject matter of the contract: loans and payments that affected the borrowers individually in New York in a direct way.[13] The loan proceeds were received in New York and repaid from New York. In contrast, the contacts with Missouri are thin and were not evident to the borrowers, diminishing the weight to be accorded them. It is true that Moseley's business was located in Missouri, money flowed to and from Missouri, and Moseley's representatives were located in Missouri when they actually contacted consumers. The lending entities, however, were not incorporated in Missouri. Furthermore, even apart from the source of funds not being evident, borrowers had no way of knowing that Moseley's business ***24** was based in Missouri. In our estimation, a review of these contacts counsels for a conclusion that New York, not Missouri, was the "center of gravity" of the transaction and thus, in favor of applying New York law.

The question is even more definitively answered, in our view, by the strength of New York's public policy in protecting its low-income borrowers from being charged usurious rates. This is an "instance[ ] where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests." *Matter of Allstate*, 81 N.Y.2d at 226, 597 N.Y.S.2d 904, 613 N.E.2d 936. As reviewed in Part I(A)(1), above, New York maintains and acts on a strong public policy in favor of protecting indigent borrowers from "improvident transactions drawn by lenders and brought on by dire personal financial stress." *Schneider*, 41 N.Y.2d at 243, 391 N.Y.S.2d 568, 359 N.E.2d 1361. Considered in combination with the factors reviewed above, we rule that New York law applies to the transaction and that the district court was correct when it so instructed the jury.

B. Fair warning

Moving on from choice of law, Moseley urges us next to rule that the government's reliance on RICO's "unlawful debt" provision violated the fair warning guarantee of the Due Process Clause. He contends that, in combination, the government's use of this RICO provision and the judicial determination that his contracts' choice-of-law clauses are unenforceable in New York was so unforeseeable as to violate fundamental notions of fairness, requiring us to invalidate his conviction.

[13] [14] [15]The Supreme Court has identified "three related manifestations of the fair warning requirement," including, as relevant here, that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). The first use of a longstanding statute to prosecute defendants engaged in a particular type of conduct—here, usurious payday loans—does not necessarily violate the Constitution, however. For the Constitution to disallow such an initial use, the construction of the statute that it depends on must be both "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). Our Circuit has consistently found that a statute avoids running afoul of the "unexpected and indefensible" standard stated in *Bouie* when "the law give[s] sufficient warning that [people] may conduct themselves so as to avoid that which is forbidden, and thus [does] not lull the potential defendant into a false sense of security, giving him no reason even to suspect that his conduct might be within its scope." *Rubin v. Garvin*, 544 F.3d 461, 469 (2d Cir. 2008) (citing *United States v. Herrera*, 584 F.2d 1137, 1149 (2d Cir. 1978)).

[16]The "unlawful debt" provisions of RICO are straightforward and neatly apply here. *See* 18 U.S.C. §§ 1962(c), 1961(6). Further, the unenforceability in New York of the Nevada, Nevis, and New Zealand contractual choice-of-law provisions, as discussed above, was foreseeable: such a provision clearly violates New York public policy. Moseley cites no reasonably persuasive authority that would have given him reason to believe that his loans were not "unlawful debts" under RICO. While he points to federal cases upholding choice-of-law provisions for corporations in the usury context, he identifies no precedent favorable ***25** to his position in the context of a consumer transaction, where the core policy behind usury laws squarely applies. Accordingly, we see no basis to conclude that Moseley was somehow "lull[ed] ... into a false sense of security" or had "no reason even to suspect that his conduct might be within [RICO's] scope." *Rubin*, 544 F.3d at 469. His arguments that his prosecution offended the Constitution fail to persuade.

C. Mental state for RICO counts

[17]In a more general attack on the RICO verdicts, Moseley maintains that the record contains insufficient evidence to support the jury's conclusion that he had the mental state that we assume to be required to support the jury's guilty verdict: that is, that he was aware of the unlawful nature of the loans. He provided uncontradicted exculpatory evidence that he relied in good faith on the advice of counsel, he submits, and thus he did not have specific intent to violate the law.

[18] [19]A defendant challenging the sufficiency of the evidence after a conviction by jury "bears a heavy burden." *United States v. Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013). On such an appeal, we review the record evidence "in the light most favorable to the government." *United States v. George*, 779 F.3d 113, 115 (2d Cir. 2015). The standard is well established that we must affirm if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original).

On review, we have no trouble locating record evidence that provided a rational basis for a jury to find that

Moseley was aware of the unlawful nature of his loans. At trial, Moseley admitted that he knew that he was lending at rates more than twice the rate allowed in New York.[14] He further acknowledged that he incorporated lending entities abroad to attempt to avoid the strictures of state usury laws. *See* App'x 1428-30. Other evidence showed that Moseley received numerous complaints from state attorneys general, including the New York State Attorney General, informing him that he was lending in violation of state laws that applied regardless of the lending entity's jurisdiction of incorporation. *See* Supp. App'x 131 (New York State Attorney General letter dated March 5, 2013, advising, "Please note that New York State's usury and licensing laws apply to foreign entities lending to individuals in the state."). Furthermore, the record reflects that, to evade regulatory action in certain states, Moseley stopped making loans through those of his lending entities that had come under scrutiny by state attorneys general, while continuing to lend through those that were not under scrutiny. Finally, the record shows—in tension with his advice-of-counsel defense—that one of his attorneys warned Moseley, "[Y]our business model carries substantial risk and is one that we would not have recommended." App'x 1574. This evidence and evidence like it provided ample basis for the jury to disbelieve Moseley when he purported not to know that his scheme was unlawful.

We therefore reject Moseley's sufficiency challenge to the scienter element of the offense.

***26 II. TILA Counts**

Turning to Moseley's conviction for violating the Truth in Lending Act, 15 U.S.C. § 1611, and related regulations: Moseley assails this conviction, too, on sufficiency grounds. To convict on a criminal TILA violation, the jury must find that the defendant, "willfully and knowingly," has "give[n] false or inaccurate information or fail[ed] to provide information which he [was] required to disclose." 15 U.S.C. § 1611(1).

Here, the operative indictment focused on Moseley's business's allegedly inaccurate "total of payments" disclosures to their borrowers. The TILA requires lenders to make various disclosures for all one-time loans. These include the following:

> (5) The sum of the amount financed and the finance charge, which shall be termed the "total of payments".
>
> (6) The number, amount, and due dates or period of payments scheduled to repay the total of payments.

15 U.S.C. § 1638(a)(5)-(6). The related regulations add more detail, linking the "payment schedule" and the "total of payments" disclosures as follows:

> (g) Payment schedule. ... [Defined as:] [T]he number, amounts, and timing of payments scheduled to repay the obligation.
>
> ....
>
> (h) Total of payments. The total of payments, using that term, and a descriptive explanation such as "the amount you will have paid when you have made all scheduled payments."

12 C.F.R. § 226.18(g)-(h). Both the statute and the implementing regulations focus on the lender's obligation to disclose the "payment schedule." In addition, the regulations tie the "total of payments" disclosure and the scheduled payments concept together by requiring, as part of the "total of payments" disclosure, a "descriptive explanation such as 'the amount you will have paid when you have made all scheduled payments.' " *Id.* Considering this language, we understand the "total of payments" disclosure to require display of the total dollar amount of the scheduled payments: principal plus the aggregate interest or fee.

[20]Moseley insists that his loan disclosures were accurate and fully in compliance with both statute and regulations. Once again, however, the record contains substantial evidence to the contrary and in support of the jury's guilty verdict: it shows that, on the typical Moseley loan document, the "total of payments" disclosure included just one finance charge in addition to the loan principal amount. This choice of display was made notwithstanding Moseley's knowledge (and in fact, his intention) that, unless the borrower acted, the total she would pay would amount to much more than a single finance charge, and that the "total of payments" had no upper limit at all except those arbitrarily imposed by Moseley's business, such as 40 or 45 charges.

TILA-compliant disclosures must reveal the "total of payments" under the payment schedule set *at the time of the loan disbursement*—not under an illusory payment schedule achievable only after the borrower undertakes steps described in fine print. This understanding is consistent with the regulations' requirement that the "total of payments" should disclose "the amount you will have paid when you have made all *scheduled* payments." 12 C.F.R. § 226.18(h) (emphasis added). Thus, a jury could rationally have found that Moseley's "total of payments" disclosure of just the loan principal plus one finance

charge—despite the fact that no such payment was actually scheduled—was inaccurate and misleading.

***27** Moseley insists that he could not have provided an accurate disclosure because there was no way to know what a borrower's "total of payments" would be. He argues that, because subsequent events would control the ultimate total paid, his disclosure was as accurate as he could make it, and points to 12 C.F.R. § 226.5(e) as anticipating this fluid and unpredictable situation. Section 226.5(e) provides: "If a disclosure becomes inaccurate because of an event that occurs after the creditor mails or delivers the disclosures, the resulting inaccuracy is not a violation of this regulation ...." Moseley's disclosure was already inaccurate at the time of the initial disbursement, however, as already discussed, and section 226.5(e) is therefore inapplicable here. Furthermore, the fact that the "total of payments" amount may be difficult to predict and will vary borrower to borrower does not somehow exempt Moseley from the obligation to disclose the potentially limitless "scheduled" amount. He could have advised borrowers accordingly.

We therefore conclude that adequate evidence supported the jury's guilty verdict under TILA.

III. Other Issues

Moseley offers a collection of additional arguments that challenge the sustainability of the district court proceedings. We identify no basis in them for disturbing the result reached.

A. Admission into evidence of borrower complaints

First, Moseley charges error in the district court's decision to allow the verbatim introduction of borrower complaints about Moseley's business. He argues that (1) they should have been excluded as hearsay under Fed. R. Evid. 801(c) and 802, (2) they were testimonial and their introduction violated his Sixth Amendment Confrontation Clause rights, and (3) they should have been excluded as unfairly prejudicial or cumulative under Fed. R. Evid. 403.

[21] [22]We review evidentiary rulings for clear abuse of discretion, requiring a showing of "manifest error" before we will consider taking any further action on appeal. *Cameron v. City of New York*, 598 F.3d 50, 61 (2d Cir. 2010).

[23] [24] [25]The familiar prohibition on hearsay statements addresses statements that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Evidence of customer complaints may be introduced to show the defendant's culpable state of mind, however, and when so used, they are not considered "to prove the truth of the matter asserted in the statement." *Id.* "[A] statement is not hearsay where ... it is offered, not for its truth, but to show that a listener was put on notice" of illegal acts. *United States v. Dupree*, 706 F.3d 131, 137 (2d Cir. 2013). Applying this rationale, we have specifically held that "evidence that there had been complaints which were called to [the defendant's] attention was relevant on the issue of [the defendant's] intent." *United States v. Press*, 336 F.2d 1003, 1011 (2d Cir. 1964). Here, borrower complaints about illegal practices by Moseley's business served to put Moseley on notice of their potential illegality. That he continued to operate his business despite this notice makes the complaints probative of his intent to violate the law. Furthermore, any impermissible effect was addressed by the district court's appropriate limiting instruction, which directed the jury to consider the complaints only for purposes of assessing Moseley's state of mind.

***28** [26] [27] [28]As to Moseley's Sixth Amendment Confrontation Clause argument arising from his inability to cross-examine the complaining borrowers: The purpose of the Confrontation Clause is "to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). The Confrontation Clause applies only when the evidence is "testimonial," and while courts debate the precise contours of the term "testimonial," the complaints at issue here do not present a borderline case. *See Crawford v. Washington*, 541 U.S. 36, 50-52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (listing definitions). Borrowers complained intending to seek relief from the onerous terms of Moseley's loans—not to provide evidence for eventual use in Moseley's prosecution.

[29]Finally, Moseley urges that the introduction of the full texts of borrower complaints, including potentially emotional details about the hardships brought on by Moseley's schemes, resulted in their probative value being outweighed by their prejudicial effect. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice ...."). We recognize that the

government could have demonstrated the fact of borrower complaints without introducing the complaints themselves verbatim, *see Press*, 336 F.2d at 1011 (the prosecution introduced just "evidence that complaints had been received"), but we do not identify a clear abuse of discretion in the district court's decision. The court observed that borrower witnesses would testify at trial to anguish expressed in their written complaints, and indeed, five borrower witnesses did, ultimately, testify at trial. Moseley did not object to the witness testimony. Although this issue presents a closer call than do Moseley's other evidentiary arguments, we agree that prejudice caused by introduction of the written complaints themselves was only marginal in these circumstances. We therefore defer to the district court's determination that this prejudice did not "substantially outweigh[ ]" the complaints' significant probative value in assessing Moseley's intent. Fed. R. Evid. 403. We perceive no abuse of discretion in the district court's decision to allow introduction of the complaints.

B. Sentencing: procedural unreasonableness

As to his sentence, Moseley attacks it as procedurally unreasonable. He purports to identify error in the district court's determination, as part of calculating the applicable United States Sentencing Guidelines range, that overall Moseley caused borrowers nationwide a loss of $49 million.

Under U.S.S.G. § 2B1.1, the sentencing court increases the defendant's offense level based on the "loss" to victims caused by his acts. *See* U.S.S.G. § 2B1.1(b)(1). Here, the district court increased Moseley's offense level by 22 points based on its valuation of the related loss at more than $25 million, but less than $65 million. *Id.* § 2B1.1(b)(1)(L)-(M). The result was a total offense level of 43. Combining this offense level with a criminal history category of I produced a Guidelines incarceration sentence of a life term. This result was modified by the district court's determination that the statutory maximum sentence was 996 months, or 83 years—also in effect a life sentence for any adult. At sentencing, the district court downwardly departed from the Guidelines, taking account of the statutory maximum, and ultimately sentenced Moseley to 120 months in prison.

[30] [31] [32]Notwithstanding the court's significant departure in Moseley's favor, ***29** we review the Guidelines calculation for error because the district court may have selected a different sentence had it started in the context of a different Guidelines range. *See United States v. Elefant*, 999 F.2d 674, 678 (2d Cir. 1993) ("[A] departure does not insulate an error in the calculation of the guideline range from which the departure is made, unless the District Court specifically states that it would have departed to the same level regardless of whether it had accepted the defendant's guideline arguments."). Under the Guidelines, the relevant loss amount must be established by a preponderance of the evidence; we review such a calculation for clear error. *See United States v. Brennan*, 395 F.3d 59, 74 (2d Cir. 2005). The "Guidelines do not require that the sentencing court calculate the amount of loss with certainty or precision." *United States v. Bryant*, 128 F.3d 74, 75 (2d Cir. 1997).

[33]We find no error in the district court's calculation. The district court arrived at a loss estimate of $49 million based on two factors: (1) Moseley's business netted $69 million in profits during the relevant time period, and (2) an employee estimated under oath that borrower authorization was obtained in only 30% of loans. The court estimated a $49 million cumulative loss to borrowers by taking 70% of $69 million, representing money obtained from borrowers who did not authorize loans.

Moseley assails this calculation technique as too crude in its assumptions. The Guidelines commentary provides, however, that "[t]he estimate of the loss shall be based on available information." U.S.S.G. 2B1.1 cmt. n.3(C). The calculation performed here was made in accordance with this standard using the evidence—admittedly limited—that was available.

Moseley also contends that, for purposes of calculating the loss amount, only the borrowers who complained to Moseley's business about non-authorization of a loan should be deemed to have been defrauded. The district court reached too far, he implies, by including as "loss" funds derived from all borrowers who were not contacted via phone. We reject this argument. Moseley cites no evidence in the record to suggest that his business used a mechanism for obtaining loan authorization other than telephone contact. It was therefore correct of the district court to treat 70% of the loans as unauthorized. That a borrower may have never objected to the loan does not mean that the process that led to it was free of fraudulent representations or that those borrowers were not defrauded in the process.

We therefore identify no error in the district court's calculation of the applicable loss amount or in its determination of Moseley's Guidelines range.

All Citations

980 F.3d 9

CONCLUSION

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

Footnotes

1 Because Moseley appeals his conviction by a jury, "our statement of the facts views the evidence in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor." *United States v. Rosemond*, 841 F.3d 95, 99-100 (2d Cir. 2016).

2 The Consumer Financial Protection Bureau advises, "While there is no set definition of a payday loan, it is usually a short-term, high cost loan, generally for $500 or less, that is typically due on your next payday. Depending on your state law, payday loans may be available through storefront payday lenders or online." *What is a Payday Loan?*, Consumer Financial Protection Bureau, https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567 (last visited Sept. 2, 2020); *see also United States v. Grote*, 961 F.3d 105, 109 (2d Cir. 2020) ("Payday loans are small loans typically to be repaid on the borrower's next payday.").

3 Moseley controlled several business entities that went by different names. These included SSM Group, LLC; CMG Group, LLC; DJR Group, LLC; BCD Group, LLC; and Hydra Financial Limited Funds I through IV. Because their functions were virtually identical and they were supported by a single administrative apparatus, we need not differentiate among them here, and we refer to their activities as a single "business."

4 Licensed lenders, in contrast, are allowed to charge interest rates of up to 25 %. *See* N.Y. Banking Law §§ 340, 356. Moseley's business was unlicensed, but his model generated charges that violated the licensed lenders' maximum rate as well.

5 At trial, Moseley attempted to demonstrate through testimony that borrowers "e-signed" the agreements when they inquired about loans. Substantial evidence to the contrary was adduced by the government, however. The jury could have concluded that those borrowers whom Moseley's staff did not contact by phone had no notice of loan terms and had no opportunity to accept (or reject) those terms before the related credits and debits began. In a similar vein, evidence also indicated that the business generated loan agreements bearing false e-signatures and purporting to show, inaccurately, that borrowers agreed to loans.

6 More specifically, the six counts were: (1) conspiracy to collect unlawful debts under RICO, in violation of 18 U.S.C. § 1962(d); (2) collection of unlawful debts, in violation of 18 U.S.C. §§ 1962(c) and 2; (3) conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; (4) wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; (5) aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1), 1028A(b), and 2; and (6) making false disclosures under TILA, in violation of 15 U.S.C. § 1611 and 18 U.S.C. § 2.

7 Unless otherwise noted, this Opinion omits from quoted language all internal quotation marks, brackets, alterations, and citations.

8 It provides:

> A person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or for[ ]bearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period. Criminal usury in the second degree is a class E felony.

N.Y. Penal Law § 190.40.

9 *See, e.g.*, *Nev. Dep't of Bus. & Indus. v. Check City P'ship*, 130 Nev. 909, 337 P.3d 755, 756 (2014) ("Nevada does not have a usury law, so there is no statutory cap on interest rates.").

10 We need not determine whether under New York law any of the three jurisdictions named in the choice-of-law provisions had "sufficient contacts with the transaction," *Int'l Minerals*, 96 F.3d at 592, because we conclude that the law of those places is unenforceable as a matter of public policy. One might reasonably wonder whether any of the three could pass the "sufficient

contacts" test, but our public policy conclusion makes the inquiry superfluous.

11 By statute, New York circumscribes the availability of civil usury laws as a shield for corporations, which almost by definition are more sophisticated than consumers, and may be wealthier as well. *See* N.Y. Gen. Oblig. Law § 5-521(1) ("No corporation shall hereafter interpose the defense of usury in any action."). Even so, and consistent still with its public policy concern about usury, New York law permits corporations to raise a *criminal* usury defense. *See id.* § 5-521(3).

12 Missouri law is substantially less strict with lenders than is New York law. For all lenders making unsecured loans of $500 or less, Missouri law prohibits borrowers from being required to "pay a total amount of accumulated interest and fees in excess of seventy-five percent of the initial loan amount on any single loan ... for the entire term of that loan and all renewals." Mo. Ann. Stat. §§ 408.500, 408.505(3). This prohibition thus allows lenders to require borrower payments of up to $175 on a $100 loan, regardless of the length of the loan term. The effect is to allow lenders to charge interest rates far above the New York caps. Even so, Missouri law would still disallow some (but not all) of the loans Moseley's business made, depending on how many times the borrower paid finance charges.

13 Since the contract was not negotiated, we do not consider the place of negotiation as a separate factor.

14 On cross-examination, Moseley answered as follows:

Q. Sir, you knew you were lending in excess of the usury laws of New York State, right?
A. Yes.
Q. You knew that you were charging more than double the limits of New York, right?
A. Yes.

App'x 1424.

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APPENDIX B

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 16 CR 79 (ER)

RICHARD MOSELEY, SR.,

Defendant.

----------x

New York, N.Y.
October 26, 2017
2:30 p.m.

Before:

HON. EDGARDO RAMOS,

District Judge

APPEARANCES

JOON H. KIM,
Acting United States Attorney for the
Southern District of New York
EDWARD IMPERATORE
DAVID ABRAMOWICZ
Assistant United States Attorneys

PERLMUTTER & McGUINNESS PC
Attorneys for Defendant
ADAM PERLMUTTER
DANIEL ADAM McGUINNESS
VICTORIA NICOLE MEDLEY

District that we're trying to -- we may have to enter a plea on in front of Judge Johnson, and we're trying to work out with the government a date that we can do that. We'd like to do it sooner rather than later. It's a very difficult case with a very difficult set of facts and circumstances, so we have an interest in trying to get that plea done.

THE COURT: Okay.

MR. PERLMUTTER: But it has not been scheduled yet, and I am going to confer with the government in the Eastern District today after about 4:00 p.m., and we'll see what we can tee up. If possible, I would see if I can maybe do it on, like, a Friday afternoon and then come do it later, so we can get as much of the day in as possible.

THE COURT: Yes. It's been many years. I don't know what Judge Johnson's scheduling practices are.

MR. PERLMUTTER: I don't either, Judge, to be quite honest. But if he doesn't do it, I'll see if we can have the magistrates do it, but I'll keep the Court and the parties posted. I apologize for that.

THE COURT: Okay. Well, let's see whether or not we will be able to accommodate you. And we certainly will if we can.

Still outstanding are the defendant's omnibus motions to dismiss Counts One, Two, and Five -- I guess it's Six now -- and for venue, et cetera.

I know that this issue affects other in limine motions that have been made, including for particular jury requests. It is the Court's decision that the motions to dismiss Counts One and two are denied, and the motion to dismiss Count Now six, the Truth In Lending Act motion, is denied. And I know that there is no case that has been brought to the Court's attention that is directly on point concerning the payday loans in the context of the entity being either offshore or in a state outside of New York, with victims either in the State of New York or other states where there are criminal usury laws, but it seems to me that the cases that are most like this case, the one most recently before Judge Castel and the one in the civil context before Judge Sullivan, which went up to the Second Circuit, indicated or certainly stand for the general proposition that one cannot absolve themselves of liability under New York's criminal usury laws by conducting their business outside of the State of New York.

Again, I acknowledge that it is not necessarily a home run in that regard, and that there is some nuance to the case law, but, on the whole, I am convinced that -- on the facts of this case, that not only is Mr. Moseley unable to avoid criminal liability here in New York by placing his businesses either in Missouri or offshore, but that if the Court were to go through the exercises of the conflict of loss analysis, that I would determine that New York law would apply because of the

importance of the public policy of New York in enforcing the anti-usury statutes.

With respect to the TILA count, I find that the indictment adequately sets forth the elements of the offense, adequately advises Mr. Moseley of the charges against him sufficient to allow him to put forth a double jeopardy defense in the event that he is subsequently indicted for a similar offense, and, therefore, that motion is dismissed as well.

The motion to dismiss on the basis of venue is also dismissed. The indictment adequately alleges that Mr. Moseley's businesses operated throughout the United States, including here in the Southern District of New York, and that he engaged in activities to unlawfully collect unlawful debt certainly here in the State of New York. Accordingly, venue is appropriate here.

I am going to deny as well Mr. Moseley's request to review the grand jury minutes. There has been an insufficient basis made to allow the Court to invade the purview of the grand jury's secrecy. There is, in fact, as far as I can tell in the papers, no particular allegation that the government even engaged in wrongdoing sufficient to allow the Court to review the grand jury minutes.

With respect to the discovery motions that have been made that were part of the omnibus motion, the government has recommended, just like the defense has represented, that it has

APPENDIX C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 16 Cr. 79 (ER)

RICHARD MOSELEY, SR.,

Defendant. Trial

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New York, N.Y.
October 30, 2017
9:32 a.m.

Before:

HON. EDGARDO RAMOS,

District Judge,
and a Jury

APPEARANCES

JOON H. KIM
Acting United States Attorney for the
Southern District of New York
BY: EDWARD A. IMPERATORE
DAVID M. ABRAMOWICZ
Assistant United States Attorneys

PERLMUTTER & MCGUINNESS, P.C.
Attorneys for Defendant
BY: ADAM D. PERLMUTTER, ESQ.
DANIEL A. MCGUINNESS, ESQ.
VICTORIA N. MEDLEY, ESQ.

ALSO PRESENT: JAKE SIDRANSKY, Paralegal Specialist, USAO
NICHOLAS SWANSON, Special Agent, FBI
RYAN REDEL, Special Agent, FBI

Mr. McGuinness has highlighted that Mr. Moseley took no action in response to complaints, the fact that he took no action is highly probative. The fact that these people are telling him about problems and issues and regulators, it's critically important to show Mr. Moseley's knowledge and intent when he takes no action in response to the complaints.

THE COURT: Okay. I'm going to allow the complaints to come in. I do believe that on the hearsay issue, it's very clear that these are not hearsay statements. They're not being brought in for the truth of the matter asserted, and I will give an appropriate instruction. And like we all do in this courthouse and courthouses around the country, we assume that the jury will understand and follow those instructions.

On the 403 argument, I think it is a slightly closer call, but on balance, I think that certainly my understanding, and based on some of the exhibits that I've seen, the nature of the complaints are similar to those that I assume will be talked about directly by victim witnesses. They are the same nature, the same type, the same systems that were used by Mr. Moseley and, therefore, are not prejudicial in that regard.

And also, based on the representation that there will only be several dozen, and as I understand the case, Mr. Moseley was made aware and his companies received I assume hundreds if not thousands of complaints over the years. So from that respect also, it's not unduly prejudicial.

So those complaints will come in.

Now on the expert issue, I've not had an opportunity to study carefully the government's letter, but Mr. Perlmutter, is it the case that you anticipate that these experts will testify, the two New Zealand and Nevis experts will testify as to the law of those jurisdictions and to the fact that his companies were legally established?

MR. PERLMUTTER: That's it, Judge. We're not having them testify as to the legality of interstate lending in the United States or whether he could engage in interstate and payday lending in New York. It's simply to rebut the allegation in the indictment that Mr. Moseley set up these companies as a sham. The fact is is that Mr. Moseley set them up completely in accordance with the laws of those jurisdictions and maintained them and had them properly registered and properly able to do business as entities from those jurisdictions. So -- and he is very scrupulous about doing that, and we think it's important for the jury to understand that, based on the advice of the attorneys that he received, he was very careful to make sure that those companies were properly set up, were properly registered, were properly sited, to the legal extent required to be in those jurisdictions.

THE COURT: But in light of my decision concerning the conflict of laws, even if they were to say all of that, so

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

– against –

RICHARD MOSELEY, SR.,

Defendant.

ORDER

16-CR-79 (ER)

RAMOS, D.J.:

For the reasons to be stated on the record at sentencing on June 12, 2018, the motion of Defendant Richard Moseley, Sr., for acquittal or a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33, respectively, is DENIED. The Clerk of Court is respectfully directed to terminate the motion, Doc. 159.

It is SO ORDERED.

Dated: June 7, 2018
New York, New York

Edgardo Ramos, U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 16 Cr. 79 (ER)

RICHARD MOSELEY, SR.,

Sentence

Defendant.

----------x

New York, N.Y.
June 12, 2018
11:15 a.m.

Before:

HON. EDGARDO RAMOS,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
EDWARD IMPERATORE
DAVID ABRAMOWICZ
Assistant United States Attorneys

DANIEL A. McGUINNESS
VICTORIA N. MEDLEY
Attorneys for Defendant

ALSO PRESENT: RYAN REDEL, Special Agent FBI

(Case called)

MR. IMPERATORE: Good afternoon. Edward Imperatore and David Abramowicz, for the government. With us at counsel table is Special Agent Ryan Redel with the FBI.

THE COURT: Good afternoon.

MR. McGUINNESS: Good afternoon. Daniel McGinnis, for Mr. Moseley, and I'm joined by cocounsel, Victoria Medley.

THE COURT: Good morning to you all.

This matter is on for sentencing. However, Mr. Moseley did file post-trial motions pursuant to Rules 29 and 33 for acquittal or for new trial. I indicated via short order last week that the motions were denied, and I would state the reasons therefor. So let me begin with that.

Under Rule 29, a district court will grant a motion to enter a judgment of acquittal on grounds of insufficient evidence if it concludes that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. A defendant challenging the sufficient of the evidence bears a heavy burden because the reviewing court is required to draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury verdict. Citing *United States v. Kozeny*, reported at 667 F.3d 122. Moreover, the jury verdict must be upheld if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The Second Circuit has emphasized that courts must be careful to avoid usurping the role of the jury when confronted with a motion for acquittal and not substitute its own determination of the credibility of witnesses, the weight of the evidence, and the reasonable inferences to be drawn for that of the jury.

With respect to Rule 33 on a motion for a new trial, the ultimate test is whether letting the guilty verdict stand would be a manifest injustice. Citing *United States v. Aguiar*, reported at 737 F.3d 251. The court must exercise its authority under Rule 33 sparingly and only in the most extraordinary circumstances. Put another way, a motion pursuant to Rule 33 should be granted only if the court finds a real concern that an innocent person may have been convicted.

Those standards are well-established and well-known to the parties, and I denied the motions in large part because Mr. Moseley's arguments essentially boiled down to believe me and believe what I testified to on my direct and cross-examination and do not credit the testimony of the government's witnesses. That is exactly what I am required not to do. And I find, moreover, that the government's case was, in fact, overwhelming. From almost the very beginning and certainly at least as early as 2006, it is clear that Mr. Moseley, as established at trial, was aware that his company was issuing loans to individuals who had not been told

what the terms of the loan were, who had not explicitly consented to being loaned those moneys.

Mr. Moseley was made aware of dozens, if not hundreds, of complaints that would come in on an almost daily basis into his office, of which he was very well aware from individuals complaining that they had seen deductions made from their bank accounts based on loans they had never agreed to. Mr. Moseley was made aware that his companies and his businesses were under scrutiny by various governmental agencies, regulatory agencies, state attorneys general advising him that they were made aware of loans that his companies were making, and under the law of those states, the loans that he was making were illegal.

Notwithstanding that, Mr. Moseley continued to conduct his businesses in that manner. And in that fashion, according to the government's evidence, issued hundreds of thousands of loans to individuals, many of which, the majority of which, were unaware that they had actually signed up for these loans, in fact, had not signed up for these loans, and brought in tens of millions of dollars.

Moreover, with respect to the Truth in Lending Act violation, it was imminently clear that the box advising the individuals upon whom these loans were imposed indicated that the total amount of the total cost of the loan would be the principal plus a one-time payment of 30 percent of that loan. And in many instances, indeed the majority of instances, that

turned out not to be the case, as it was not made clear in the loan documents that the interest would continue to accrue and the interest would continue to be deducted from their accounts until they made an express request to pay down the principal.

So the testimony of the government consisted of, I believe, 11 witnesses; many, many emails indicating the knowledge of Mr. Moseley and his employees in the way that they were doing business. It was overwhelming evidence, and I certainly was not left with any sense that an innocent man had been convicted.

So for those reasons and the reasons set forth in the government's very thorough response to the motion, the motion pursuant to Rules 29 and 33, again, is denied.

With that, let's move forward to sentencing. In preparation for today's proceeding --

MR. IMPERATORE: Your Honor.

THE COURT: I'm sorry.

MR. IMPERATORE: I apologize for interrupting the Court. I wanted to just -- if the Court would indulge me, I wanted to briefly respond to an argument made in the post-trial motion about the government's discovery production which we responded to during trial. I'd like to just amplify the record now, if the Court will permit me.

THE COURT: Very well.

MR. IMPERATORE: On page 4 of the defendant's