No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2021

JOHN GREGORY ALEXANDER HERRIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

ANTHONY R. GALLAGHER
Federal Defender
*MICHAEL DONAHOE
Deputy Federal Defender
Federal Defenders of Montana
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*Counsel of Record

SUBMITTED: October 22, 2021

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NOT FOR PUBLICATION

FILED

JUN 23 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN GREGORY ALEXANDER HERRIN, Defendant-Appellant.	No. 20-30130 D.C. No. 6:16-cr-00015-SEH-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted June 11, 2021*
Seattle, Washington

Before: GOULD, CLIFTON, and MILLER, Circuit Judges.

John Herrin appeals from his convictions for interstate transportation of stolen property and money laundering. We have jurisdiction. 28 U.S.C. § 1291. We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Reviewing de novo, *see United States v. Ward*, 747 F.3d 1184, 1188 (9th Cir. 2014), we conclude that there was no constructive amendment of the indictment. *See United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002). "[T]he proof offered at trial matched the charges made in the indictment." *United States v. Hartz*, 458 F.3d 1011, 1021 (9th Cir. 2006). Prosecutors have broad discretion in bringing charges. *United States v. Batchelder*, 442 U.S. 114, 124 (1979). The Grand Jury Clause was not violated because Herrin was neither tried for nor convicted of bank theft. That he might have been charged with that crime is irrelevant. That there was evidence at trial that might have suggested his guilt of that crime is also irrelevant. The evidence admitted was relevant to the charges for which he was tried, and it did not alter those charges. *See Hartz*, 458 F.3d at 1021.

We review the denial of a motion in limine[1] and the decision to admit evidence at trial for an abuse of discretion. *United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016). Whether evidence falls within the scope of Federal Rule of Evidence 404(b) is reviewed de novo. *United States v. Dorsey*, 677 F.3d 944, 951 (9th Cir. 2012). The evidence to which Herrin objected was relevant

[1] Herrin's motion was a motion in limine and not a motion to suppress because it sought to exclude evidence based on evidentiary grounds and not on grounds that the evidence was illegally obtained. *Compare Motion to Suppress*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("A request that the court prohibit the introduction of illegally obtained evidence at a criminal trial."), *with Motion in Limine*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("A pretrial request that certain inadmissible evidence not be referred to or offered at trial.").

under Rule 401 and was not "other act" evidence subject to Rule 404(b)'s constraints. *See* Fed. R. Evid. 401 (evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence . . . and the fact is of consequence in determining the action"); *United States v. Loftis*, 843 F.3d 1173, 1176 (9th Cir. 2016) ("Rule 404(b) applies solely to evidence of 'other' acts, not to evidence of the very acts charged as crimes in the indictment."). The evidence was directly relevant to "element[s] of the crime charged," principally that Herrin transported the money interstate and that Herrin had knowledge that the money was stolen. *See Loftis*, 843 F.3d at 1176 (citation omitted); 18 U.S.C. § 2314 (elements include proving that property was transported interstate and that defendant had knowledge that the property was stolen). The district court did not abuse its discretion in admitting it.

Reviewing de novo, *United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir. 2000), we conclude that the district court did not err in rejecting Herrin's proposed jury instruction and giving the instruction that it did. Because the evidence was relevant under Rule 401, the district court was not necessarily required to give a limiting Rule 404(b) instruction, but it was not error to give it. *See United States v. Rrapi*, 175 F.3d 742, 748–50 (9th Cir. 1999). A district court must consider a defendant's proposed jury instruction that covers the defendant's theory of the

case, *see United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011), but a defendant is "not entitled to an instruction in a particular form," *United States v. Keyser*, 704 F.3d 631, 641–42 (9th Cir. 2012). Herrin's proposed jury instruction was offered to prevent the jury from considering other-act evidence in deciding whether Herrin was guilty of the offenses charged in the indictment. However, the instruction the district court gave, which was patterned after this Circuit's model 404(b) jury instructions, served that purpose as well. *See* Ninth Cir. Model Crim. Jury Instrs. 2.10 & 4.3 (2018). It was proper for the district court to give the instruction it did. *See United States v. Thomas*, 612 F.3d 1107, 1122 (9th Cir. 2010).

AFFIRMED.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Montana

UNITED STATES OF AMERICA
v.
JOHN GREGORY ALEXANDER HERRIN

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 16-15-H-SEH

USM Number: 17460-046

Michael Donahoe (Appointed)
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

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

☑ was found guilty on count(s) after a plea of not guilty. I, II, III, IV, V, VIII, XI, XII, XIII

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2314	Interstate Transportation of Stolen Property	1/13/2014	I
18 U.S.C. § 1957	Money Laundering	7/15/2014	II, III, IV, V, VIII, XI, XII, XIII

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

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

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

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

6/15/2020
Date of Imposition of Judgment

Sam E Haddon
Signature of Judge

Sam E. Haddon, United States District Judge
Name and Title of Judge

6/16/2020
Date

DEFENDANT: JOHN GREGORY ALEXANDER HERRIN
CASE NUMBER: CR 16-15-H-SEH

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 30 months on Counts I, II, III, IV, V, VIII, XI, XII and XIII, all terms of confinement to run concurrently, one with the other.

☐ The court makes the following recommendations to the Bureau of Prisons:

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOHN GREGORY ALEXANDER HERRIN
CASE NUMBER: CR 16-15-H-SEH

SUPERVISED RELEASE

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

3 years on Counts I, II, III, IV, V, VIII, XI, XII and XIII, all terms of supervision to run concurrently, one with the other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

DEFENDANT: JOHN GREGORY ALEXANDER HERRIN
CASE NUMBER: CR 16-15-H-SEH

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: JOHN GREGORY ALEXANDER HERRIN
CASE NUMBER: CR 16-15-H-SEH

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant must provide United States Probation with any requested financial information and must not incur new lines of credit without prior approval of the probation office. The defendant must notify the probation officer of any material changes in his economic circumstances that might affect his ability to pay court-ordered financial obligations.

2. The defendant must apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other financial gains to outstanding court-ordered financial obligations.

3. The defendant must participate in a mental health program inclusive of gambling treatment that is approved by United States Probation. The defendant must remain in the program until he is released by the probation office in consultation with the treatment provider. The defendant must pay part or all of the costs of this treatment as directed by United States Probation.

4. The defendant must not engage in any form of gambling (including, but not limited to, lotteries, online wagering, sports betting) and must not enter any casino or other establishment where gambling is a primary purpose (e.g., horse racetracks, off-track betting establishments).

5. The defendant must submit his person, residence, place of employment, vehicles, and papers, to a search, with or without a warrant by any probation officer based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation. The defendant must warn any other occupants that the premises may be subject to searches under the terms of this condition. The defendant must allow seizure of suspected contraband for further examination.

6. The defendant must participate in and successfully complete a program of substance abuse treatment as approved by United States Probation. The defendant must remain in the program until he is released by the probation office in consultation with the treatment provider. The defendant must pay part or all of the costs of this treatment as directed by United States Probation.

7. The defendant must abstain from the consumption of alcohol and is prohibited from entering establishments where alcohol is a primary item of sale.

8. The defendant must participate in substance abuse testing to include not more than 365 urinalysis tests, not more than 365 breathalyzer tests, and not more than 36 sweat patch applications annually during the period of supervision. The defendant must pay part or all of the costs of testing as directed by United States Probation.

9. The defendant must not possess, ingest or inhale any psychoactive substances that are not manufactured for human consumption for the purpose of altering his mental or physical state. Psychoactive substances include, but are not limited to, synthetic marijuana, kratom and other synthetic stimulants such as bath salts or spice.

10. The defendant must not purchase, possess, use, distribute or administer marijuana, including marijuana that is used for recreational or medicinal purposes under state law.

DEFENDANT: JOHN GREGORY ALEXANDER HERRIN
CASE NUMBER: CR 16-15-H-SEH

CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 900.00	$	$ N/A	$ N/A	$ N/A

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

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

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

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

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

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

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: JOHN GREGORY ALEXANDER HERRIN
CASE NUMBER: CR 16-15-H-SEH

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $ _____ due immediately, balance due

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

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

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

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

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

F ☑ Special instructions regarding the payment of criminal monetary penalties:
Special assessment shall be immediately due and payable. While incarcerated, criminal monetary penalty payments are due during imprisonment at the rate of not less than $25 per quarter, and payment shall be through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk, United States District Court, P.O. Box 8537, Missoula, MT 59807 **Assessment John Gregory Alexander Herrin **.

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

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

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

FILED
1/16/2020
Clerk, U.S. District Court
District of Montana
Helena Division

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

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JOHN GREGORY ALEXANDER HERRIN,** **Defendant.**	**CR 16-15-H-SEH** **VERDICT**

1. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

_____Not Guilty

__X__Guilty

of the offense of Interstate Transportation of Stolen Property as charged in count I of the indictment.

2. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

_____Not Guilty

__X__Guilty

of the offense of Money Laundering as charged in count II of the indictment.

3. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

_____Not Guilty

__X__Guilty

of the offense of Money Laundering as charged in count III of the indictment.

4. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

_____Not Guilty

__X__Guilty

of the offense of Money Laundering as charged in count IV of the indictment.

5. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

_____Not Guilty

__X__Guilty

of the offense of Money Laundering as charged in count V of the indictment.

6. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

__X__ Not Guilty

_____ Guilty

of the offense of Money Laundering as charged in count VI of the indictment.

7. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

__X__ Not Guilty

_____ Guilty

of the offense of Money Laundering as charged in count VII of the indictment.

8. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

_____ Not Guilty

__X__ Guilty

of the offense of Money Laundering as charged in count VIII of the indictment.

9. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

__X__ Not Guilty

_____ Guilty

of the offense of Money Laundering as charged in count IX of the indictment.

10. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

X Not Guilty

__ Guilty

of the offense of Money Laundering as charged in count X of the indictment.

11. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

____ Not Guilty

X Guilty

of the offense of Money Laundering as charged in count XI of the indictment.

12. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

____ Not Guilty

X Guilty

of the offense of Money Laundering as charged in count XII of the indictment.

13. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

____ Not Guilty

X Guilty

of the offense of Money Laundering as charged in count XIII of the indictment.

14. We, the Jury, in the above-entitled matter, unanimously find the defendant, John Gregory Alexander Herrin,

X Not Guilty

____ Guilty

of the offense of Attempted Witness Tampering as charged in count XIV of the indictment.

DATED this 16 day of January, 2020. Foreperson signature redacted. Original document filed under deal.

FOREPERSON

FILED
2/19/2020
Clerk, U.S. District Court
District of Montana
Helena Division

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GREGORY ALEXANDER HERRIN, Defendant.	CR 16-15-H-SEH **ORDER**

Defendant Herrin was convicted of one count of interstate transportation of stolen property and eight counts of money laundering on January 16, 2020, following a jury trial.[1] A Renewed Motion for Acquittal under Fed. R. Crim. P. 29(c), or, in the alternative, a Motion for a New Trial under Fed. R. Crim. P. 33was filed on January 30, 2020.[2] The motion is opposed.

The Court has considered each of the several arguments advanced or renewed in support of the motion. All, in substance, were raised by Defendant's

[1] *See* Doc. 93.

[2] Doc. 98.

Fed. R. Crim. P. 29 motion at the close of the government's case. None, individually, warrants ordering a judgment of acquittal. Nor do the asserted grounds collectively warrant a new trial under Fed. R. Civ. P. 33.

Under Fed. R. Civ. P. 29, the Court must decide, after viewing the evidence in the light most favorable to the prosecution, "whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[3] Given the evidence produced at trial, the Court cannot say or conclude that a rational trier of fact could not have found Defendant guilty beyond a reasonable doubt of the charges for which he was found guilty.

Alternatively, the Court may grant a new trial under Fed. R. Civ. P. 33 "if the interest of justice so requires."[4] The "decision to grant or deny a new trial is within the sound discretion of the district court."[5] A motion for a new trial "should be granted 'only in exceptional cases in which the evidence preponderates heavily against the verdict.'"[6]

---

[3] *United States v. Sharif*, 817 F.2d 1375, 1377 (9th Cir. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[4] Fed. R. Civ. P. 33(a).

[5] *United States v. Steel*, 759 F.2d 706, 713 (9th Cir. 1985).

[6] *United States v. Showalter*, 569 F.3d 1150, 1157 (9th Cir. 2009) (quoting *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981)).

Defendant has not shown that the evidence preponderates heavily against the verdict. The interests of justice do not require a new trial.

ORDERED:

Defendant's Renewed Motion for Acquittal Under Rule 29(c) Fed. R. Crim. P. and Alternative Motion for New Trial Under Rules 29(d) and 33 Fed. R. Crim. P.[7] is DENIED.

DATED this 19th day of February, 2020.

Sam E. Haddon

SAM E. HADDON
United States District Judge

[7] Doc. 93.

FILED
1/10/2019
Clerk, U.S. District Court
District of Montana
Helena Division

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN GREGORY ALEXANDER HERRIN, Defendant.	CR 16-15-H-SEH **ORDER**

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

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

ORDERED:

Defendant's Motion to Suppress Evidence[2] is DENIED.

[1] Doc. 13.

[2] Doc. 13.

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

DATED this 10th day of January, 2019.

Sam E. Haddon

SAM E. HADDON
United States District Judge

FILED

JUL 26 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN GREGORY ALEXANDER HERRIN, Defendant-Appellant.	No. 20-30130 D.C. No. 6:16-cr-00015-SEH-1 District of Montana, Helena ORDER

Before: GOULD, CLIFTON, and MILLER, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judge Gould and Judge Miller have voted to deny the petition for rehearing en banc, and Judge Clifton so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc (Docket Entry No. 36) are DENIED.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 95. Racketeering (Refs & Annos)

18 U.S.C.A. § 1957

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

Effective: October 5, 2012
Currentness

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this subsection is greater.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the

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Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title.

CREDIT(S)

(Added Pub.L. 99-570, Title I, § 1352(a), Oct. 27, 1986, 100 Stat. 3207-21; amended Pub.L. 100-690, Title VI, §§ 6182, 6184, 6469(a)(2), Nov. 18, 1988, 102 Stat. 4354, 4377; Pub.L. 102-550, Title XV, §§ 1526(b), 1527(b), Oct. 28, 1992, 106 Stat. 4065; Pub.L. 103-322, Title XXXIII, § 330020, Sept. 13, 1994, 108 Stat. 2149; Pub.L. 103-325, Title IV, § 413(c)(2), Sept. 23, 1994, 108 Stat. 2255; Pub.L. 109-177, Title IV, § 403(c)(2), Mar. 9, 2006, 120 Stat. 243; Pub.L. 111-21, § 2(f)(2), May 20, 2009, 123 Stat. 1618; Pub.L. 112-186, § 4(b)(2), Oct. 5, 2012, 126 Stat. 1429.)

Notes of Decisions (159)

18 U.S.C.A. § 1957, 18 USCA § 1957
Current through PL 117-51.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 103. Robbery and Burglary (Refs & Annos)

18 U.S.C.A. § 2113

§ 2113. Bank robbery and incidental crimes [Statutory Text & Notes of Decisions subdivisions I to III]

Effective: November 2, 2002
Currentness

<Notes of Decisions for 18 USCA § 2113 are displayed in multiple documents.>

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense,

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kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means--

(1) a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 796; Aug. 3, 1950, c. 516, 64 Stat. 394; Apr. 8, 1952, c. 164, 66 Stat. 46; Pub.L. 86-354, § 2, Sept. 22, 1959, 73 Stat. 639; Pub.L. 91-468, § 8, Oct. 19, 1970, 84 Stat. 1017; Pub.L. 98-473, Title II, § 1106, Oct. 12, 1984, 98 Stat. 2145; Pub.L. 99-646, § 68, Nov. 10, 1986, 100 Stat. 3616; Pub.L. 101-73, Title IX, § 962(a)(7), (d), Aug. 9, 1989, 103 Stat. 502, 503; Pub.L. 101-647, Title XXV, § 2597(l), Nov. 29, 1990, 104 Stat. 4911; Pub.L. 103-322, Title VI, § 60003(a)(9), Title XXXII, § 320608, Title XXXIII, § 330016(1)(K), (L), Sept. 13, 1994, 108 Stat. 1969, 2120, 2147; Pub.L. 104-294, Title VI, §§ 606(a), 607(d), Oct. 11, 1996, 110 Stat. 3511; Pub.L. 107-273, Div. B, Title IV, § 4002(d)(1)(C)(ii), Nov. 2, 2002, 116 Stat. 1809.)

Notes of Decisions (1342)

18 U.S.C.A. § 2113, 18 USCA § 2113
Current through PL 117-51.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 113. Stolen Property (Refs & Annos)

18 U.S.C.A. § 2314

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Effective: January 2, 2013
Currentness

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof; or

Whoever transports, transmits, or transfers in interstate or foreign commerce any veterans' memorial object, knowing the same to have been stolen, converted or taken by fraud--

Shall be fined under this title or imprisoned not more than ten years, or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this section is greater. If the offense involves the transportation, transmission, or transfer in interstate or foreign commerce of veterans' memorial objects with a value, in the aggregate, of less than $1,000, the defendant shall be fined under this title or imprisoned not more than one year, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.

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For purposes of this section the term "veterans' memorial object" means a grave marker, headstone, monument, or other object, intended to permanently honor a veteran or mark a veteran's grave, or any monument that signifies an event of national military historical significance.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 806; May 24, 1949, c. 139, § 45, 63 Stat. 96; July 9, 1956, c. 519, 70 Stat. 507; Pub.L. 87-371, § 2, Oct. 4, 1961, 75 Stat. 802; Pub.L. 90-535, Sept. 28, 1968, 82 Stat. 885; Pub.L. 100-690, Title VII, §§ 7057, 7080, Nov. 18, 1988, 102 Stat. 4402, 4406; Pub.L. 101-647, Title XII, § 1208, Nov. 29, 1990, 104 Stat. 4832; Pub.L. 103-322, Title XXXIII, § 330016(1)(K), (L), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 112-186, § 4(d)(1), Oct. 5, 2012, 126 Stat. 1429; Pub.L. 112-239, Div. A, Title X, § 1084(a), Jan. 2, 2013, 126 Stat. 1963.)

Notes of Decisions (1426)

18 U.S.C.A. § 2314, 18 USCA § 2314
Current through PL 117-51.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 213. Limitations (Refs & Annos)

18 U.S.C.A. § 3282

§ 3282. Offenses not capital

Effective: April 30, 2003
Currentness

(a) In general.--Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

(b) DNA profile indictment.--

(1) In general.--In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

(2) Exception.--Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to--

(A) the limitations period described under subsection (a); and

(B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment.

(3) Defined term.--For purposes of this subsection, the term "DNA profile" means a set of DNA identification characteristics.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 828; Sept. 1, 1954, c. 1214, § 12(a), formerly § 10(a), 68 Stat. 1145; renumbered Pub.L. 87-299, § 1, Sept. 26, 1961, 75 Stat. 648; Pub.L. 108-21, Title VI, § 610(a), Apr. 30, 2003, 117 Stat. 692.)

Notes of Decisions (471)

18 U.S.C.A. § 3282, 18 USCA § 3282
Current through PL 117-51.

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reasonably under the rules for the United States -- I'll simply address the issues when they are presented.

MR. RACICOT: Thank you, Your Honor.

THE COURT: Mr. Donahoe, you've made your record.

MR. DONAHOE: Yeah. I -- you know, I -- Your Honor, I did want to say -- I mean, in light of the comment, that my purpose here is just to have an informed court and an informed opponent. And these issues are very sensitive. And I don't want to get before another court at a later time being called upon to explain why I did or did not do certain things.

These evidentiary issues will arise during the trial. But they'll transform to sufficiency issues once the evidence closes.

I'm prepared to make all my objections in stride with the progress of the trial.

THE COURT: Mr. Donahoe, you're certainly entitled to defend the case as you think appropriate. And we will rule as matters are presented to us.

MR. DONAHOE: I'm confident that will happen.

THE COURT: All right.

Very good.

Now, I want to just close this session with one observation. The note that was handed to me concerning the conduct of a prospective juror, one Sean Poston Manners, has been retained by the court. I'm going to deliver that to the

THE COURT: Of course.

MR. DONAHOE: Something you want to let me bring up. Since this came up before we broke for lunch about this motion and the content, my objections to the admissibility of the evidence, would it be more convenient for me to make one global objection and ask for a continuing objection?

Or, I mean, how does the court want to handle that?

THE COURT: I don't have a preference. If you think you can adequately address the matter in one objection, and we'll hear Mr. Racicot's response, and then I'll make a ruling.

MR. RACICOT: I would have no -- no -- take no issue with that, Your Honor, if that's his preference.

MR. DONAHOE: All right.

So, basically, the objection would be 401 relevance. Then, that the government is required for any other acts evidence to include bank statements, using a stick to get in the truck, trips to Las Vegas, bank deposits, anything of that nature that proves that he was the stealer of the money, Mr. Herrin, is 404(b) evidence, and must be articulated foundation-wise for some 404(b) purpose.

So, it's not logically relevant. It's not 404(b). It should be run through 403. It's more prejudicial than probative in the final analysis. There's been no grand jury indictment for Mr. Herrin as the thief, and the statute of limitations has expired on any claim that Mr. Herrin is the

thief. So all of those things in their totality, individually and together, standing alone and in combination, would be my objection.

THE COURT: All right.

Mr. Racicot, your response.

MR. RACICOT: Thank you, Judge.

We believe that all of that evidence that we plan to introduce is directly relevant under Rule 401, because it's going the help establish knowledge on Mr. Herrin's behalf that the money was stolen, and prove, in fact, that the money was stolen, which are two of the required elements for Count One in the indictment, the interstate transportation of stolen property.

THE COURT: All right.

Well --

MR. RACICOT: Thank you.

THE COURT: -- to the extent I can, I am going to deny the request to exclude at this point. And Mr. Donahoe, if you feel it necessary to protect your record to renew your motion previously made, you may state it in summary fashion for the record.

MR. DONAHOE: Okay. I'll do that, Your Honor.

THE COURT: And then, I'll address it as appropriate. Any reason not to bring in the jury at this time?

MR. RACICOT: No, Your Honor.

Q Did you ask that these photographs be taken as a part of your investigation?
A Yes.
Q Why did you do that?
A To show a representative similar-type bag that was missing.
Q So you wanted to see a representative sample to the bag that went missing on November 20th of 2013?
A Yes.
Q And are all four pictures contained in Government's 10 true and accurate representations of the load bags that appeared on that day?
A Yes.

MR. RACICOT: I'd move for the admission of Government's 10.

MR. DONAHOE: Objection. Relevance, no foundation.

THE COURT: Overruled. It's admitted.

Before we move on, each one of these bags that appears in this part of the exhibit in turn appears to be a container holding a -- some amount of cash money. Am I correct about that?

THE WITNESS: Yes, sir.

THE COURT: Is the amount of cash money that's supposedly in the bag in any way recorded on any of these documents that are attached to the outside of the bag?

A An ATM load bag, this one destined for a Wells Fargo ATM in Kalispell, ATM Number 569 -- I'm sorry -- 5796 M, as in Mary. This bag also shows on its label: "Date: 12/4/13," and it is the amount on it also -- it also has the amount -- excuse me -- of the $20 notes, which in this case is $90,000, and $50 notes, and in this case, it's $65,000, for a total said to contain amount of a hundred and fifty-five thousand dollars.

Q So, Mr. Prell, how, if at all, does the photograph of the bag in page 1 of Exhibit 11 relate to your investigation of the money that was missing on November 20th?

A It would show a bag similar in size to the Wells Fargo Bank bags missing.

Q And this, again, is a four-page exhibit. Have you reviewed all four of the photographs of this bag in Government's 11?

A Yes.

Q And do all four photos truly and accurately represent what the bag looked like on December 4th of 2013?

A Yes.

MR. RACICOT: I'd move for the admission of Government's 11.

MR. DONAHOE: Objection. Relevance, no foundation.

THE COURT: Yes. Objection is noted.

The objection is overruled.

The exhibit will be received.

MR. DONAHOE: Same objections.

THE COURT: Yes. The objection is noted. The objection is overruled. The exhibit is received.

Q (BY MR. RACICOT) And again, if we could look at the balance and payment information on the top of page 1 of Government's 19.

A This shows the total credit limit has been raised to $12,000. The new balance is $6,602. He has a minimum payment due of a hundred and sixty-five dollars.

Q If we could zoom out.

And in the middle of the page, if we could highlight the payment information.

A On February the 2nd, he makes an online payment of 8,000. And on the 7th, he makes a payment of $10,064.

Q And Agent DeVantier, am I correct that some of the information contained on Government's 19 is duplicative of information in Government's 18?

A It is.

Q So, there was some overlap in the time frame of records that you obtained?

A It is.

Q If we could look at page 3 of the document, please, of Government's 19. If we could look at the payment information in the middle of the page.

What information is contained here?

please.
A This is showing a ticket out of St. Louis, Missouri, via Minneapolis and Minneapolis into Las Vegas. Mr. Herrin took the trip on June 17th of 2014 and returned the same day.
Q And did you see information in Mr. Herrin's other records that indicated he traveled to Las Vegas from St. Louis area on June 17th?
A I did.
Q Agent DeVantier, I'm going to show you what's been marked as Government's Exhibit 26, which is not yet in evidence. This is a nine-page exhibit.
Do you recognize the first page of government's Exhibit 26?
A I do. This is Allegiant airlines information.
Q And is all nine pages of Government's 26 information you obtained from Allegiant?
A Yes.
Q And have you reviewed all nine pages?
A I have.
Q And are they true and accurate copies of the records you receive from Allegiant?
A They are.
MR. RACICOT: I'd move for the admission of Government's Exhibit 26.
MR. DONAHOE: Objection. Relevance under 401. The

government needs to state a 404(b) purpose under 404(b)(2). They're inadmissible, in any event, under Evidence Code 403. There's no grand jury indictment showing Mr. -- or alleging that Mr. Herrin is the thief. And the statute of limitations has expired.

THE COURT: Counsel, we don't need a speech. I need an objection to the exhibit if there is one.

MR. DONAHOE: That would constitute my objection.

THE COURT: All right.

Overruled.

Subject to being connected up by other evidence, the exhibit is received.

Q (BY MR. RACICOT) Agent DeVantier, now that the jury can see page 1, can you just briefly summarize the information contained on page 1.

A Yes. This is showing that he took a flight -- Mr. Herrin took a flight on Sunday, March 23rd, from Bozeman to Las Vegas. And the amount is $251, or thereabouts.

Q And we saw the trip to France in Exhibit 25 leaving on March 24th. Did your research indicate that Mr. Herrin took this flight down to Las Vegas in order to leave for France?

A Yes.

Q If we could look at page 9 of Exhibit 26, please.

If we could zoom in on the middle portion of the exhibit, please.

What information's contained in the middle page of this -- of page 9 of 26 that was important to your investigation?
A As you well know, a lot of times we all book tickets, and maybe for whatever reason don't take the flight. We wanted to ensure that Mr. Herrin actually did take the flight. This information shows that he actually did board the plane on Sunday, March 23rd.
Q And is that the reference to "boarded" that we've zoomed in on?
A Correct.
Q I'm going to show you what's been marked as Government's Exhibit 27, which is not yet in evidence. This is an 11-page exhibit.
Did you recognize page 1 of Government's 27?
A I do.
Q And have you reviewed all 11 pages of the exhibit?
A I have.
Q Are these true and accurate copies of additional records you received from Allegiant airlines?
A They are.
MR. RACICOT: I'd move for the admission of Government's 27.
MR. DONAHOE: Same objections.
THE COURT: Objection's noted. The objection is overruled, subject to the statements of the court with the

Q And are the pages true and accurate copies of records you received from Wells Fargo?
A They are.
Q Does this relate to Mr. Herrin's checking account?
A It does.
MR. RACICOT: I'd move for the admission of Government's 13.
MR. DONAHOE: Same objections, Your Honor.
THE COURT: Objections as made are noted.
The objection is overruled. The exhibit is received.
Q (BY MR. RACICOT) If we could zoom in on the deposit ticket, please.
What information is contained on this deposit ticket?
A It shows that he deposited into his checking account ending in 8094 on January 7th, 2014, a cash deposit of $37,370, and a check in the amount of a hundred and twenty-three thousand five hundred dollars, for a total deposit of a hundred and sixty thousand eight hundred and seventy dollars.
Q Agent DeVantier, have you had an opportunity to review the indictment in this case?
A I have.
Q Does this deposit on January 7th correspond to Count Two of the indictment?
A It does.
Q If we could see page 2 of the exhibit. If we could zoom

in on the check, please.

And what is this, Agent DeVantier?

A This is the check issued by Aria Resort and Casino out of Las Vegas for winnings for John Herrin in the amount of a hundred and twenty-three thousand five hundred dollars. The check issue date was -- excuse me -- was January 5th, 2014.

Q And that constitutes the check portion of the January 7th deposit?

A It does.

Q I'm going to show you what's been marked as Government's Exhibit 14, a one-page exhibit.

Do you recognize Government's Exhibit 14?

A I do.

Q What is it?

A It is another deposit slip for Wells Fargo Bank.

Q Is it for John Herrin's checking account?

A It is.

Q And what's the date?

A It is January 30th, 2014.

Q Is this a true and accurate copy of a document you received from Wells Fargo?

A It is.

MR. RACICOT: I'd move for the admission of Government's 14.

MR. DONAHOE: Same objections.

A It's an application for a bank and savings account with Wells Fargo Bank.
Q Have you reviewed all of the pages of Government's Exhibit 15, all 69?
A I have.
Q And what is the other information contained in the exhibit?
A It shows that John Herrin opened this account with his mother and father.
Q And how about the rest of the records, do they contain monthly statements?
A It does, yeah. And the account was opened back in December of 2003.
Q Are all 69 pages of Government's Exhibit 15 true and accurate copies of documents you received from Wells Fargo?
A They are.
MR. RACICOT: I'd move for the admission of Government's 15.
MR. DONAHOE: Same objections.
THE COURT: Same objection is noted. The objection is overruled. The exhibit is received.
Q (BY MR. RACICOT) So, Agent DeVantier, the jury can now see page 1. Can you go ahead and walk them through the information contained on this application?
A Yes. It shows that it's Wells Fargo Bank; that he's

Exhibit 16, which is not in evidence.

Agent DeVantier, Exhibit 16 is a 12-page document.

Can you tell the jury what's contained on page 1.

A Yes. It's consumer account application for Wells Fargo for premier checking.

Q And have you reviewed all 12 pages of Government's Exhibit 16?

A I have.

Q And are these the monthly statements for Mr. Herrin's savings account?

A Yes.

Q The account that ends in 2888?

A It is.

MR. RACICOT: I'd move for the admission of Government's 16.

MR. DONAHOE: Same objections.

THE COURT: Yes. The objection is noted. The objection's overruled. The exhibit is received.

Q (BY MR. RACICOT) Agent DeVantier, now that the jury can see page 1 of Government's 16, can you walk them through the information contained on this page.

A It shows that he opens a Wells Fargo savings account in Helena, savings account number ends in 2888. Coincides with his checking account ending in 8984. And he opens it on the 31st of January 2014.

received from Wells Fargo?
A They are.
MR. RACICOT: I'd move for the admission of Government's 17.
MR. DONAHOE: Same objections.
THE COURT: The objection as made is noted. The objection is overruled, as previously stated. The exhibit is received.
Q (BY MR. RACICOT) Agent DeVantier, I'm going to ask to zoom in on the top portion of the balance summary portion of this statement, and have you walk the jury through the information contained as of December 20th to January 18th, 2013.
A Yes. It shows a previous balance that he brought forward of $1,332. Fees and interest in the amount of $25,017 -- or $25 and $17, respectively. The new balance is $1,393. At that time, his credit limit is twenty-five hundred dollars.
Q And below that, is there some payment information?
A Yes. A minimum payment due of $82.
Q I'll have you look at the top of page 2 of Exhibit 17.
What information is contained on page 2 that was relevant to your investigation?
A It just shows annual program fee for the card, I would presume, in the amount of $19. There is a late fee charged of $25. Interest in the amount of $17.

Q Are these records, again, that you received from Wells Fargo pursuant to a subpoena?
A It is.
Q And are all five pages of Government's 18 true and accurate copies of records you received from Wells Fargo?
A They are.
MR. RACICOT: I'd move for the admission of Government's 18.
MR. DONAHOE: Same objections.
THE COURT: The objection, as repeated, is noted. The objection is overruled. The exhibit is received.
Q (BY MR. RACICOT) Agent DeVantier, now that the jury can see this document, first of all, there's some handwriting at the top. Is that your handwriting?
A It is.
Q And I think we'll see some additional highlighting throughout the document, as well. And again, is that information you added to the document as you were reviewing it?
A It is.
Q Why does this document look different than Government's Exhibit 17, the monthly statements for 2013?
A Like I stated, we got initial information for a specific amount of time, so it looks different than when we subpoenaed for the entire amount of his records.
Q So we don't need to get specific in transactions on this

20?
A I do.
Q And what is Government's Exhibit 20?
A It is a signature card for U.S. Bank for John Herrin.
Q Are the additional pages of Government's 20 the statements that correspond to this account?
A They are.
Q Have you reviewed all 13 pages?
A I have.
Q Are they true and accurate copies of documents you received from U.S. Bank?
A Yes.
Q And do they pertain to Mr. Herrin's account?
A Yes.

MR. RACICOT: I'd move for the admission of Government's 20.

MR. DONAHOE: Same objections.

THE COURT: Yes. The objection is noted. The objection is overruled, subject to the prior rulings of the court. The exhibit is received.

Q (BY MR. RACICOT) Agent DeVantier, go ahead and walk the jury through page 1 of Exhibit 20, if you would.
A Yes. This is just showing that he has a U.S. Bank account signature. He opens it in -- it's blocked by the signature in 2014. It looks to be June.

from Rocky Mountain Credit Union in this case?
A We did.
Q Is Exhibit 21 the records you obtained from Rocky Mountain Credit Union?
A It is.
Q Have you reviewed all four pages of the exhibit?
A I have.
Q And are they true and accurate copies of the documents you received from Rocky Mountain Credit Union?
A They are.
Q Do they relate to Mr. Herrin's account at Rocky Mountain Credit Union?
A It does.

MR. RACICOT: I'd move for admission of Government's 21.

MR. DONAHOE: Same objection.

THE COURT: The objection previously made and renewed is noted. The objection is overruled. The exhibit is received.

Q (BY MR. RACICOT) So, if we could zoom in first on just the top portion of the document.

What information is contained on the top portion of this document?
A His name, and then the dates July 1st, 2014, through July 31st, 2014.

statement on the 31st, $7,209.
Q And Agent DeVantier, in your review of Rocky Mountain Credit Union records, was there anything else notable about the information you received from Rocky Mountain Credit Union as it relates to Mr. Herrin's activity there?
A I don't believe so.
Q I'm going to have you look at Government's Exhibit 22, which is a three-page document, not yet in evidence.
Is this another Rocky Mountain Credit Union statement?
A It is.
Q For December of 2014?
A It is.
Q Did you review all three pages of this exhibit?
A I have.
Q And are these documents, again, true and accurate copies of information you received from Rocky Mountain Credit Union?
A Yes.
Q For Mr. Herrin's account?
A Correct.
MR. RACICOT: I'd move for the admission of Government's 22.
MR. DONAHOE: Same objections.
THE COURT: The objection previously made and renewed is noted. The objection's overruled. The exhibit is received.
Q (BY MR. RACICOT) If we could zoom in on the account

Q If we could see page 3.
What's page 3 of Government's Exhibit 22?
A It's showing that the account is closed, and John Herrin's signature, December 17th, 2014.
Q I'm finished with that exhibit.
Thank you.
And Agent DeVantier, you also mentioned that you received some tax information from Mr. Herrin; is that right?
A I did.
Q I'm going to show you what's been marked as Government's Exhibit 23, which is a four-page exhibit.
Do you recognize page 1 of Government's Exhibit 23?
A I do.
Q And what is Government's Exhibit 23?
A It's his tax return for 2013.
Q And did you review all four pages of Government's Exhibit 23?
A I did.
Q Is it true and accurate copies of information you received concerning his taxes?
A It is.
MR. RACICOT: I'd move for the admission of Government's 23.
MR. DONAHOE: Same objections.
THE COURT: The objection is noted. It is overruled.

A Yes.
Q Concerning Mr. Herrin's 2014 taxes?
A They are.
MR. RACICOT: I'd move for the admission of Government's 24.
MR. DONAHOE: Same objections.
THE COURT: The objection is noted. It is overruled. The exhibit is received.
Q (BY MR. RACICOT) So Agent DeVantier, does the top portion contain the same information, just John Herrin's name, et cetera?
A It does.
Q So, if we could focus on the income portion of the form on page 1.
Can you walk the jury through that information.
A It shows income in the amount of $13,319. It shows a business loss of $82,246. Excuse me. Other -- another loss of $2,000. Line 21, other income in the amount of 241,000, for a combined amount total income of $170,073. Excuse me.
Q That's quite all right. I've been asking you to talk a lot.
If we could go ahead and skip to page 3 of the document. If we could zoom in on just boxes 38 to 56 there.
And Agent DeVantier, when you're ready, could you walk the jury through that information.

with anyone in any manner until the case is fully and finally submitted to you for your deliberations and your verdict.

You are to keep an open mind on all issues, without any conclusions being drawn or opinions expressed to yourself or to anyone else, until this case is fully and finally submitted and you retire to the jury room to commence and carry out your deliberations.

Keep an open mind until then.

It is ten past the hour. We will return to the courtroom at -- we'll return to the courtroom at 10:30.

We'll give you a few minutes to have a cup of coffee and have some refreshments, if they are available.

Madam Clerk, if you'll escort the jury out, please.

(The following proceedings were had in open court, outside the presence of the jury, beginning at 10:10 a.m.:)

THE COURT: Be seated, please, counsel.

The jury has retired from the courtroom.

Is there anything counsel wish to take up before we commence our break?

MR. RACICOT: Nothing from the government.

MR. DONAHOE: Your Honor, I just wanted to make sure that -- I'm confident that the court heard my objection. And that --

THE COURT: It's on the record.

MR. DONAHOE: Yeah. That it was under 401, 404(b), 403, no grand jury indictment, and statute of limitations under 3182 has expired.

THE COURT: Some of those, Mr. Donahoe, are in addition to what you stated on the record earlier.

I will consider the record supplemented to include all objections you wish to have of record concerning the communication between Mr. Herrin and the agent that the court allowed to be presented to the jury.

MR. DONAHOE: No, Your Honor. I'm talking about the records. I want to be clear here.

My consistent objections --

THE COURT: Are you talking about your record you made to the -- as an objection to the admission of this statement by the agent?

MR. DONAHOE: No. No. I'm not talking about the statement.

THE COURT: Then, you need to clarify to the court what you're talking about.

MR. DONAHOE: I'm talking about the banking records, the IRS records, those objections all along the way.

THE COURT: All right.

You have been granted what amounts to and you should consider a continuing objection to all of these records that have been introduced, starting with, I believe, Exhibit 13 and

Mr. McAlpin, was there ever a time when you locked the keys to truck 326 on the truck?
A I couldn't tell you if I locked them in, or if Mr. Herrin locked them in, but the keys were locked inside the vehicle when both of us were outside the vehicle.
Q And that was a time when you were working with Mr. Herrin?
A Correct.
MR. DONAHOE: Objection. I want to make my objections here, 401, 404(b), 403, no grand jury indictment, statute of limitations.
THE COURT: Your objections are noted. I'll allow the questions.
This is background related to use of the truck.
A Can you repeat that, please.
THE COURT: Go ahead.
MR. RACICOT: Thank you, Your Honor.
Q (BY MR. RACICOT) Did you say you were working with Mr. Herrin when that happened?
A Correct.
Q Where were you, if you recall?
A We were in Kalispell at the First Interstate Bank.
Q And do you remember when, approximately, in relation to November 20th of 2013?
A Oh, it was a month or so prior to that.
Q So, a month or so before the money went missing?

heavy, so it was nice to have somebody open the doors for you, so no, the policy was not always followed.

Q And would the times when the truck was unattended, did that tend to happen if you were delivering a particularly large amount of items into a bank or business?

A Yes.

Q Did you yourself, were there times when you and whoever else you were working with would leave the truck unattended?

A Yes.

Q Was there ever a time where you left the truck unattended where you locked yourself out of the truck?

A Yes.

Q Can you tell the jury when you recall that happening.

MR. DONAHOE: Objection. 401, 404(b), 403, no grand jury indictment, statute of limitations.

THE COURT: Overruled.

You may answer the question, sir.

A Yes. It -- there were several times it happened. Like, one in particular, we were in Great Falls. I was with John Herrin. We are in the big truck, the fed truck. We were using a -- we had locked the key in the truck. And we were able to -- and I don't recall which one of us did it, but we were able to climb onto the roof. And you could pry open the vent cover from the outside. And you could stick something long, like either a broom handle, or some kind of rod, and hit the button

Q And what is it?
A It is deposit tickets for First Security Bank going into two separate checking accounts.
Q Is this part of a CTR report that you filed in 2014?
A Yes, it is.
Q And actually, is this part of one of two CTR reports that you filed in 2014?
A Yes, it is.
Q And are both of those CTR reports in Exhibit 36?
A Yes.
Q And were you able to review all -- sorry -- all 14 pages of Exhibit 36?
A Yes.
Q And are they true and accurate copies of the two CTR reports you filed?
A Yes.

MR. KAKUK: Your Honor, I offer Exhibit 36 into evidence.

MR. DONAHOE: Objection. 401, 404(b), 403, no grand jury indictment, and statute of limitations.

THE COURT: The objections are noted. The document will be received subject to the explanation the court has made earlier.

You may go ahead.

MR. KAKUK: Thank you, Your Honor.

Q (BY MR. KAKUK) Ms. Mann, now that the jury can see this exhibit.
Can we blow-up the first portion here, the deposit ticket.
Can you see that better?
A Yes.
Q What is that?
A Deposit slip into a checking account for Watson Law Office, PC.
Q And what date?
A I believe this one was deposited on March 10th, 2014.
Q And the amount?
A Nine thousand five hundred dollars in cash.
Q How can you tell it was in cash?
A At the top of -- or the side where it indicates "currency and coin," the amount is listed in the currency section. And at that time, the tellers were -- normally circled "currency" and initialed saying that they verified the amount.
Q I'm sorry. And you said this is for the Watson Law Office?
A Yes.
Q Why is John -- the name "John Herrin" written in there?
A I would guess that that would mean John Herrin would be a client or potential client of Watson Law Office. But I don't know that. I would just assume that that's what it is.
Q Thank you.

2014.

Q And have you actually had an opportunity to review the other pages that are part of Government's Exhibit 32?

A Yes.

Q Are they all true and accurate copies of documents that are kept in the ordinary course of business by Ameritrade?

A Yes.

Q And do they all pertain to Mr. Herrin?

A Yes.

I'd move for the admission of Government's 32.

MR. DONAHOE: Objection. Relevance, 401, 404(b), 403, no grand jury indictment, statute of limitations has expired.

THE COURT: The objections are noted. Overruled. The exhibit is received.

Q (BY MR. RACICOT) Ms. Hough, the jury can now see page 1 of Government's Exhibit 32.

Could you walk them through the information contained on this document.

A Yes. Page 1 of the January 2014 statement identifies the account number, identifies the name of the account holder, John Gregory Alexander Herrin, as well as his address. It then gives you a portfolio summary of the investments, the current cash investments in the account total was $22,775.73. The opening balance was zero. The securities purchased current of

different bank accounts, the Wells Fargo, U.S. Bank, Rocky Mountain Credit Union, that John Herrin transferred money either in or out of his TD Ameritrade account from.

Q And again, that's information that's maintained by Ameritrade?

A That's correct.

Q I'll have you look at the first page of what's been marked as Government's Exhibit 33, which is not yet in evidence.

Do you recognize Government's 33?

A Yes. That is the 2014 tax statement for John Herrin's account.

Q And did you have a chance to review all of Government's Exhibit 33?

A Yes.

Q And is it a continuation of the 2014 tax statement?

A It is, yes.

MR. RACICOT: I'd move for the admission of Government's 33.

MR. DONAHOE: Same objections.

THE COURT: The objection's noted in its entirety. Overruled.

The exhibit is admitted.

Q (BY MR. RACICOT) So again, Ms. Hough, the jury can now see page 1 of Exhibit 33.

A Yes.

jury an idea. Again, is this all involved with Mr. Herrin's trading -- margin trading?
A It is, yes.
Q So, do these figures necessarily bear any relationship to the actual dollars he put into the account or the actual money he lost or won?
A I'm sorry. Could you say that again.
Q Do these numbers bear any direct relationship to real dollars put into the account?
A No. It has a lot to do with the margin, also.
Q Okay.
A Attributable to the account.
Q I'm going to have you look at page 1 of Government's Exhibit 34, which is not yet in evidence.
Do you recognize Government's Exhibit 34?
A Yes. That is the 2015 tax statement on Mr. Herrin's account.
Q So, is that the same document as Government's 33, but for the next year?
A It is. Yes.
MR. RACICOT: I'd move for the admission of Government's 34.
MR. DONAHOE: Same objections.
THE COURT: The objection's noted.
Overruled.

Q And does it relate to a vehicle owned by Mr. John Herrin?
A Correct, it did.
Q And is each and every page a true and accurate copy of the application and attachments that you submitted?
A It sure is. It came directly from the DMV. It was submitted from our office. This is a true image.
MR. KAKUK: At this point, I'd like to offer Exhibit 35 into evidence, Your Honor.
MR. DONAHOE: Same objections. 401, 404(b), 403, no grand jury indictment, statute of limitations has expired.
THE COURT: The objection is noted.
It is overruled.
The exhibit is received.
MR. KAKUK: Thank you, Your Honor.
Q (BY MR. KAKUK) Mr. Wysocki, now that the jury has a chance to see the exhibit, is that your signature at the bottom, sir?
A Yes, sir, it is.
Q And can you tell when you -- maybe we should blow-up that bottom portion.
Can you tell when you submitted this application?
A This was on the 3rd day of February, 2015.
Q Thank you.
If we could skip to page 4.
Is this part of that same application, sir?

THE COURT: All right.

The record will reflect this witness has identified the defendant here in the courtroom.

MR. RACICOT: Thank you, Your Honor.

Q (BY MR. RACICOT) Mr. O'Neil, was the first interaction you had with Mr. Herrin on January 7th of 2014?

A Yes.

Q I'd like to show you what's been marked and received into evidence as Government's Exhibit 13.

If we could zoom in on the deposit ticket, please.

Mr. O'Neil, do you recognize Government's Exhibit 13?

A Yes, I do.

Q Does this deposit ticket correspond to the first interaction you had with Mr. Herrin?

A Yes.

Q So would you --

MR. DONAHOE: Your Honor, if I could, I'd like to incorporate all my objections to the exhibit.

THE COURT: You may do so --

MR. DONAHOE: And his testimony.

Thank you.

THE COURT: -- Mr. Donahoe. And you will have a continuing objection. Although, this matter is already in evidence. This particular exhibit.

Go ahead, counsel.

John came in. There was kind of a couple people in front of him. I noticed he had a big shoe box with him.

MR. DONAHOE: I would make the same set of objections.

THE COURT: You may have the objection, Mr. Donahoe.

The objection is, as previously stated, is noted as received -- restated at this time.

The objection is to what, Mr. Donahoe? You've stated the objection. But I'm not sure what you are objecting to.

MR. DONAHOE: Your Honor, this is separate visit to the bank.

THE COURT: I understand.

MR. DONAHOE: I'm just making the same set of objections, 401, 404(b), 403, no grand jury indictment, and statute of limitations has expired.

THE COURT: All right.

The objection to questions related to this second visit to the bank that occurred on -- what date was it, counsel?

MR. RACICOT: January 30th of 2014, Your Honor.

THE COURT: January 30, those objections are overruled.

The witness will be allowed to testify concerning the encounter that occurred on January 30, 2014.

Q (BY MR. RACICOT) Mr. O'Neil, can you tell the jury first before you get into more of a narrative explanation, what time

MR. DONAHOE: Your Honor, I'd like to make my same set of objections, please.

THE COURT: You may.

The record will so reflect.

The objections to the line of questioning that's being undertaken are at this point overruled.

You may proceed.

MR. RACICOT: Thank you, Your Honor.

Q (BY MR. RACICOT) Go ahead, Ms. Tierney. Did you have interactions with John Herrin, a customer at Wells Fargo in January of 2014?

A Yes.

Q I'd like to show you what's been received into evidence as Government's Exhibit 13.

If we could zoom in on the deposit slip.

Do you recognize Government's Exhibit 13?

A Yes, I do.

Q Was that the first interaction that you had any involvement with Mr. Herrin on January 7th of 2014?

A Yes.

Q Where -- what Wells Fargo Bank installation did that interaction take place?

A The main branch on Last Chance Gulch.

Q And can you tell the jury what you remember about what your interaction was with Mr. Herrin that day?

THE COURT: Be seated, everyone.

The record will show that the jury has departed the courtroom. We are continuing in open court session. Counsel for the parties are present. The defendant is present.

The government has rested its case. The defendant has indicated that there are matters to be addressed in the absence of the jury at the close of the evidence.

And Mr. Donahoe, you may proceed.

MR. DONAHOE: Thank you.

So, Your Honor, I want to work backwards. I guess I want to go to the last count. And that would be, I guess, Fourteen. Let me make sure of that.

THE COURT: I think it is Fourteen, counsel.

MR. DONAHOE: Yeah.

So, I want to go there and move to dismiss that under Rule 29 and Jackson versus Virginia, which I cited in my Rule 29 papers. That would be ECF 75 and 76. I cited Jackson versus Virginia, and give a little bit of an exposition of what the standard is there.

The government's case fails on venue grounds there. First, because the text was received in Nevada. And although, maybe there's law -- cases that talk about it being sent from a particular place. And that district or jurisdiction would be in play, as well, for venue purposes. There's absolutely no proof as to where Mr. Herrin was at the time the text was sent,

assuming, without conceding, that it was actually sent.

Second, the proof is wanting on the ground that the government has the resources to get the phone records, to get copies of the texts. We don't have a verbatim recital of what was said. Again, assuming, without conceding, that the text was actually sent.

So, based on a complete failure of proof and on venue grounds, we'd move to dismiss Count Fourteen.

Insofar as the remaining counts are concerned, I guess we're at the juncture that I anticipated in the filings that I made; would be ECF 75 and 76.

I'd also like to point out that these arguments were raised throughout the course of this case in ECF 13, 14, 20, and 31. They would be our pretrial papers that I'm sure the court is familiar with. And 31 being the trial brief that we filed.

Basically, what the argument here is is that A, the government has not indicted Mr. Herrin for being a thief of the money. There's no count in this indictment to that effect. The government concedes that openly.

And this is where the rubber meets the road here. All of the proof that we've objected to throughout the course of the trial, pretrial, in the Ninth Circuit briefing, in the Supreme Court cert. petition, is at issue now. And there's nothing that the government put forward that shows other than the fact

that Mr. Herrin was the thief.

It is their profound contention, the government's, that Mr. Ailer was not the thief. That Mr. McAlpin was not the thief. That no other Garda employee took the money.

And therefore, all the suspicion must focus on Mr. Herrin. The proof, likewise, shows through FBI Agent DeVantier that the sole reason that we're here is to rely on records of banking activities, trips, spending, and bank deposits and the like collectively; that that money represents the money that was taken from truck 326 on November 20, 2013.

There is no proof in this record that that is so. None. It's a circular argument. Because of the amount of money, it has to be the money that was -- that went through the accounts and the spending and the trips and so on.

It has to be the money that was taken from the truck.

But there's no proof, no videos, no ledgers, no serial numbers, no video cameras, nothing. Mr. Herrin is not present, at, or near truck 326 on the day in question when the money goes missing. There's independent proof that the bags could have been mistakenly transferred to the Missoula shuttle truck, and that would have been the fed's truck -- the fed truck's first meeting of the day on that particular Wednesday in Missoula.

I'd like to bear down, Your Honor, on the standard. And this is important, I think, in this case. And I would beg Your

Honor to take cognizance of this important fact: The standard that is at issue now for Your Honor is whether there's evidence from which a reasonable jury could conclude and reach a reasoned verdict based on the evidence that was presented one way or the other.

And I took pains to go into that, and that's the Jackson versus Virginia standard, which quotes an older case by the Supreme -- or by the -- maybe the D.C. Circuit Court called Curley. C-U-R-L-E-Y.

And the court in there talks about what this standard is. And that standard has not been met in this case. All of the counts, One through Thirteen, rely on the fact that the money was stolen under Count One.

And all of the proof that goes to Count One with the money being stolen, is that Mr. Herrin is the thief. So we have clear legal violations of the grand jury indictment clause. Clear legal violation of the statute of limitations in 3282, Title 18. All of that proof is insufficient on its face, either on its merits, or on its technicalities, to show that Mr. Herrin was the thief.

It can't be a freestanding proposition that because an individual runs -- I'll pick a number -- somewhere between 250 and $300,000 through his or her checking account, credit card accounts, Ameritrade accounts, that that money had a particular providence, unless there's independent proof of that

providence.

So, for all those reasons, Your Honor, this entire case should be dismissed. And it should be dismissed now.

The jury shouldn't even have to deliberate on it.

Thank you, Your Honor.

THE COURT: All right.

Mr. Racicot, I'd like to hear your response.

MR. RACICOT: Thank you, Your Honor.

Judge, I know you're well versed with the standard for Rule 29. But it's whether any reasonable juror could convict Mr. Herrin of the counts in the indictment if they view the evidence in a light most favorable to the government.

I'll start with Mr. Donahoe's first argument as it relates to the venue allegation for Count Fourteen. We just heard from Ms. Nguyen that her recollection is that the text message was sent by Mr. Herrin within a few days of her arrival -- their arrival back in the United States from France.

And Government's Exhibit 19, pages 8 and 9, Mr. Herrin's credit card statements for his Wells Fargo Visa credit card show charges back in Montana. We have flight records that indicate he flew back into Missoula, Montana, on March 31st. And then there's charges in Montana beginning on April 1st and continuing through April 5th. That's pages 8 and 9 of Government's Exhibit 19. Those are charges in Helena, Montana, Deer Lodge, Montana, Helena, Montana, Whitehall, Montana, and

this is just complete error here to give this instruction. I don't know how the jury would process that.

Then, on top of that, I'll discuss now my proposed Number 1, which would be document Number 27 that I filed last year at this time or around this time.

And that instruction taken from the Beacham case is an expressed exposition of how this 404(b) evidence should have been handled throughout the course of the trial. And in particular now, at the end of the trial, so that the jury could understand in its particulars how all of that other act evidence would be used.

So, I would submit that the instruction proposed in Document Number 27 in the record should take the place of this instruction if the court were so inclined to try and correct things now.

I think that would be pretty much it, Your Honor.

THE COURT: All right.

I think I understand your position, Mr. Donahoe. You have stated it repeatedly throughout the course of the trial. And by way of some additional explanation, the court has endeavored to incorporate your arguments with reference to --

MR. DONAHOE: Oh, and one other thing, Your Honor, I did want to take up with you. I wanted to offer an apology to Your Honor. I probably got a little ahead of myself here yesterday. And I didn't mean to do that. I don't mean ever to

lockers could be accessed without a key, at least one locker, just by punching in the code. And we know Mr. Herrin knew that, because he worked on that truck. And you can infer that he knew those Kalispell bags would not be missed for a while. That truck has to make runs all over Missoula, up Highway 93 to Kalispell before anybody's going to get into locker 13 to try to deliver those three bags.

So what might have happened to the money? Maybe Mr. Herrin followed the truck to Missoula that day. We know Curt McAlpin and Clay Olson were working. But maybe he followed it over there. Maybe he wore his uniform in order to blend in. Waited for McAlpin and Olson to leave the truck, used a broom handle to open the truck, opened locker 13, took the bags, and drove back to Helena several hours before anyone at Garda realized the money was even missing.

And then the fingers were pointed to all the employees who were working that day, and Mr. Herrin wasn't. You can infer that based on the evidence here. There's enough evidence to draw that conclusion. But you don't need to answer that question.

You only need to address the counts in the indictment and the elements for those counts. So let's start with Count One, interstate transportation of stolen money. And you have the elements instruction; it will be with you in the jury room.

But essentially they are that Mr. Herrin transported

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Criminal Docket
No. 16-15-H-SEH

JOHN GREGORY ALEXANDER HERRIN,

Defendant.

TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS

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

BEFORE THE HONORABLE SAM E. HADDON

UNITED STATES DISTRICT JUDGE

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

Proceedings recorded by mechanical stenography, transcript produced by computer.

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

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The following proceedings were had:

THE COURT: Good morning, everyone.

Be seated, please.

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

CLERK OF COURT: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

The defendant, as the court understands his position,

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

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

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

defendant.

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

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

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

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

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

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

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

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

to take.

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

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

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

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

And the court will address the issue as follows:

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

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

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

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

Excuse me, counsel.

I think that sets the stage and the background.

Mr. Donahoe, you may proceed.

MR. DONAHOE: Thank you, Your Honor.

We would call Mr. Arnold Ailer.

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

name, Mr. Donahoe?

MR. DONAHOE: Spell his name, Your Honor?

THE COURT: Yes. Please.

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

THE COURT: Yes.

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

THE COURT: All right.

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

THE WITNESS: Yes, sir.

CLERK OF COURT: Please raise your right hand.

THE WITNESS: Yes, ma'am.

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

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

Mr. Donahoe, you may proceed.

MR. DONAHOE: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. DONAHOE:

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

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

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

A Yes, sir.

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

A Yes, sir.

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

A Yes, sir.

Q And you were present with your attorney?

A Yes, sir.

Q And would you identify who your attorney is.

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

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

A Yes, sir.

Q And you've retained that counsel?

A Yes, sir.

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

A Yes, sir.

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

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

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

Q All right.

Tell me what your job was at GardaWorld?

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

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

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

A Yes, sir.

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

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

Q Okay.

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

A Yes, sir.

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

A Yes, sir.

Q And you could maybe stock ATMs?
A Yes, sir.
Q Okay.
Now, on November 20, 2013, did you have some sort of rendezvous with another GardaWorld truck early in the day?
A Yes, sir. With the date what we discussed before, yes, sir, it would the -- what they called the fed truck from Helena -- from here, yes, sir. Yep.
Q All right.
Would you tell me and explain to the Judge concisely what the fed truck is?
A As far as I understood it, they brought over all the money that was either for, like, Missoula from the bank here. Yes, sir. Yeah.
And then they give us what was supposed to be delivered in Missoula, and then take off. Yes, sir. Yeah.
Q And then they'd go on some other route?
A Yes, sir.
Q Okay.
A Yes, sir. Yeah.
Q So, you would meet up with this fed truck?
A Yes, sir.
Q Now, do you recall, as you're here today, actually having that meeting in November of 2013?
A I don't remember that day. But I was driving that day,

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

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

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

Q And what time would that have been, approximately?

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

Q So fairly early in the morning?

A Yes, sir.

Q Okay.

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

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

Q So, the doors on each truck open?

A Yes, sir. At the back there.

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

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

Q Okay.

So, like shutters in a window?
A Yes, sir. Yeah. You just open it up, yes, sir (witness indicating).
Q Okay.
And then the trucks sort of marry together by backing into one another?
A Yes, sir.
Q Is there a purpose to that?
A I guess to be close, yes, sir, as far as I knew.
Q When the transfer is made and on this particular occasion, where were you sitting in your truck?
A Driver's seat. Yes, sir. I was the driver that day. I would be, yes, sir, in the driver's seat.
Q And do you have a helper on your truck?
A Yes, sir. You've got the guy that's in the back.
Q All right.
And does he have a name or a title?
A They call him -- what did they say? The jumper or messenger.
Q The messenger?
A Yes, sir.
Q Okay.
So who was your messenger on this day we're talking about; do you remember?
A Yeah. It was Chris was his name, young fellow. The only

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

Q So you had a meeting with the government?

A Yes, sir.

Q With government counsel?

A Yes, sir.

Q And you refreshed recollection and remembered that --

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

Q All right.

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

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

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

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

Q So that would have been your job?

A Yes, sir.
Q All right.
Does the messenger do anything with the bags? Does he call out numbers? Anything of that nature?
A At the end of it when we start to take off, yeah, he calls out how many pieces we got, yes, sir.
Q Okay.
So this money that's transferred from one truck to another, how is it packaged? Is it in cellophane? Is it in paper bags? Is it -- can you describe that to me.
A Plastic bags. I believe it's plastic bags, sealed plastic bags. And then they got the coins in these cardboard boxes. And the coins that got the different colors for the coinage on it; quarters and nickels and dimes and pennies and whatnot.
Q Okay.
So, do these bags have numbers on them?
A Yes, sir. Yeah. They got the serial numbers on them, yes, sir.
Q So there's some kind of manifest or inventory concerning what's moving from one truck to the next truck?
A Yes, sir.
Q All right.
Is there a process that you guys go through, your messenger and you as the driver and perhaps the people in the other truck, to ensure that there's an accurate exchange?

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

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

Q Okay.

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

A Yes, sir.

Q Okay.

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

A Yes, sir. Absolutely, sir. Yep.

Q And what would you do after that?

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

Q All right.

Anything unordinary about this particular day?

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

Q The fed truck?

A No, sir.

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

A No. No, sir.

Q Nobody called you and told you that that day?
A That day, that I can remember, no. Like I said, if any calls would come from -- that I know from working there, any calls that would come would go to the manager. And then he would call us. But I don't remember getting any calls that day from anybody.
Q Did you subsequently learn that money may have been transferred erroneously to your truck?
A No. No, sir.
Q Nobody ever told you that?
A No, sir.
Q Did anybody endeavor ever to question you about that from GardaWorld?
A Yes, sir. There was -- well, I don't know if it was for that, or whatever. But, yeah. They had some fellows come -- investigator fellows come in to the office there at one time there, yes, sir.
Q And they were from the GardaWorld company?
A That's what Bruce Reese, the manager, said, yes, sir.
Q All right.
Bruce Reese was your manager in Missoula?
A Yes, sir.
Q Okay.
And these other folks that apparently worked for GardaWorld that were going to investigate, did they come from

afar?
A I don't know. They just said they worked for the company.
Q Okay.
So you don't know their point of origin?
A No. No, sir.
Q Did you speak with these individuals that wanted to investigate something, apparently, that you were not aware of?
A Briefly, yes, sir.
Q So, can you tell me about that.
A Oh, yeah. No, they just said they wanted to talk about monies missing. I said, well -- I gave them my lawyer's business number. "Yeah. Call him. We can set something up with it."
Yes, sir.
Q All right.
Did you ever subsequently meet with them?
A No, sir.
Q Did you ever meet with a detective from the Missoula police department named Stacy Lear?
A No, sir. No, sir.
Q All right.
So, did you later learn that money was missing from the truck? A lot of money?
A No. Because we just always hear about money missing, like I said, from the manager, Bruce Reese, and Aaron Johnson was

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

Q All right.

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

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

Q All right.

Once in a while?

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

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

A Yes, sir.

Q And it just shut down there?

A Yes, sir.

Q All right.

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

A No, sir. No, sir.

Q Have you stolen any money from GardaWorld?

A No, sir.
Q Did you have attempted contact from the police in Missoula, the local police, trying to speak with you about such activity?
A Yes, sir.
Q And can you tell me about that.
A Got a call from -- I don't remember who it was. It was somebody -- I know it was a lady from -- from Missoula Police Department, and that's when I just called my lawyer. I said: "Hey, I got somebody calling me from Missoula Police Department."
And he just took it from there.
Q Okay.
A Yes, sir.
Q Fair enough.
So, did you ever have a sit-down with that person?
A No, sir.
Q Nobody ever made inquiry of you directly about any money that was missing from GardaWorld?
A No, sir.
MR. DONAHOE: I don't have anything further.
Thanks.
THE COURT: You may examine, Mr. Racicot.
MR. RACICOT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. RACICOT:

Q Good morning, Mr. Ailer.

A Good morning, sir.

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

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

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

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

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

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

sir. That was the route Monday through Friday.
Q So, for the larger period of time that you worked for Garda, your route involved meeting people from Providence and other medical installations and picking up the results of medical tests, blood tests, and that sort of thing?
A Yes, sir.
Q And then later on, and for a shorter period of time that you worked for Garda, you handled the armored truck deliveries?
A Yes, sir. And did that, too. Yes, sir.
Q And still worked as what you were calling a courier, as well --
A Yes, sir.
Q -- doing the medical routes?
A Yes, sir.
Q And one thing, Mr. Ailer, you and I have to be careful not to talk over one another, so the court reporter can get down what I say, and then what you say, and then back and forth; okay?
A Yes, sir. Sorry.
Q That's okay.
Mr. Donahoe asked you if you ever took money from Garda in November of 2013. Did you ever take money from Garda at any time while you were employed for Garda?
A No, sir. No, sir.
Q Did you ever take money out of an ATM that you were

servicing for Garda?
A No, sir.
Q Did you ever take any other property that you were supposed to courier for Garda and take that property?
A No, sir.
Q Mr. Donahoe asked you about the trucks backing up close to one another. And the back of those trucks both had double doors; correct?
A The -- what we drove here in Missoula had the one door. Had a big ol' door, yes, sir.
Q So, you'd open your one big door, they would open their one or two doors if they had two, back the trucks up close together?
A Yes, sir.
Q Was the stuff that you were transferring, the bags of money and the boxes of coin, heavy?
A Coin is, yes, sir.
Q Is one of the reasons the trucks were backed up close to one another in order to make that transfer easier, because of the weight that you were transferring back and forth?
A I assume so. That would make it easier, yes, sir.
Q And was that also maybe to ensure safety and security during the transfer?
A Yes, sir. That would make sense, yes, sir.
Q As opposed to, say, parking a couple hundred feet away and

wheeling handcarts back and forth, or something like that?
A Oh, yes, sir. Yes, sir.
Q You said that as the driver on this -- whoop, excuse me -- on this local route, that as the driver, your job was basically to look around, you know, keep watch, essentially?
A Yes, sir.
Q And then when the transfer was over, to take note of how many pieces, how many bags of money and boxes of coin your truck had accepted from the other truck?
A Yes, sir.
Q And it's your understanding that your messenger, working in concert with either the driver or messenger from the fed truck, would actually be checking serial numbers on the bags to try to make sure they got the right stuff?
A Yes, sir.
Q Okay.
So, you had specific bags and boxes you were supposed to get from the fed truck?
A Yes, sir. Yes, sir.
Q But your job as the driver was just to know the gross number. How many things you were getting?
A Yes, sir. The total, yes, sir.
Q Mr. Ailer, at the end of the day, these Wednesdays when the fed truck was making its run, you would meet the fed truck again at the end of the day; is that right?

A Yes, sir. There at the office.
Q And then you would give them things that now they were supposed to take back to Helena?
A Yes, sir.
Q And those would be things you had picked up from other stops on your route?
A Yes, sir.
Q For instance, if you're meeting with the fed truck and then one of your other stops is a bank because you're going to service an ATM, you would take whatever money is left in that ATM and put in the new amount of money; correct?
A Yes, sir.
Q And then you would take that leftover money, and at the end of the day, you would transfer that back to the fed truck, and they would take that back to Helena?
A Yes, sir.
Q Okay.
And do you remember meeting with the fed truck at the end of the day on November 20th of 2013?
A No, sir, I do not. No, sir.
Q Do you assume that you did, because that was standard procedure for the fed truck run?
A Yes, sir. Yeah. You would either -- if you got back before they did, you would just take off on your next courier route. But I can't remember that particular day, no, sir.

Q Okay.

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

A No, sir.

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

You don't remember any conversation like that?

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

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

A No, sir.

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

A No, sir. No, sir.

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

did November 20th, 2013, stick out to you in any way?
A No, sir. No, sir.
Q And when you were -- when the Garda investigator attempted to interview you after November 20th of 2013, did you know it was specifically about that day?
A No, sir.
Q Do you think back then you would have known that that's what it was about? Would you have heard, as you say, these rumors that money had gone missing and would you know that's why they were there then, and you just don't remember now?
A No. Because like I said, Mr. Reese never did talk about just that -- money is missing, you know. And, you know, that's where they found it, or whatever happened with it, that kind of stuff. But I don't remember anything saying dates and anything like that, no, sir.
Q And when the Garda investigator attempted to interview you, am I correct that you did not refuse to be interviewed, you just said: "Here's my lawyer's card. If you want to interview me, talk to my lawyer and set it up through my lawyer"?
A Yes, sir. Certainly. Yes, sir. Yep.
Q And why did you do that?
A Well -- at least my family have always been that way, when it comes to -- like I said, you know, if something's wrong with my electrical, I call an electrician. If something's wrong

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

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

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

Q Okay.

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

A Yes, sir.

Q Tell me about that.

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

Q So I'm going to break that down a little bit. Your family had a cleaning business in Virginia?
A Cleaning and maintenance business, yes, sir.
Q And what kind of cleaning and maintenance would your family do in Virginia?
A Residential and commercial. And pretty much any odd-end jobs anybody ever needed done, yes, sir.
Q So, cleaning houses; cleaning office buildings, that sort of the thing?
A Yes, sir.
Q And at this period of time here in Missoula, your family wanted to restart that business?
A Yes, sir.
Q And you had some money just that you or your family had saved?
A Yes, sir, as our savings, yes, sir.
Q Was that money money that you had taken from Garda or out of an ATM machine?
A No, sir.
Q So, you decided to take this money into a bank to open a bank account?
A Yes, sir. Business bank account, yes, sir.
Q And when you took the money into the bank to open the bank account, what did the bank tell you about the money?
A Well, nothing. They opened up my account for me. Yes,

sir.
Q Okay.
And did they do any special paperwork as it related to the fact that you brought in money? Cash money?
A No. No, sir. I just filled out a couple little things there for to open up the account, if I remember right. And that was it. They told me I'd get my -- get your card and all that kind of stuff later, you know, with it, like they do when they mail it to you.
Q And how much money did you take into the bank to open the account?
A I think it was around 25,000. Yes, sir.
Q And did you hear anything else from either the bank or law enforcement about that money?
A Down the road, that's when that lady called me from the Missoula Police Department. Yes, sir, yeah.
Q And what, if anything, did you know about what was happening with that money?
A At that point, I had -- I didn't even know when she just said they needed to talk to me pertaining to the money I put in the bank. I was, like, okay. "Well, I'm going to get in contact with my lawyer."
Then, like I said, after that I just -- whatever he told me was going on, is what was going on. Yes, sir.
Q Okay.

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

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

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

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

A No, sir.

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

A No, sir.

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

A Yes, sir. Yes, sir.

Q And does your family have that cleaning business?

A Yes, sir, they do.

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

THE WITNESS: Oh. Yes, sir.

THE COURT: I have one question.

Or Mr. Donahoe, do you have a redirect?

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

Thank you. Go right ahead.

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

THE WITNESS: I want to say -- I want to say August or September, I believe.
THE COURT: Of what year?
THE WITNESS: 2013, yes, sir.
THE COURT: Was it before this missing-money event occurred on November 20 of '13?
THE WITNESS: Oh, yes, sir.
THE COURT: Several months before that?
THE WITNESS: Yes, sir.
THE COURT: All right.
That's all I have.
You may step down, sir.
THE WITNESS: Yes, sir. Thank you.
(Witness excused from the witness stand.)
THE COURT: Call your next witness, please.
MR. DONAHOE: I will call Stacy Lear.
Judge, this examination will involve an exhibit I've marked as Defense 501.
I've served copies on Mr. Racicot, or a copy. And I've provided copies to the clerk.
THE COURT: Well, is there a copy for the court's reference?
MR. DONAHOE: There is, Your Honor. Certainly.
(Clerk of Court delivering a document to the court.)
THE COURT: Thank you.

CLERK OF COURT: Come forward, please.
Raise your right hand, please.

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

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

DIRECT EXAMINATION

BY MR. DONAHOE:

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

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

Q And how long have you been so employed?

A Since August of 2006, just over 12 years.

Q And were you so employed in or around 2013?

A Yes.

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

A Yes, sir.

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

A Arnold Ailer, Junior, yes.

Q And was he a Missoula resident at the time, do you know?
A I can't say for certain, because I was never able to establish a residential address, but he had P.O. Boxes in that area.
Q Okay.
And what was your contact with Mr. Ailer?
A My only actual contact with him, as I recall, is one voicemail and one phone call.
Q Okay.
So why did he come to your attention, Mr. Ailer?
A Initially, in September of 2013, I had been assigned to investigate a report on an allegation of theft in which Mr. Ailer was identified as a suspect.
Q And who was the victim of the theft?
A Garda International, I think is the name of the company.
Q And is that an armored car company?
A Correct.
Q That works all around Montana; correct?
A Yes.
Q Yeah.
And what was the nature of the concern with Mr. Ailer?
A Specifically, in that case from September, approximately $30,000 had gone missing from ATM pickups between April and August of 2013. And in October 2013, Mr. Ailer had made a suspicious deposit of 20,000 -- $25,000 cash into a new bank

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

Q Okay.

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

A Correct.

Q And was that resolved?

A Ultimately, yes.

Q And how so?

A Prosecution was declined.

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

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

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

A The county attorney who declined the case?

Q Yes.

A Okay.

That would be Jason Marks.

Q And he was an assistant, or a deputy?

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

Q At that time?

Okay.

So, that resolved that investigation?

A Correct.
Q And you worked it through as an ordinary case. It was declined. And that was the end of that?
A Correct.
Q Now, subsequently, did you have -- or desire to have contact with Mr. Ailer concerning other missing money from GardaWorld?
A Can you rephrase that question.
Q Did you become aware at some time in your duties as a detective that money had gone missing from GardaWorld in November --
A Yes.
Q -- of 2013?
A Yes, sir.
Q Did Mr. Ailer surface as a possible suspect, I'll say, in connection with that matter?
A Yes.
Q And did you endeavor to contact Mr. Ailer to speak with him about that?
A I don't think I tried to contact him as a part of that case. Or at least if I did, I can't recall. But I may be mixing it up with the previous case.
Q Okay.
Did you at some point in time decide as the investigator in this second matter that we're talking about from November of

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

A Yes, I did.

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

A I did.

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

A Yes, sir.

Q -- in a previous meeting?

Did you have an opportunity to review that?

A I did.

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

A Yes, I was.

Q And why?

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

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

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

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

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

Do you have that?

A I don't see any exhibits up here.

MR. DONAHOE: Can I approach, Your Honor?

THE COURT: Yes. Of course.

(Mr. Donahoe approaching witness with a document.)

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

A (Witness reviewing document.)

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

Q That is your signature?

A Yes, sir.

Q Do you recognize the document?
A I do.
Q Did you prepare it?
A I did.
Q And was it submitted to the court?
A Correct.
Q And was the warrant issued?
A Yes.
Q Did you obtain the phone records?
A I did.
Q And was there anything worthwhile there for you?
A No.

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

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

MR. RACICOT: No objection.

THE COURT: Five oh one is received without objection.

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

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

A (Witness reviewing document.)

Yes, sir.

Q All right.

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

A Correct.

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

A Correct.

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

A Correct.

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

A Initially, yes. That was the belief.

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

A It would have seemed to have been.

Q All right.

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

why you wanted to look at those phone records?
A Correct.
Q Now, subsequent to all of that work that you did, did you learn later that there had been suspicious activity reports filed in relation to another individual?
A Yes.
Q And did you -- do you have any particulars in terms of knowledge or memory about those reports?
A I recall -- I reached out to an FBI agent in my jurisdiction requesting those reports, I believe on all the employees who could have been involved at the time. And in response, I received records showing that Mr. Herrin had gambled over a hundred thousand dollars in Vegas, I believe, around January 2014. And had also made a deposit, I think, of about $30,000 into a bank account, and then withdrawn about $60,000 from a bank account, all within January of 2014.
Q Okay.
So, similar investigative paradigm to Mr. Ailer; correct?
A Correct.
Q All right.
And as a result of that, did the focus of the investigation shift to the other side of the hill here to Helena?
A Correct.
Q And did you cease and desist with your investigation?

A I did.
Q Mr. Ailer was no longer a suspect in your mind?
A I had nothing to support him being a suspect in the second case.
Q Okay.
Did you ever make any connection between Mr. Ailer and Mr. Herrin?
A Not that I'm aware of, no.
MR. DONAHOE: I have nothing further.
Thanks.
THE COURT: You may examine, Mr. Racicot.
MR. RACICOT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. RACICOT:
Q Good morning, Detective.
A Good morning.
Q I'm Tim Racicot from the U.S. Attorney's Office in Missoula.
Detective Lear, am I correct that when you first began the investigation into what culminated in Mr. Ailer's deposit of cash, Garda suspected that Aaron Johnson might have been involved with the missing sum of money that had accumulated from April to August or September of 2013; correct?
A That's correct.
Q So when you first talked to the manager of Garda, Bruce

Reese, in Missoula, he said: "We think it might be Aaron Johnson who's been taking this money, because Aaron Johnson's been present at the ATM every time the money's gone missing"?
A Correct.
Q So, was it your understanding that when Garda services these ATM machines, they essentially have to balance up the money that was delivered the last time, the money that the customers have since come into the bank and taken out of the ATM, and the money that's left?
A That's correct.
Q And when they were trying to make that balance, they were coming up short for several instances over the course of several months in the spring, summer, and early fall of 2013?
A Yes.
Q And so initially they said: "We think it's Aaron Johnson," and that's sort of what people thought initially until Mr. Ailer went into the bank to make this cash deposit?
A That's correct.
Q And then it was the circumstances surrounding his cash deposit, including what you characterized as his fictitious reasons for making the deposit and his resignation from Garda that made people think, well, maybe it was Arnold Ailer and not Aaron Johnson?
A Yes. Although the resignation did not come until November.

Q The resignation from Garda didn't come until later?
A Correct.
Q Okay.
And did you learn he had resigned from Garda to take a job with Charter Communications to lay cable for them?
A I don't recall who he went to work for, but I knew he had resigned and already had a job waiting.
Q Okay.
So didn't just leave and then get a job; he left to go to a new job?
A That's correct.
Q Did you know that he's still at that job today?
A I do not know.
Q So, as part of the investigation into this first batch of missing money from ATM machines, you actually prepared a search warrant in that case to seize that money; correct?
A I did.
Q And that was for purposes of wanting to have that actual cash around to maybe be able to compare bill denominations, serial numbers, that sort of thing?
A Correct.
Q And eventually, that money was returned to Mr. Ailer when the prosecution was declined?
A Correct.
Q And then you got another warrant, but that related to the

money that went missing off the truck on November 20th of 2013?
A Correct.
Q And that was for phone records --
A Yes.
Q -- for Mr. Ailer's phone?
A Yes, sir.
Q And essentially, the only thing that even sort of relates to money are text messages from Mr. Ailer to someone saying: "Don't spend too much money around the Christmas holiday"?
A That's correct.
Q Okay.
In your search warrant application for those phone records, Mr. Donahoe referred you to paragraphs 3, 4, and 5 in particular, but paragraph 4 is where Mr. Molzhon, spelled M-O-L-Z-H-O-N, who is the messenger on the Missoula truck, said he thought he accidentally accepted those missing bags?
A That's correct.
Q But didn't know one way or the other; is that correct?
A I don't think I could speak to what he knew exactly, but I can tell you later when I received the actual supporting documents from Garda, I found discrepancies between his oral statement, his written statement, and what I had been told in the initial investigation.
Q Okay.
A So he -- he may have believed that at the time, or he may

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

Q Okay.

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

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

A Correct.

Q Okay.

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

A That's correct.

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

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

Q Okay.

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

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

A I do not know.

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

A I do not know.

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

A No.

Q Okay.

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

Thank you.

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

MR. DONAHOE: Thank you.

REDIRECT EXAMINATION

BY MR. DONAHOE:

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

Did you determine, at least insofar as your investigation

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

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

Q Okay.

So, you never saw it written down?

A If I did, I can't recall.

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

A (Witness reviewing documents.)

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

But that, again, was what I was told.

Q All right.

So that's the determination that you made?

A Correct.

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

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

Q Okay.

So, making the assumption there was such a policy, the records show that he actually had had his phone?
A That his phone was certainly in use. And it appeared to be by him based on the context that I saw.
Q And there was a text message that said something to the effect: "Don't spend too much money at Christmastime"?
A Something like that, yes.
Q And to whom was that directed?
A I don't know that I knew the name. But it appeared to be a romantic partner, possibly, in California is my recollection.
Q Okay.
Did you ever undertake to do anything to investigate that other party in California?
A I did not.
Q Thank you.
THE COURT: Did I understand correctly that, Detective Lear, that once you obtained this search warrant and looked at the phone records of Mr. Ailer, your department concluded that there was nothing of value to the department in considering Mr. Ailer as a robbery suspect?
THE WITNESS: (No response.)
THE COURT: You mentioned the "don't spend money at Christmas," but a lot of people are -- some, at least, may be cautioned to such potential extravagance.
THE WITNESS: I can't say that it would make me

eliminate him as a suspect solely on that basis.

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

THE WITNESS: No, I did not.

THE COURT: Thank you.

You may step down, ma'am.

(Witness excused from the witness stand.)

THE COURT: Your next witness, Mr. Donahoe.

MR. DONAHOE: Thank you, Your Honor.

I would call Mr. Curtis McAlpin.

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

CLERK OF COURT: Please raise your right hand.

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

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

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

THE WITNESS: Thank you, Your Honor.
THE COURT: Would you state your name for the record, please.
THE WITNESS: Curtis Lynn McAlpin.
THE COURT: Spell your last name, please.
THE WITNESS: M-C capital A-L-P-I-N.
THE COURT: Thank you, sir.

DIRECT EXAMINATION

BY MR. DONAHOE:

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

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

Q And how long have you been so employed?

A About three years.

Q And previously, were you employed by GardaWorld?

A I was.

Q What is GardaWorld?

A It is an armored car company.

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

A Yes, sir.

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

A I did.
Q And in that -- was that a Garda vehicle?
A Yes.
Q And did it have coin and currency that needed to be transported to Missoula and other locations on the other side of the mountain?
A Yes.
Q What time did you arrive in Missoula that day; do you recall?
A I would say it was seven'ish in the morning.
Q So, when you arrive in Missoula, what's the first thing you do?
A We usually complete the Missoula branch of Garda, and we do a cash and coin transfer.
Q Now, prior to coming to court today, did you and I have a sit down for a few minutes with my investigator, Mr. Hopkins?
A Yes.
Q And do you recall us discussing this transfer on this particular day, November 20, 2013?
A Yes.
Q And where did it take place? Do you recall telling me?
A It's on Front Street in front of First Interstate Bank.
Q So you went to First Interstate Bank.
Did you have to make a drop at that bank that day?
A We did.

Q And did you, in your memory, start to make that drop at the bank before the other Garda Missoula truck came to meet you?
A Yes. They were not there upon our arrival, so we had to go ahead and make the delivery to the bank.
Q So that delivery would consist of what?
A Unloading coin and currency and put it on a hand pushcart into the bank.
Q And again, we're talking about First Interstate Bank; correct?
A Correct.
Q Now, did you have a helper that day?
A I did.
Q And he's titled a messenger?
A Correct.
Q And who was it?
A Clay Olson.
Q And is Mr. Olson still with us?
A He passed away.
Q And do you know when?
A It was a couple years ago, I believe.
Q All right.
And did you know Mr. Olson?
A I've known him for quite a long while.
Q And he was a Helena resident?

A He was.
Q And you guys went to school together?
A No. He was several years older. I went to school with his ex-wife.
Q I'm sorry. Yeah. That was the story.
So that's how you became friends with Mr. Olson?
A Right.
Q All right.
But he was a long-standing friend?
A He was more an acquaintance than a friend. I associated with him off and on.
Q Through the relationship with the other person?
A Right. Uhm-hum.
Q Okay.
So, back to First Interstate Bank, the material that you took to deliver to the Missoula truck and to other banks that we'll talk about in a second, came from where?
A Out of our truck. It came from the Helena branch.
Q All right.
So, that truck was loaded up here in Helena?
A Correct.
Q And does it contain Federal Reserve funds?
A Yes.
Q And when are those funds obtained from Federal Reserve?
A Usually, on the over-the-road route, they're obtained the

day before.
Q All right.
So, this truck that you were driving has up till now been identified as the fed truck.
A Correct.
Q Does that make sense?
A Yes.
Q And is it likewise sometimes called the OTR truck?
A It is.
Q And what's OTR stand for?
A Over the road.
Q So, you were in charge of the over-the-road truck on November 20, 2013?
A I was.
Q And did you load that truck, personally?
A I did that morning.
Q And did your helper help you to load that truck?
A Yes.
Q Was there any other GardaWorld person in Helena who helped you load that truck?
A No.
Q After these charges were brought -- or actually, before these charges were brought, did you have an opportunity to look at a videotaping of your loading of that truck?
A Yes.

Q And when did you do that, sir?
A Oh, it was several times. It was, I believe, about a week after. The Garda security came from out-of-state to review the taping -- or the videotape.
Q And what was the purpose of reviewing it?
A To see if the actual money lost was actually loaded onto the truck.
Q All right.
When you say "money lost," what money was lost?
A There was three bags of what they call fit money. It was for ATMs.
Q And do you know approximately how much?
A I believe it was 370,000.
Q Somewhere in that neighborhood?
So, did people have contact with you from GardaWorld wanting to discuss that missing money?
A Yes.
Q And was part of that discussion involving looking at this videotape?
A Correct.
Q Did you discern anything or conclude anything on your own from reviewing that tape?
A I had checked out 12 packages of ATM money. And I counted 12 movements into the truck.
Q So, it seemed to you after reviewing the tape, what?

A That all the ATM money that was due to be delivered on that route was placed into the truck.
Q Now, inside your OTR truck there are lockers; correct?
A Correct.
Q And did you have a personal policy about storing money in those lockers?
A Yes.
Q Can you tell me about that, sir.
A All the fed money that came out of the Federal Reserve that was packaged in their wrap, was placed on the floorboard of the currency room. And the lockers are on the driver's side and the passenger's side.
I personally always -- always put the Kalispell delivery ATM money in locker 13. I never deviated from that. Ever.
Q Now, when you say the Kalispell ATM money, is that the money that went missing?
A Correct.
Q So, when you met up with the truck in Missoula to make the exchange in front of First Interstate Bank, was the locker money accessed at that time?
A No.
Q Do you recall, personally, as a matter of personal knowledge, putting that ATM money in locker 13?
A You know, I never really deviate from that when I load the truck. I've been on that truck for six years. I've always put

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

Q All right.

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

A Not a hundred percent, no.

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

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

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

A Missoula and Kalispell.

Q Missoula and Kalispell? Okay.

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

A No.

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

A Correct.

Q Was there anything that struck you in memory as unusual about the transfer from your truck to the Missoula truck on November 20th, 2013?
A Other than they were later than average. And we decided to make the transfer -- or the delivery to the bank prior to our delivery to them.
Q Okay.
So I want to talk about that a little bit.
That would have been a slight deviation from normal protocol?
A There's no set protocol. Normally, the Missoula truck is there just shortly after we're there, so it's usually pretty quick. But if we did a transfer, then we'd start our deliveries.
Q All right.
But in this particular instance that particular day, you have specific memory of starting the First Interstate drop before the Missoula truck arrived?
A Correct.
Q Now, mechanically, how would that have worked?
A The truck, or --
Q Well, in other words, were you in progress of making this First Interstate Bank drop, and then the Missoula truck showed up?
A Yes.

Q So, did you terminate that delivery to First Interstate Bank, and then start to engage to the Missoula truck?
A Correct.
Q So, can you describe to me in pictorial form, in words, what that looked like?
A We had came out of the bank, we'd made our delivery. We were coming out with returns. And we threw our coin -- throw our currency into the truck, threw our return coin into the truck. Then proceeded on. Getting the Missoula truck, basically, back-to-back.

And then, I was on the bumper transferring what we needed from the inside to the Missoula truck.
Q So, after that interruption, was there further activity after that Missoula truck job transfer was done, was there other activity that had to occur inside First Interstate Bank?
A Yeah. We had to go back in and get all the paperwork signed and make sure the piece count was right. And could you -- get ready to continue our route.
Q All right.

So, in your memory, there definitely was an interruption in the First Interstate Bank delivery?
A Correct.
Q Would the back of the truck, your truck, have been open for the First Interstate delivery?
A We had to open it to pull the material out.

Q Was there any time, once you pulled your materials out, that that truck, your truck, was left unattended while you were inside First Interstate Bank?
A The vehicle was secured, and we both exited the vehicle.
Q So, the two of you, you and your helper, had gone into First Interstate Bank?
A Correct.
Q And the truck was freestanding? Was it running?
A Yes.
Q And was there anybody in the truck?
A No.
Q Had the Missoula truck yet arrived?
A No.
Q So, the truck was unattended for how long?
A Well, total, it was almost a half-an-hour from start to finish.
Q All right.
I -- you got to break that down for me, sir.
From start to finish of the loading the Missoula truck?
A No. The Missoula truck come -- came in between.
Q In the middle of that half-an-hour?
A Yeah. I would have to look at the route sheet, because it would show the time I arrived at the bank and the time that Missoula showed up.
Q All right.

But that would -- so, that's good enough.
Those records would give you a pretty good estimate of how long your truck was unattended?
A Correct.
Q Okay.
I get that.
Is it policy of GardaWorld to have the truck unattended?
A No.
Q Was it unattended for more than ten minutes?
A Yes.
Q After you loaded up the Missoula truck, you stopped the First Interstate delivery, the Missoula truck did what?
A After they came, backed into our truck, after we put our returns in, and then we proceeded with the transfer of what they needed to conduct their route.
Q So then, they take off. Is that --
A Correct.
Q To put it in the vernacular.
A Correct.
Q And they're going to go do their day's work?
A Correct.
Q And what did you do on their departure, on the Missoula truck's departure?
A Well, we secured the doors.
We organized what we just threw in. We -- the truck is a

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

Q Okay.

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

A Correct.

Q And was the truck unattended once again?

A I believe so.

Q All right.

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

A Correct.

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

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

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

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

A No.

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

A Correct.

Q So, after all business in Missoula is concluded, where do you go?
A Depending on which week it was, we head up towards Kalispell. One week, we'll go to Polson; the off week, we would go to St. Ignatius and Ronan.
Q All right.
So -- and we could figure that out, probably, by documentation.
But the gist of it is, is that you have further duties, and you head north?
A Correct.
Q And what's your ultimate destination?
A Our last stop is Kalispell. Or last town is Kalispell.
Q And depending on the week, you're going to make two or three stops in between Missoula and Kalispell?
A Correct.
Q At any time in your memory and of personal knowledge, do you remember your truck being unattended between Missoula and Kalispell on November 20th?
A I -- I would say yes. I believe we stopped in Polson. And I had -- Clay was brand new on the truck. Never been on it a day before.
Q This is Mr. Olson?
A Correct.
You could not send an unknown guy into anywhere.

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

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

You arrive in Kalispell; correct?

A Correct.

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

A Correct.

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

A Yes.

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

A Opened up locker 13, and it was empty.

Q And what did you do?

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

Q Did you contact anybody?

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

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

A Yes.

Q Was it your cell phone?

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

Q So, a business cell phone --
A Yes.
Q -- that's provided to you? And it goes on the run with you?
A Yes.
Q Were you given any instructions?
A Told us to completely, thoroughly go through the truck to make sure that it wasn't somewhere misplaced. We searched the truck high and low. Could not find it.
Q All right.
So, did you ultimately conclude business up in Kalispell?
A Yes.
Q And then where did you go?
A Went back to Missoula, picked up the returns that the Missoula branch had from their deliveries, and we head back to Helena.
Q All right.
When you went back to Missoula, was there discussion about this money from locker 13?
A Yeah. Prior, I had called them to make sure that it wasn't inadvertently misdelivered. And we did that when we couldn't find the money on the truck. And just make sure that they didn't have it. And they stated that they didn't have it.
So we picked up our returns, and came back to Helena.
Q All right.

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

A Right.

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

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

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

Q Sure. Just using logic; right?

A Uhm-hum.

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

A Uhm-hum.

Q Correct?

A Correct.

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

A Yeah. Yeah.
Q And then you posed the question: There could have been an erroneous transfer in Missoula; correct?
A Correct.
Q And then a third option was what?
A Thievery.
Q That somebody --
A Entered the truck while it was unattended, and took the funds.
Q And through the course of that day, how many times do you figure that truck was left unattended?
A Probably five times.
Q Varying degrees of time?
A Right.
Q Amounts of time?
Have you ever had occasion -- how long did you work for GardaWorld?
A Approximately six years.
Q And in the course of your experience there as an employee, did you ever lock your keys in the truck?
A Once.
Q And what did you do?
A Myself and the defendant, we made one call to a locksmith, see if they would open up the truck. They refused to do so. And we had to kind of figure it out. I had left the driver's

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

Q Okay.

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

A Yes.

Q And what's that called?

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

And then, there was a back door.

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

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

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

A Either myself or the messenger does.
Q Right. And where's the other key?
A The master key is usually kept in the branch manager's office.
Q And that would be in --
A Helena.
Q -- in Helena? Okay.
So, on this particular occasion, though, you did gain access to the truck?
A Yes.
Q Did that ever occur on another occasion?
A Not when I was on the truck.
Q No?
And whose idea was it to access this stick?
A Well, between Mr. Herrin and I, we came up with it. I don't know who thought of it. But -- the access was gained. And that was several years ago. I don't remember who came up with the thought plan.
Q All right.
And just for clarification, this discussion you and I just had about getting into that truck when the keys were locked in there, was not on November 20, 2013?
A It was on the Missoula route. You know, the exact date, I thought it was October, but I know I worked a certain amount of time after that.

Q So, it was October of that year?
A It was -- it was either October or November. Because I know I worked up until right before Christmas, and they terminated my employment.
Q And that's where I was going to go next.
Were you spoken to about this missing money?
A Several times.
Q And did you openly and freely discuss the situation with GardaWorld?
A Yes.
Q With the investigators?
A And the -- I want to say the district manager out of California, I believe.
Q Okay.
So, somebody even a little higher up?
A Yes.
Q And you made yourself available for interview?
A Absolutely.
Q And told them everything you knew?
A Yes.
Q Perhaps everything we discussed here today?
A Yes.
Q You had nothing to hide?
A Nothing at all.
Q Did you take the money --

A No.
Q -- on November 20th, 2013?
A Did not.
Q Were you ever accused of that?
A Yes.
Q By whom?
A The individual that came in from another district. I want to say Gonzo or Gonzalez, or --
Q Right. And was that in confrontational style?
A It was more of an interrogation than an interview. He demanded his money.
Q And you denied having it?
A I did.
Q And you denied taking it?
A I did.
Q And you deny taking it today?
A I do.
Q Did you ever determine to your own satisfaction what happened to this misplaced money?
A No.
Q Thank you, sir.

MR. DONAHOE: I have nothing further.

THE COURT: Mr. Racicot, you may examine.

MR. RACICOT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. RACICOT:

Q Good morning, Mr. McAlpin.

A Good morning.

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

Did you ever take money from Garda?

A No.

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

A I've assisted other branches on servicing ATMs.

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

A No.

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

A I was at the First Interstate Bank in Kalispell.

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

A Yes.

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

A That's correct.

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

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

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

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

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

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

Q One of these roof vents?

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

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

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

unlock one of the doors?
A Correct.
Q And that's what happened with you and the defendant that day in Kalispell?
A Correct.
Q You talked with Mr. Donahoe about, basically, trying to hypothesize how the money might have gone missing. And so you called back to Helena and said: "Did we leave it in the vault?"
Correct?
A Correct.
Q And then you said: "Well, later on, we'll check the video and see if we seemed to be making the right number of motions to load the bags on the truck"; correct?
A Yeah. That was after this Garda security or branch manager pulled the video out of the -- their armored bay.
Q Right. That was more during the investigative phase?
A Correct.
Q And then, going back to the day that the money goes missing, you figure: "Well, we better call Missoula. We met the Missoula truck, we'll call them and see if they have it"?
A Correct.
Q Now, does that seem unusual to you, because you would have, in all likelihood, put those bags in locker 13 and never opened it again till you got to Kalispell?

A Correct.
Q So, no matter how unusual it might have been, you wanted to make sure that for some reason, you didn't forget to put them in locker 13 that day, and then accidentally give them to the Missoula truck?
A Correct.
Q However extraordinary the options are, you're just trying to run through all of the options that would lead you to the ultimate conclusion, which is somebody took it?
A Correct.
Q Okay.
You searched your truck?
A Yes.
Q Now, you talked about these 12 -- you see yourself making 12 motions with ATM bags when you're loading the truck?
A Correct.
Q But the truck has a lot more than just 12 bags on it; correct?
A Oh, yes.
Q How many items, approximately, are you going to be hauling over on the fed truck day to Missoula and, ultimately, Kalispell?
A Over 500 pieces.
Q Over 500 pieces total?
A Correct.

Q So that's bags of money, boxes of quarters, dimes, nickels, and pennies, et cetera?
A Correct.
Q Is it heavy?
A That truck ran heavy all the time.
Q Are the boxes of coin heavy?
A Very.
Q And then, you're picking things up. Other than from the Missoula truck at the first stop, generally, when you're dropping things off, you're also picking things up?
A Yeah. We pick up bank returns.
Q Leftover money from ATMs, lefover coin?
A Yeah. The coin from every -- every delivery we make, the bank sends out a shipment to be redeposited, coin and currency.
Q So even as throughout the day you're unloading some of these 590 pieces, you're also acquiring additional pieces?
A Correct.
Q So it's -- not to be coy -- but garbage in/garbage out sort of throughout the day?
A Absolutely.
Q Other than with that first Missoula truck?
A Correct.
Q Because you settle up with them at the end of the day?
A Correct.
Q So, you talked about this instance with Mr. Herrin in

Kalispell, that's on the OTR truck, the fed truck day?
A Yes.
Q Did you work that route with Mr. Herrin very often?
A Yeah. We worked that -- the Billings route and the Missoula route for quite a long while. He was my co-driver.
Q And where you put things in the truck, that's sometimes called "staging the truck"; correct?
A Correct.
Q And so, you were sort of in charge of staging the fed truck for the run from Missoula to Kalispell?
A Correct.
Q Did the people that work with you on the fed truck after they worked with you a while, have a pretty good idea of how you staged your truck?
A Yes. It never deviated.
Q So they would have a pretty good idea, whoever was on that route with you with any frequency, where you put those Kalispell ATM bags, in locker 13?
A Correct.
Q You talked with Mr. Donahoe about the truck being unattended by both you and Mr. Olson about five times on November 20th, 2013.

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

unattended; correct?
A Correct.
Q And it was for approximately, give or take, 30 minutes each of those incidents; correct?
A Correct.
Q Now, that's against company policy; right?
A Correct.
Q Why did you and Mr. Olson violate company policy by leaving the truck unattended?
A They cut our manpower from three to two. And expected us to do the same amount of work in the same amount of time with less manpower, and they gave me a new guy and a weak guy.
Q Would you leave the truck unattended, even when you worked with other people, just for the sake of efficiency?
A Just Mr. Herrin.
Q When you worked with Mr. Herrin?
A Yeah.
Q You mentioned you're dealing with upwards of 600 pieces, 590-some pieces of stuff, either coin or money.
Are you under kind of a time crunch that day to get all of that stuff delivered and all the other stuff picked up?
A Yes.
Q And was that a dictate that came down to you from management that you need to get this route done in a certain amount of time?

A That, and we have a commercial driver's license, and we are only allowed to drive and operate so many hours in a 24-hour period.
Q So you only have so many hours that you can operate per regulations regarding your CDL?
A Correct.
Q And there's also this sort of overriding company policy saying: "We want you to get all this work done as quickly as possible."
So was this fed truck run a hustle? Were you moving to try to get this done?
A Every time.
Q And did that create the opportunity to make mistakes?
A Yes.
Q And did it create in your mind, at least, the necessity to leave that truck unattended for at least some stops?
A Yes.
Q And were those stops, when you're making a particularly large volume of drop-offs to the bank or the other business?
A Yes.
Q You mentioned the truck had a cell phone, a business cell phone assigned to it.
Was there a company policy that prohibited employees from having their personal cell phone with them on a truck?
A Yes.

Q In other words, not supposed to be on your person or with you at all; correct?
A Correct.
Q Did people violate that policy?
A Constantly. I, as well.
Q Pardon?
A I, as well.
Q You did, as well?
So people would take their personal cell phones with them even though they weren't supposed to?
A Yes.
MR. RACICOT: That's all the questions that I have. Thank you.
THE COURT: Redirect, Mr. Donahoe.
MR. DONAHOE: Thank you.

REDIRECT EXAMINATION

BY MR. DONAHOE:
Q Just a couple, sir, based on the cross.
So, the access to the lockers -- are the lockers locked?
A Yes.
Q All right.
And who has the key to the locker?
A Usually, the messenger.
Q So, on this day, you would have put the money, as you testified previously, in the locker, but Mr. Olson would have

had the key?
A I believe I had the key that particular day, because --
Q That particular day?
A Uhm-hum.
Q Is there a reason you remember that?
A Because Mr. Olson didn't know how to use the control panel to get into the lockers.
Q All right.
So, if you broke in the truck -- if somebody broke in the truck, they'd have to have the key to the locker?
A Normally. I believe you could open up one locker, possibly two, before it got time-locked out. And time-lock, I believe, was seven minutes.
Q All right.
So, what does that mean to me with locker 13?
A Okay. On the wall --
Q In the truck?
A -- in the truck, in the currency department, there is a control panel on the passenger side which has a key slot, and that's for the master key to go into. And then you would turn it till the power came on, so you could operate the control panel to open up lockers.
Q I see.
A You would push the number of the locker, hit "enter," it would unlock the locker. You turn a knob, pull the money out.

Then you shut it, relock it.

It automatically locks. And cancels that particular order.

Q Okay.

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

A Yes.

Q All right.

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

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

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

A It was probably the fall or summer.

Q It was either one?

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

Q It could have been sooner, then?

A Uhm-hum.

Q It could have been summer?

A Pardon me?

Q It could have been summer?

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

Q Did the messenger door on the fed truck become broken?
A The -- the truck inadvertently -- at times, nothing worked. You know, it breaks down; gets repaired. I couldn't -- I would say it worked. Because we used the turret to get out the door on a number of occasions. And we keep the handcart inside the turret door.
Q Okay.
Thank you, sir.
THE COURT: Mr. McAlpin.
THE WITNESS: Yes, sir.
THE COURT: On the day in question, November 2013, you were the driver of this truck that's been called the fed truck and the OTR truck, the same truck?
THE WITNESS: Yes.
THE COURT: And you started driving where? What location?
THE WITNESS: I left Helena.
THE COURT: You left Helena with the truck early in the morning?
THE WITNESS: Roughly, 4:30.
THE COURT: All right.
And you make a stop in Missoula?
THE WITNESS: Correct.
THE COURT: First stop?
THE WITNESS: Correct.

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

THE WITNESS: We -- the first stop?

THE COURT: Right. Go ahead.

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

THE COURT: All right. I understand that.

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

THE WITNESS: Correct.

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

THE WITNESS: No.

THE COURT: No?

THE WITNESS: I offload my property to their truck.

THE COURT: All right.

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

THE WITNESS: Just what they needed.

THE COURT: All right.

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

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

THE COURT: All right.
Where did you do that?
THE WITNESS: At the Helena Garda branch.
THE COURT: All right.
You put this money that later was found to be missing, you put it into your truck in Helena before you left Helena early in the morning?
THE WITNESS: Correct.
THE COURT: And you believe that you put those bags into locker 13?
THE WITNESS: Correct.
THE COURT: And how many bags did you put into locker 13?
THE WITNESS: I believe there was four.
THE COURT: Four? All right.
When you get to Kalispell, are all four bags gone? Or is there one of the four still in locker 13?
THE WITNESS: You know, I don't rightly remember. I want to say there was maybe one.
THE COURT: Well, I believe you stated earlier that locker 13 was empty when you got to Kalispell.
THE WITNESS: Yeah. I'm going by what I looked at the delivery.
THE COURT: Okay.
Well, let's be more specific.

THE WITNESS: Yes.
THE COURT: I would like your best recollection today of what the situation was with locker 13 when you got to Kalispell.
THE WITNESS: I remember that I didn't see anything in there.
THE COURT: All right.
All right.
And you had put whatever you deposited into locker 13, you had done that in Helena before you ever left?
THE WITNESS: Correct.
THE COURT: All right.
You get to Missoula.
Does anyone that you were aware of have any access to locker 13 or do anything with locker 13 when you were in Missoula?
THE WITNESS: Nobody that was with me.
THE COURT: Nobody that was with you? All right.
But as I understand, the truck was unattended for some period of time in Missoula; correct?
THE WITNESS: Correct.
THE COURT: Where were you stopped when that happened?
THE WITNESS: It was First Interstate Bank on Front Street.

THE COURT: All right.
THE WITNESS: Wells Fargo. I can't remember -- it's off of -- I want to say maybe Brooks.
THE COURT: Well, let me be more specific: How many times did the truck stop in Missoula before you left Missoula in which the truck was unattended?
THE WITNESS: At least three times.
THE COURT: All right.
Are you aware of anyone having access to locker 13 when the truck was unattended during those three stops?
THE WITNESS: They -- my first thought was someone had the other master key that was kept in the branch manager's office. That would be the only way to get into it. There's only two keys.
THE COURT: I understand that.
But are you aware of anyone having had access to locker 13 at the three stops in Missoula?
THE WITNESS: No.
THE COURT: You make an additional stop en route to Kalispell in Polson. Am I right?
THE WITNESS: I believe so, yes.
THE COURT: Was the truck left unattended for a period of time when it was in Polson?
THE WITNESS: Yes.
THE COURT: What was the total time that the truck

was unattended before you ever left Missoula?
THE WITNESS: Possibly, a half-an-hour.
THE COURT: All right.
Then you drive north to Polson.
Is that the first stop after you leave Missoula?
THE WITNESS: I believe that particular day was Polson. We only have, like, three stops between Missoula and Kalispell.
THE COURT: All right.
And one of those was Polson?
THE WITNESS: Correct.
THE COURT: And you believe that was the first stop after you left Missoula?
THE WITNESS: I believe so.
THE COURT: Was the truck left unattended in Polson?
THE WITNESS: Yes.
THE COURT: For what period of time?
THE WITNESS: Roughly, a half-an-hour.
THE COURT: All right.
Did you stop again before you got to Kalispell?
THE WITNESS: I don't believe we did.
THE COURT: And the truck was, I believe you said, unattended in Polson for about a half-an-hour?
THE WITNESS: Correct.
THE COURT: And then you get to Kalispell and open up

locker 13; right?

THE WITNESS: Correct.

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

THE WITNESS: Correct.

THE COURT: All right.

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

THE WITNESS: Correct.

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

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

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

THE WITNESS: Correct.

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

THE WITNESS: Correct.

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

THE WITNESS: No. It only happened the one time.
THE COURT: All right.
Was it before or after this truck was found to be missing the cargo when you got to Kalispell?
THE WITNESS: Before.
THE COURT: Before that?
THE WITNESS: Yes.
THE COURT: All right.
And you and Mr. Herrin were working together on the truck the day that this method of gaining access was worked out and carried out?
THE WITNESS: Correct.
THE COURT: And I believe you said that once you got inside the truck, that there would be a time period in which one could gain access to some of the lockers before a time-lock would shut everything down?
THE WITNESS: Yes.
THE COURT: And you described that as about seven minutes?
THE WITNESS: It would lock you out for seven minutes. You could open one or two lockers.
THE COURT: All right.
If you got in, you could open one or two lockers before the shutdown system took over and shut everything down.
THE WITNESS: Correct.

THE COURT: Is that right?
THE WITNESS: Correct.
THE COURT: So a person who knew where to go or what to do could gain access to one or two lockers during that brief period of time after gaining access to the truck?
THE WITNESS: Correct.
THE COURT: And then the shutdown process would lock everything?
THE WITNESS: Correct.
THE COURT: You've answered my questions.
Thank you, sir.
You are excused.
You may step down.
(Witness excused from the witness stand.)
THE COURT: Call your next witness.
MR. DONAHOE: Mr. Jeff Stacey.
This is it, Your Honor.
And this witness should be fairly brief.
THE COURT: Counsel, as someone wiser than I said, the Lord made a lot of time. You may take as much as you require.
MR. DONAHOE: Thank you.
I know you're generous with your time.
THE COURT: Mr. Stacey, come in, sir.
Walk up here to where the clerk is standing. She will

administer the oath for you.

CLERK OF COURT: Please raise your right hand.

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

CLERK OF COURT: Go ahead and have a seat.

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

DIRECT EXAMINATION

BY MR. DONAHOE:

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

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

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

A Yes.

Q Did you work with Mr. Herrin?

A Yes.

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

A I did.

Q And can you tell me from when to when?

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

up.
It was, I believe, from December to April.
Q Of the following year?
A Yes.
Q So into '14?
A Correct.
Q Okay.
And did you guys just share rent and expenses? Was that the extent of the relationship, or did you hang out together?
A No. That was pretty much it.
Q Just sharing expenses?
A Yes.
Q Okay.
Did you work shifts together at GardaWorld?
A Yes.
Q And did you drive the OTR truck?
A Not the big truck, no. I worked on the truck, but I never drove it.
Q Okay.
Were you a messenger or driver?
A I was a messenger.
Q Okay.
And so, you did serve as messenger on the OTR truck?
A Yes.
Q Do you know how many occasions?

A Hundreds.
Q Just time and again?
So, how long did you work for GardaWorld?
A Just shy of 11 years.
Q At some particular time, did you have discussion with Mr. Herrin about money that was missing --
A Yes.
Q -- from one of the trucks?
A Yes.
Q And when was that, sir?
A It was in 2013 after the money had come up missing. We were working a Great Falls route.
Q And can you tell me what the nature of that discussion was? What -- you know, the content of it?
A Yeah. It was -- the content was, basically, how we felt the money could have been taken.
Q So you were kind of hypothesizing, floating theories about how the money could have turned up missing?
A Exactly.
Q And what were some of the ways that you came up with?
A Some of the ways is if somebody had a key, they could possibly have, if somebody on the truck possibly could have taken it that was working that day. And also, there was a way to do it with a broom handle if you were -- if you knew the method.

Q So pretty much the gamut of how this money may have gotten out of that truck; is that correct?
A Yes.
Q And when I say "this money," I'm talking about money that was taken or became misplaced in or around November of 2013?
A Yes.
Q And you were aware of that?
A I was.
Q Was that common knowledge in your shop?
A That the money was missing?
Q Yeah.
A Yes.
Q So, employees knew? It wasn't a secret; right?
A Correct.
Q Were you questioned about it personally?
A Later on, yes.
Q So you worked the OTR truck?
A Yes.
Q And inside the truck, there are lockers?
A Yes.
Q Can you tell me how those lockers function?
A Yeah. There is two rows of lockers, one on each side of the truck. There's a number pad up above with a key.
Q So, a keypad?
A A keypad, yes.

Q Okay.
A With a key. Basically, you -- you go up and you put the key into the lock, and then you put the locker number and press enter. It will allow you to open, potentially, up to three lockers without the key.
Q Just by using the key pad?
A Yes.
Q And so, if somebody gained access to the truck with a broom handle or a mop, something of that nature, you could just use the keypad and pop open one of those lockers?
A Yes. Potentially.
Q All right.
Why do you say "potentially"? There's a qualification there. What is it?
A There is. And what it is is every now and then when you'd go to open a locker, even without the key -- or even with the key, I'm sorry, sometimes it would give you a five-minute delay.
So yeah, you could still get in, but you'd be delayed five minutes. It's supposed to do it after three lockers, but sometimes it would do it after one. Or sometimes it would do it without you opening any lockers.
Q So it's an automatic no access?
A Correct.
Q And it happens randomly?

A Seemingly so, yes.
Q Okay.
So sometimes it would kick in after you had already opened three lockers, but sometimes it would kick in after you had opened one?
A Sometimes it would do it even if you hadn't opened any.
Q Okay.
So kind of hit or miss?
A Right.
The key is supposed to override that, but --
Q But if you broke into the truck and you had the key, chances are you'd have more clear access to the lockers?
A Yes. You -- theoretically, you should have access to all of the lockers.
Q Okay.
Did your discussions with Mr. Herrin about this misplaced or missing money involve Mr. Herrin admitting to you that he took the money?
A It did not.
Q Did he ever imply, he, Mr. Herrin, in conversation with you, that he took the money?
A He did not.
MR. DONAHOE: Thank you, sir.
I have nothing further.
THE COURT: You may cross-examine.

MR. RACICOT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. RACICOT:

Q Good morning, Mr. Stacey.

A Good morning.

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

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

A Correct.

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

A Correct.

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

A Yes.

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

A Yes.

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

A Yes.

Q This method of gaining entry to the truck, you could take a broom handle, or something like that, put it through the roof vent on the truck, and access the panel of rocker switches between the driver and passenger seat?
A Yes, you could.
Q And use that handle to hit one of those rocker switches which would open one of the doors?
A Yes.
Q Did you ever do it?
A Yes.
Q Did you do it more than once?
A I don't recall if I did it more than once. I know I did it at least once, though.
Q Could I get you to lean a little closer to that microphone?
A Yeah.
Q Thank you.
What can you tell me about the time that you did it? Tell me the circumstances, if you would.
A We were locked out. I don't recall which bank, so I think somebody had left the key inside the truck, and we both closed the door.
Q Let me stop you. Who's "we"? Who were you with?
A I believe that was with John, actually.
Q You think you were with Mr. Herrin?

A Yeah.
Q Okay.
Do you remember what town you were in?
A I want to say Great Falls.
Q When you did the Great Falls run, did you have to continue north of Great Falls? Did you ever go as far as Havre?
A Yes.
Q But you think you were in Great Falls on this occasion where the truck got locked?
A I believe it was, yeah.
Q Okay.
So go ahead. What happened?
A We were locked out. We were able to get a broom handle from one of the banks. We were able to climb on top of the truck and manually open the vent. Somebody had already drilled a hole through the mesh on top of the vent from doing this method prior. We were able to stick the handle down and open one of the doors and gain entry to the truck.
Q So there was a mesh screen, like you'd have maybe on a screen door?
A No. It was a metal -- metal mesh.
Q Metal mesh?
A Yep.
Q But there was a hole in that?
A Yes.

Q Was this method of gaining entry into the truck common knowledge?
A Yeah. I don't know how widespread it was known. But yes, there was more than a few people that knew about it.
Q Was it something you knew about before you confronted the issue of the locked truck that day in Great Falls?
A I had heard about it, yes.
Q So, in other words, it wasn't something you had to brainstorm while you were there in Great Falls?
A Correct.
Q Where did you hear about it from, if you know?
A I honestly can't recall.
Q You said "we" -- you know, got the broom from the bank. "We" got up on to the truck.
Do you remember who did what as between you and Mr. Herrin?
A I don't. I don't remember if I did or he did.
Q Okay.
But it worked?
A Yes.
Q You got into the truck?
A Correct.
Q And got the keys that had been locked inside?
A Yes.
Q As it relates to these lockers inside the truck needing

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

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

Q Okay.

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

A Yes.

Q In theory?

A In theory, yes.

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

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

Q But you had personal experiences where you did not have

the master key, and you were still able to access one or more lockers, something short of four?
A Yes.
Q And then you had experiences where you had the key, and you couldn't necessarily access all of them?
A Correct.
Q Do you remember if you were working on November 20th of 2013?
A I believe I was working the city route that day.
THE COURT: What does that mean?
THE WITNESS: That means I worked in Helena.
THE COURT: In Helena? All right.
That's helpful.
Thank you.
THE WITNESS: And I didn't leave the city.
Q (BY MR. RACICOT) And if you worked the city route, would you have any interaction at all with the fed truck?
A I would not.
Q And Mr. Donahoe asked you about being interviewed and you said you were later.
Am I correct you were not interviewed by Garda investigators or Garda management as part of the internal investigation?
A I was not.
Q You were interviewed later, if I'm correct, by federal law

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

A Correct.

Q And that was sometime later; is that right?

A Yes.

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

THE COURT: Mr. Donahoe, you may redirect.

MR. DONAHOE: Thank you.

REDIRECT EXAMINATION

BY MR. DONAHOE:

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

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

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

A Yes.

Q Okay.

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

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

Q Okay.

So, in the Great Falls event, when the broom handle was used, did the door pop and you got into the truck?
A Yes.
Q And you had immediate access to the back?
A Yes. On this particular occasion.
Q Did it ever happen where you guys had to take something apart because the messenger door was broken?
A Yes.
Q All right.
Is that the same event as what we were talking about in Great Falls?
A It is not. This is another event.
Q All right.
So, there was yet a third event, correct, of access to the truck, or a second event?
A A second event, yes.
Q Okay.
When did that happen?
A I don't recall the date.
Q All right.
In relation to the first one that you described in Great Falls, where you popped the door open, this -- did this second one occur before or after?
A I want to say after. But I don't know for sure.
Q Okay.

And tell me what was taken apart?
A There's a side bin, so to speak, in that truck that's opened with a switch. We call it the bread box. There's a sliding door that would allow access to only one side, either the outside or the inside. On this particular time when the drum was broken, we were able to get the bread box open. And there's two sliders, or two guides, I'm sorry, on the sides. We were able to take the screws or bolts out of that to take that slider off.
Q All right.
When you say "we," that would be who?
A It was Mr. Herrin and I.
Q All right.
And this second event, you don't remember whether it was before or after the first Great Falls event, did that involve a lot of time, or a short period of time to access into the truck?
A Through the bread box?
Q Yes.
A It was a pretty significant amount of time.
Q More than an hour?
A I would say yes.
Q So what about the first time? How long did that take?
A I -- I don't recall.
Q All right.

Mr. Racicot asked you things about being familiar with Mr. McAlpin's staging habits.
A Yes.
Q Do you recall that?
A Yes.
Q All right.
And how would he stage money that needed to go to Kalispell for ATMs?
A He would -- he would utilize certain lockers, like he'd have Missoula ATM transfer in one locker, we'd have -- essentially, whatever we needed to -- at certain towns, he'd put in certain lockers. Kalispell would always go in one locker.
Q Okay.
So -- and were the lockers numbered?
A Yes.
Q Do you recall the locker that the Kalispell money would go into?
A I don't.
Q Okay.
But you do recall, at least, that money for various stops would be segregated into different lockers?
A Yes.
Q And the messenger door was broken beginning when?
A I couldn't tell you.

Q Just --
A That was before I was working regularly on the truck. So I don't know how long it was broken.
Q Okay.
But just so I have this right: If the messenger door is broken, you'd have to go through the bread box?
A If you're utilizing that method, yes.
Q Okay.
If you go through the bread box, that takes more time?
A A significant amount.
Q A significant amount of time?
A Yeah.
Q Okay.
Now, so it sounds like -- is it a fair statement that there's more than one way to access these trucks if the keys are locked in there? Or they're unattended?
A For the people on the truck to access it, it's fairly limited, but yes, there is more than one way.
Q And is it common knowledge in the shop how to do this for the drivers and the messengers?
A Like I said, I don't know how widespread it is, but yes, other people know about it.
Q Other people did know about it?
A Yep.
Q Thank you, sir.

MR. DONAHOE: I have nothing further.
THE COURT: You may step down.
THE WITNESS: Thank you.
THE COURT: Do you have other witnesses, Mr. Donahoe?
MR. DONAHOE: No, Your Honor.
Thank you.
THE COURT: Mr. Racicot, what's the timeline on the government's presentation of evidence?
MR. RACICOT: We don't have any witnesses to call, Your Honor.
THE COURT: Very well.
It's five minutes past noon. We'll take a 15-minute recess. The court will reconvene at that time, and I will attempt to address the issues raised by the motion.
We're in recess till 25 past.
(The proceedings in this matter were recessed at 12:08 p.m. and reconvened at 12:27 p.m.)
THE COURT: Be seated, please, all.
We are back in open court session.
Counsel for both parties are present.
The defendant is present.
And the evidence record on this motion has been closed, the defendant having presented four witnesses who gave testimony. The government having stated it has no witnesses to present on this particular issue.

So we'll deem the matter, insofar as the record is concerned, submitted.

Counsel, I'll be pleased to hear summary argument on both sides as you care to present it. Keep in mind, please, that the court has read the briefs and has conducted what it considers to be appropriate additional research directed to the issues.

But you are welcome to proceed. I have no particular preference as to order of presentation, keeping in mind, as I said earlier, the court will approach the issues on the basis of the totality of the record that's before it.

MR. RACICOT: Thank you, Your Honor.

Judge, we would just highlight a couple of points that we referenced in our briefing that I know the court has reviewed, and that's first and foremost that there is prosecutorial discretion in which offense to charge in a case of this type. And interstate transportation of stolen property and all of the transportation of property statutes relate as much to receiving of stolen property as to the initial taking. And that in this case, we charged receiving and transportation. The best analogy I could think of that's not contained in our brief would relate to the possession and transport of stolen motor vehicles across state lines. There is no federal offense that I'm aware of specifically addressed to stealing a vehicle. But if I steal a vehicle here in Helena, and I drive it across

state lines, I can be prosecuted federally for the transportation of that stolen property, even though I couldn't be charged for it -- for the actual underlying theft.

Here, there's arguments that Mr. Herrin could have been charged with the underlying theft, but he wasn't. We believe that's within our discretion to make that determination, so long as we're not discriminating against any class of defendant, which there's been no indication that we are.

Then in our view, as we've said in our brief, it becomes an issue of the evidence and whether it's relevant under 401, whether it's unduly prejudicial under 403. We think there's pattern instructions the court can give the jury at the time of trial to help focus their review of proof, including pattern instruction 3.10 that addresses the fact that the defendant is not on trial for any conduct or offense that is not charged in the indictment.

So the jury will not be asked to find the defendant guilty or not guilty of actually taking the money off the truck. They'll be asked to determine whether the government met its burden of proof as to the elements of interstate transportation of the stolen property. We think that argument dovetails with the Ninth Circuit decisions in Helberg and Desmond, which are cited in our briefs. And we just don't think the defendant's argument as it relates to the Fifth Amendment and being charged under the Fifth Amendment by the way of grand jury for the

actual theft is relevant here, because he will not be exposed to double punishment. He will not be punished for actually taking the money, because the jury won't be asked to determine whether he actually took the money. Any evidence that did he would be relevant only to proving, one, that the money is stolen; and two, that he knew it at the time he transported it across state lines, which are two of the elements of interstate transportation of stolen property.

And with that, Your Honor, unless you have questions, I'd be happy to stand on our briefs.

THE COURT: Nope. I don't have questions.

MR. RACICOT: Thank you.

THE COURT: Mr. Donahoe.

MR. DONAHOE: Thank you.

Your Honor, thank you for the opportunity to make some closing remarks here.

So, I'm going to pick up where the government began, and they seem to be just fastened, apparently, to this idea of prosecutorial discretion. And I would ask the court to conceive of this as prosecutorial obligation.

I think it's apparent from what the court heard today, that the orientation of this case, from the government's point of view, is that Mr. Herrin took the money.

There's evidence of truck break-ins, accessibility to the trucks, keys, possession of keys. Your Honor now has, I think,

a context to look at this indictment and think to yourself: "Well, was it Mr. McAlpin that took the money?"

He denies that, and he's never been charged with it.

Nor was it anyone else that apparently had contact with these funds that took the money.

There's some testimony that seems to indicate that perhaps the correct number of bags were loaded by looking at this video cam, but even that hasn't been established.

Frankly, Your Honor, I think at this point, what we have here is money that has been misplaced. If the government doesn't want to say that Mr. Herrin did it, I guess we're fine with that. And that would take a large part of the government's case, in terms of evidence, and set it to the side. Because there would be no apparent relevance for it.

At the beginning of the hearing, Your Honor summarized in some detail its understanding of the papers that have been filed so far.

And alighted on the fact that the government had made the argument that this should be cast as a motion in limine and not as a motion to suppress, because there's no alleged constitutional violation.

There clearly is alleged a constitutional violation, as a violation of the grand jury clause in the Fifth Amendment, Fifth and Sixth Amendments, together with and looked at through the lens of the statute of limitations statute, which I bring

to Your Honor's attention, states expressly: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished."

The government in its remarks says: "Well, he won't be punished for taking the money." But there's two other clauses or two other words that are really stand out in this phrasing in the statute of limitations statute 3282, "prosecuted or tried."

It has to be the government's view that it intends to put on bank records, casino records, statements, apparently, that Mr. Herrin made, banking activities, deposits, all directed to the goal to show that the money, and I want to use that phrase, "the money," that was run through his accounts and perhaps used for gambling in Las Vegas and so on, is "the money" that was on the truck.

But there's not going to be any physical evidence whatsoever that will connect Mr. Herrin -- "the money" that went through his accounts to "the money" that was apparently misplaced from this truck.

So, for all those reasons, and for all the reasons in the papers, we respectfully request that the court enter an order that says that any effort by the government to offer evidence that Mr. Herrin was the taker of the funds, ought to be excluded.

Thank you, Your Honor.

THE COURT: Thank you, counsel.

We will, with those arguments, deem this matter submitted to the court for decision.

I appreciate the specificity with which both sides have addressed their perception of the issues.

And we will endeavor to address the issues as presented as specifically as possible.

Let's start with the evidence that was presented today. Defendant, at the court's direction, assumed the responsibility to present evidence related to the issues. Four witnesses were called and testified and were examined.

And it is the court's observation, and it's fair to say that the testimony that was encompassed in those four witnesses, largely focused upon the factual events that surrounded the missing money that occurred on -- in November of 2013.

The legal issues, as raised, essentially, in the briefs and argued in the briefs, were not the focus of particular evidence.

And those legal issues remain for the court's analysis and decision, essentially, on the basis of the record, which while it may be impacted to some extent by the testimony presented here today, is largely directed to an analysis of the charges made.

The defendant argues that he has made a constitutional

claim. However, upon analysis, it appears that it remains to be concluded and is concluded by the court that the arguments advanced are, essentially, arguments related to the admissibility of evidence.

But regardless of whether the court takes the motion as a motion to suppress the record which is sought to be excluded, or had the court approaches the question as one of exclusion of evidence, the issue really remains for the court to decide, and that is, whether the evidence surrounding the events of the day in question should be excluded.

That is, it is essentially the defendant's position that all of that evidence, whatever may have -- be shown to have factually occurred on the date of I think it was November the l3th, that that evidence is irrelevant, inadmissible, and prejudicial to the defendant, and should not be admitted.

The government, on the other hand, contends that this evidence has relevancy. And that the -- keeping in mind that the government, from its perspective, does not have to prove the issue of who stole the money as a part of the crime charged, that the evidence the government seeks to introduce is not only relevant, but that it has probative value, and should be allowed to be introduced at the trial, because it touches upon and deals with both the question of who took the money and whether or not the defendant intended to deprive the true owner of the money with its use and possession on a permanent basis.

This issue is framed in -- at least in part, by the Ninth Circuit pattern instructions, particularly pattern instruction 8.189, 2018 edition, the charge being interstate transportation of stolen property.

And I paraphrase: "The defendant is charged in the indictment with the transportation of stolen property in interstate commerce, in violation of Section 2314 of Title 18 of the United States Code.

"In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

"First: That the defendant transported, transmitted, transferred, or otherwise moved stolen property," in this instance, the funds taken from the Garda truck, "between the states, as it's charged, of Montana and Nevada."

Second element: "At the time of the property, the money, crossing the state line boundary, the defendant knew that it was stolen.

"Third: That the defendant intended to deprive the owner of the money temporarily or permanently.

"Fourth, that the money or property was of a value of $5,000 or more."

And finally, as an element in the standard stock instruction: "The government need not prove who stole the money."

Those are the elements of this crime as it is charged in the indictment.

And as I said earlier, the question directly for the court is: Does the court appropriately allow this evidence, which the government has outlined in its brief, to be introduced if otherwise admissible at time of trial?

The manner in which the issue is presented, arguably, could be said to have isolated the claim made by the defendant to one that does not charge a constitutional rights violation. I make no final determination on that issue, because it is the court's determination, regardless of the standard applied, and whether the review of this court's decision be for abuse of discretion, or whether it be by de novo review, that the evidence should be admitted. And that is the ruling of the court.

What happened on the day of the loss of the money that preceded the loss, the events of the day, the investigation that followed, and the evidence that presumably will be found to be admissible at trial of activities of the defendant that followed the loss of the money, are -- and it is the court's determination, relevant to the proof of the crime that was charged. That is, the taking of the money that had been stolen. Not specifically that the defendant took it. And that it is relevant to proof of the charge made by the government. The government simply does not have to prove that the defendant

was the thief, although there may be evidence that would tend to support that conclusion, yet to be developed at time of trial.

But the ruling of the court is the motion to suppress or the motion in limine, however characterized, is denied.

To the extent that the defendant has raised issues that may be appropriate for address by the instructions to be given by the court at the completion of the trial process, those questions are, in the view of the court, premature at this point, and will be addressed at an appropriate time, including, if not before, at the time of settlement of instructions at the completion of trial.

Therefore, the motion, as framed, whether characterized as a motion to dismiss or to suppress or as a motion in limine, is denied.

The evidence may be presented to the extent that the court finds it otherwise to be admissible under the Rules of Evidence to be applied.

That is the ruling of the court.

The case will proceed to trial as scheduled.

There is one other matter, counsel, that I feel obliged to bring to your attention. And that is that the scheduling order in this case that was issued required that by January 4 of this year, that a -- either a plea agreement, if there were a plea negotiation effected, or a notice of intent to go to trial were

to be filed.

No side, either side, complied with that order of this court.

I have nothing before the court to -- other than the absence of a filing, to provide the notice to the court that was required by the court's scheduling order.

I don't have any statement to that effect by the defendant. And I have no response statement or any other statement from the United States on that issue either.

Consequently, counsel, it's my order that on or before close of business on Friday of this week, that's on November -- January 11, that each of you shall file and submit to this court a written explanation of your reasons or reason for not complying with the court's scheduling order in this case.

And for the information of everyone, the court does not issue scheduling orders with the expectation or belief that counsel can or will be free to simply ignore them.

So I expect the filings to be -- as ordered to be made.

That concludes the matters before us today.

We are in recess.

MR. DONAHOE: Judge, can I be heard on something before you leave there?

THE COURT: If it's not related to the rulings of the court, yes.

MR. DONAHOE: It's not. Well, it is, I guess,

tangentially, but it would be my intention, and I just don't want to electronically file it without the court knowing, I'm going to appeal this order to the Ninth Circuit.

THE COURT: Well, counsel, that's -- whatever your prerogatives are under the --

MR. DONAHOE: Well, I just didn't want to not disclose that.

THE COURT: Well, I appreciate your bringing that to the attention. The court will act as it deems appropriate based upon whatever is filed, of course.

MR. DONAHOE: Okay.

THE COURT: All right.

We are in recess.

(The proceedings in this matter were adjourned at 12:49 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Tina C. Brilz, RPR, FCRR

Dated this 18th day of January, 2019.

From: Michael Donahoe <Michael_Donahoe@fd.org>
Sent: Wednesday, December 5, 2018 5:12 PM
To: Racicot, Tim (USAMT) <TRacicot2@usa.doj.gov>
Subject: Herrin

Sorry for the email confusion.....it's been acting up all day.

The theft of the money should have been charged under 18 usc sec 2113(b) see eg. USA v Manfas, 701 F2d 83 (9th cir 1983) and USA v King, 178 F3d 1376(11th cir 1999).

Section 3282 (SOL) says a person can't be prosecuted, tried or punished for an offense not capital unless brought within 5 years

So your theory is he stole the money but you did not indict that crime

Was that oversight or design?

How can you prove a crime that includes the elements of another crime when you did not indict the other crime on time?

Will you produce the grand jury minutes without a motion?

Michael Donahoe

From: Racicot, Tim (USAMT) <Tim.Racicot2@usdoj.gov>
Sent: Thursday, December 06, 2018 12:54 PM
To: Michael Donahoe
Subject: RE: Herrin

Hi, Michael,

First, you say the theft of money "should have" been charged under 2113(b). I'll agree it "could have" been charged, but the conduct also violates state law.

Second, without committing to any particular theory, for the purposes of this discussion it's fair to say that we believe your client was somehow involved in the theft of the money, but we did not present that charge to the grand jury and that decision was by design as opposed to oversight.

Third, the pattern instruction for interstate transportation of stolen property, 8.189, lays out the elements we need to prove for count I. We have to prove the property was stolen and that your client knew it was stolen when he transported it outside Montana. If the jury believes the money he took to Las Vegas is money from the Garda truck, and he knew it was money from the Garda truck, then they can convict if the other elements are satisfied. There is no requirement to charge the underlying theft. The pattern instruction specifically notes that "the government need not prove who stole the [money]." If we don't have to prove your client took the money off the truck, we can't be required to include that charge in the indictment. See also *USA v. Whaley*, 788 F.2d 581, 582 (9th Cir. 1986), which notes that Congress passed this statute "to extend the National Motor Vehicle Theft Act to cover all stolen property over a certain value which is knowingly transported across state or international boundaries." The federal hook for this crime is the interstate transportation, not the nature of the underlying crime. If I steal your car I'm only committing a state crime. But if I drive it to Idaho, I'm violating 18 USC 2314. The same rationale applies here. As far as I can tell, the fact we could have charged the underlying theft from Garda has no bearing on our ability to prove the elements of count I.

As for your final question, I've ordered the grand jury transcript and will produce it upon receipt. You don't need to file a motion. It might take a few weeks because I don't want our office to pay extra to get it expedited. I hope that's okay.

Thanks,

TIMOTHY J. RACICOT
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
105 E. Pine, 2d Floor
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Phone: (406) 542-8851
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District Of Montana
Missoula

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

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

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JOHN GREGORY ALEXANDER HERRIN,** **Defendant.**	**CR 16- 15 -H- SEH** **INDICTMENT** **INTERSTATE TRANSPORTATION OF STOLEN PROPERTY** **(Count I)** **Title 18 U.S.C. § 2314** **(Penalty: Ten years imprisonment, $250,000 fine, and three years supervised release)** **MONEY LAUNDERING** **(Counts II-XIII)** **Title 18 U.S.C. § 1957** **(Penalty: Ten years imprisonment, $250,000 fine, and three years supervised release)**

	ATTEMPTED WITNESS TAMPERING **(Count XIV)** **Title 18 U.S.C. § 1512(b)(3)** **(Penalty: 20 years imprisonment, $250,000 fine, and three years supervised release)**

THE GRAND JURY CHARGES:

COUNT I

On or about January 3, 2014, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, did unlawfully transport in interstate commerce from Montana to Nevada stolen money of a value of $5,000 or more, knowing the same to have been stolen, in violation of 18 U.S.C. § 2314.

COUNT II

On or about January 7, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN deposited $160,870 into his Wells Fargo Bank checking account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT III

On or about January 9, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN deposited $26,000 into his Ameritrade account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT IV

On or about January 21, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN withdrew $30,000 from his Wells Fargo Bank checking account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT V

On or about January 22, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN withdrew $30,000 from his Wells Fargo Bank checking account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT VI

On or about January 30, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN deposited $120,000 into his Wells Fargo Bank checking account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT VII

On or about January 31, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN transferred $60,000 from his Wells Fargo Bank checking account to his Wells Fargo Bank saving account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT VIII

On or about February 4, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN transferred $34,000 from his Wells Fargo Bank checking account into his Ameritrade account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT IX

On or about March 4, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN transferred $15,000 from his Wells Fargo Bank savings account to his Wells Fargo Bank checking account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT X

On or about March 6, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN transferred $25,000 from his Wells Fargo Bank savings account to his Wells Fargo Bank checking account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT XI

On or about March 7, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN transferred $23,000 from his Wells Fargo Bank checking account to his Ameritrade account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT XII

On or about June 5, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN transferred $25,000 from his US Bank account to his Ameritrade account, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT XIII

On or about July 15, 2014, at Helena, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly engaged in a monetary transaction by, through, and to a financial institution, with criminally derived property of a value greater than $10,000, affecting interstate commerce, that is, JOHN GREGORY ALEXANDER HERRIN transferred $13,000 from his Ameritrade account to his account at Rocky Mountain Credit Union, such money having been derived from a specified unlawful activity, that being interstate transportation of stolen property described in Count I, all in violation of 18 U.S.C. § 1957.

COUNT XIV

In approximately March 2014, in the State and District of Montana, the defendant, JOHN GREGORY ALEXANDER HERRIN, knowingly attempted to corruptly persuade another person, with the intent to hinder, delay, and prevent the communication of information relating to the commission of a federal offense to a law enforcement officer, and committed a substantial step toward corruptly persuading that other person, in violation of 18 U.S.C. § 1512(b)(3).

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A TRUE BILL.

Foreperson signature redacted. Original document filed under seal.

Foreperson signature

FOREPERSON

MICHAEL W. COTTER
United States Attorney

JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

WARRANT ✓

BAIL

CRM/SUM