No.

In the Supreme Court of the United States

RICKIE FOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rickie Foy was convicted of conspiring to commit felony bank theft, in violation of 18 U.S.C. §§ 371 and 2113(b), for unsuccessfully attempting to break into an ATM. Section 2113(b) makes it a felony offense to steal a bank's money "exceeding $1,000" (first paragraph) and a misdemeanor offense to steal money "not exceeding $1,000" (second paragraph). This Court has held that § 2113(b) describes two "distinct offenses" and that the valuation requirement is an "element of each paragraph's offense, rather than a sentencing factor." *Carter* v. *United States*, 530 U.S. 255, 272–273 (2000). The district court sustained Mr. Foy's felony conviction after a three-hour trial by videoconference, even though the government submitted no evidence and made no argument that Mr. Foy had intended to steal more than $1,000. The court of appeals affirmed and held that no mens rea requirement applies to the valuation element of the felony offense under § 2113(b).

The question presented is: Whether a conviction for conspiring to commit felony bank theft, in violation of 18 U.S.C. §§ 371 and 2113(b), requires the government to prove that the defendant intended to steal more than $1,000 because the valuation element is a substantive element of the offense.

STATEMENT OF RELATED PROCEEDINGS

United States Court of Appeals for the Seventh Circuit:

United States v. *Foy*, No. 21-2753 (Oct. 3, 2022)

United States District Court for the Northern District of Illinois:

United States v. *Foy*, No. 20-cr-268-2 (July 27, 2021)

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Rickie Foy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–18a) is reported at 50 F. 4th 616. The oral ruling of the district court denying petitioner's motion for judgment of acquittal or alternatively for a new trial (App., *infra*, 107a, 117a, 120a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2022. On December 15, 2022, Justice Barrett extended the time to file a petition for a writ of certiorari until March 2, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 371 of the federal criminal code (Title 18) provides that:

> **Conspiracy to commit offense or to defraud United States**
>
> If two or more persons conspire … to commit any offense against the United States … each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371; see also App., *infra*, 138a (in full).

Section 2113(b) of the federal criminal code provides that:

> **Bank robbery and incidental crimes**
>
> **(b)** Whoever takes and carries away, with intent to steal or purloin, any … money … exceeding $1,000 … in the care, custody, control, management, or possession of any bank, … 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 … money … not exceeding $1,000 … in the care, custody, control, management, or possession of any bank, … shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 2113(b); see also App., *infra*, 139a–140a (in full).

Other pertinent statutory provisions are included as an appendix to this brief. See App., *infra*, 138a–141a.

INTRODUCTION

This Court has frequently said that the traditional presumption of mens rea means that a defendant must know the facts that make his conduct fit the substantive definition of a criminal offense. Some circuit courts—including the D.C. Circuit and, here, the Seventh Circuit—have strayed from that bedrock principle.

In the decision below, the Seventh Circuit held that in order to *conspire* to steal more than $1,000, a defendant need not *intend* to steal more than $1,000, despite the amount of money being a substantive element of the offense. App., *infra*, 10a. That holding defies the plain language of the statute—which requires an "intent to steal or purloin" money "exceeding $1,000." 18 U.S.C. § 2113(b). And it defies this Court's longstanding presumption that mens rea applies to all substantive elements of an offense.

This case involves an ATM theft that never happened. A group spontaneously gathered outside a discount-grocery ATM with common hand tools and struck it. App., *infra*, 2a. The government never produced any evidence that anyone knew how much money was inside—or that anyone suspected or hoped how much was there. And minutes after the group assembled, the police arrived and arrested several of them, including petitioner Rickie Foy. App., *infra*, 2a. The ATM's façade suffered damage, but no one had gotten inside. *Ibid.*

Although Mr. Foy was initially arrested and charged with property damage under state law, the federal government took an interest—seeking to make a few examples during the unrest in the summer of the George Floyd protests. App., *infra*, 2a–3a, 12a. It charged Mr. Foy with the staggeringly serious charge of a felony conspiracy against the United States, which requires conspiring specifically to commit a felony. App., *infra*, 3a. The felony

that the government charged Mr. Foy with conspiring to commit was felony bank theft, 18 U.S.C. § 2113(b). App., *infra*, 3a. *Felony* bank theft requires taking, with intent to steal, more than $1,000. App., *infra*, 3a–4a; see 18 U.S.C. § 2113(b). Accordingly, the government was required to prove that, in the course of the conspiracy, Mr. Foy *intended* to take more than $1,000.

But the government made no attempt to prove—or even argue—that Mr. Foy had that intent. It did not argue that he knew how much he would steal, or even that he was reckless or willfully blind about the amount. App., *infra*, 7a. Instead, it simply shrugged off the amount of money as a non-element to which no mens rea applies. App., *infra*, 89a. The district court agreed, and so did the court of appeals. App., *infra*, 10a, 118a.

The Seventh Circuit's reasoning followed a handful of circuit courts that have strayed from the deeply rooted common-law presumption that mens rea applies to all substantive elements of the offense. This Court has already said that the amount of money is an element of § 2113(b)—one that makes it a "distinct offense" from stealing less than $1,000. This should have been an easy case, and the government should have been held to its burden of proof. Instead, the Seventh Circuit elevated policy over precedent and plain language. In the absence of further review, lower courts will continue to dispense with mens rea requirements. This Court should intervene.

STATEMENT

A. Factual background

1. On June 1, 2020, surveillance video captured about a dozen people gathering at an automated teller machine (ATM) in a grocery-store parking lot in Chicago. App., *infra*, 2a. There was nothing to suggest that any of the

individuals in the parking lot knew each other, and because the footage had no audio, there was no evidence that any of them exchanged a word. App., *infra*, 2a, 94a.

For all of eight minutes, the footage depicted most of the group watching as a few individuals swung at the ATM with a hammer and attempted to wedge a crowbar into it. App., *infra*, 2a. Despite their brief efforts, every attempt to open the ATM failed. *Ibid.* While there was some damage to the ATM's façade, the machine never opened and not a single dollar was taken. *Ibid.* The crowd dispersed when the Chicago police arrived after receiving calls that the ATM was being looted or damaged. *Ibid.* Mr. Foy was arrested within minutes.

2. Mr. Foy was initially charged with property damage by the state police, and this should have been a routine state-law property-damage case. Instead, the federal government soon took interest. On June 4, 2020, Mr. Foy was charged by complaint with conspiring to commit bank theft in violation of 18 U.S.C. §§ 371 and 2113(b)—a federal felony. App., *infra*, 3a, 139a–140a. On June 17, a grand jury returned an indictment charging Mr. Foy with conspiring under 18 U.S.C. § 371 "to commit an offense against the United States, namely, to take and carry away with the intent to steal money exceeding $1,000 in value belonging to, and in the care, custody, control, management, and possession of Bank of America" in violation of 18 U.S.C. § 2113(b). App., *infra*, 4a.

B. Procedural history

1. Mr. Foy was arraigned and pleaded not guilty on June 23, 2020. App., *infra*, 4a. After much delay due to the COVID-19 pandemic, Mr. Foy's trial was held by videoconference on February 10, 2021. App., *infra*, 4a.

By February 2021, Mr. Foy had already been incarcerated for eight months, and due to the COVID pan-

demic he was given the option of either a bench trial by Zoom or an even longer extended pre-trial jail stay. Despite technical difficulties and recesses, the trial took less than three hours. App., *infra*, 4a.

In those three hours, the government—which called only a single witness—failed to produce any evidence that Mr. Foy had conspired to commit a *felony* that would involve stealing more than $1,000. App., *infra*, 7a, 31a, 87a. The government charged *conspiracy*—not attempt. Yet the government produced no evidence that Mr. Foy knew, met, or spoke to anyone else in the parking lot that day. App., *infra*, 94a–95a. What is more, the government charged conspiracy to commit *felony* bank theft, which required proof that Mr. Foy had conspired to take from a bank, with the intent to steal, more than $1,000. Yet the government produced no evidence that Mr. Foy knew or even suspected that there was more than $1,000 in the discount grocery ATM. App., *infra*, 87a, 89a.

In closing argument, Mr. Foy's trial counsel pointed out the insufficient evidence offered by the government. App., *infra*, 86a–88a. He pointed out the government's failure to provide evidence of a relationship or even a conversation between the individuals. *Ibid.* And he reiterated that the government had offered no evidence suggesting that Mr. Foy had intended to "steal money exceeding $1,000." App., *infra*, 87a.

In rebuttal, the government did not argue that it had presented any evidence of intent to steal money exceeding $1,000. App., *infra*, 89a. Instead, the government merely referenced the pattern jury instructions of 18 U.S.C. § 2113(b) and argued that the statute did not require proof of the amount of money that the defendant intended to steal. App., *infra*, 89a–90a.

2. Mr. Foy moved for judgment of acquittal at the close of the government's case. App., *infra*, 4a. That motion was denied when the court found him guilty on February 16, 2021. App., *infra*, 107a. Despite the ruling, the court made no specific finding that Mr. Foy had intended to steal more than $1,000. App., *infra*, 103a–107a.

Mr. Foy moved again for a new trial on March 8, 2021. App., *infra*, 4a. That motion, too, was denied. App., *infra*, 119a–120a. The court did not disagree with Mr. Foy's argument that the government had no evidence of his intent as to the amount of money to steal. App., *infra*, 7a. Rather, the court said that intent was irrelevant. App., *infra*, 10a. Citing the pattern jury instructions for § 2113(b), the court determined as a matter of law that the statute does not require "intent to steal money or property exceeding $1,000." App., *infra*, 5a, 9a–10a.

Mr. Foy was sentenced to 37 months in prison followed by three years of supervised release. App., *infra*, 5a. He was also ordered to pay $70,808 in restitution (later reduced by about $5,000). App., *infra*, 5a.

3. The court of appeals affirmed. App., *infra*, 18a.

Mr. Foy argued on appeal, as relevant here, that the district court had erred in holding that the government did not need to show intent to steal more than $1,000 to support the charge that he had conspired to commit a felony offense. App., *infra*, 6a.

The court of appeals rejected that argument, holding that the government was required to prove only a general intent to steal, not an intent to steal more than $1,000. App., *infra*, 10a. The court interpreted the language of § 2113(b) to separate the $1,000 valuation requirement from the intent language. App., *infra*, 7a–8a. But the court's reasoning was short: it said only that "intent to steal" was "offset by commas." App., *infra*, 8a.

The court of appeals also referenced this Court's decision in *Carter* v. *United States*, 530 U.S. 255 (2000), which had analyzed § 2113(a) and (b). App., *infra*, 8a. The Seventh Circuit interpreted *Carter* to mean that the valuation requirement is its own element that has no mens rea requirement. *Ibid.* The court of appeals came to that conclusion because *Carter* did not discuss the amount of money when discussing the statute's intent element. *Ibid.* In doing so, the court of appeals implicitly rejected Mr. Foy's extensive arguments about the presumption of mens rea and the statutory text, reasoning that this Court's "recogn[ition of] the valuation requirement as its own element" had disposed of the issue. *Ibid.*

Next, the court of appeals looked to pattern jury instructions. The instructions include four necessary elements, including that "such [money; property; thing of value] exceeded $1,000 in value." App., *infra*, 9a (alteration in original). The elements listed in the instructions also include that the defendant "took and carried away such [property; money; thing of value] with the intent to steal." *Ibid.* (alteration in original). The court of appeals classified that separate listing as "additional support" for its view that mens rea did not apply to the valuation requirement. *Ibid.*

Finally, the court of appeals relied on its own policy preferences. It concluded that Mr. Foy's plain-language interpretation of Section 2113(b) would "lead to impractical and illogical results." App., *infra*, 9a–10a. It called it "unworkable" to require the government to prove that a defendant "specifically intended to steal a certain amount of money or that a defendant knew how much money was in an ATM." App., *infra*, 9a. That rebutted an argument that Mr. Foy had not made: he did not argue that "certain" knowledge was required—aspiration, intent, reck-

lessness, or willful blindness might suffice. Mr. Foy's point was that the government had offered *nothing at all* regarding his intent. But the court of appeals stated that it would "not interpret § 2113(b) to absolve those who rob an ATM but did not have a specific intent regarding the amount of money they intended to steal." App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

A criminal defendant must intend the facts that make his conduct fit the definition of the charged offense. Exceptions to that traditional rule are narrow and few. The mens rea principle is deeply rooted in the common law, and it applies whenever Congress has not clearly dispensed with it.

Mr. Foy was convicted of *conspiring* to commit felony bank theft—a crime of specific intent—because no actual bank theft occurred. Section 2113(b) defines felony bank theft (as compared to the misdemeanor offense) by the amount of money stolen; theft of less does not violate the provision that the government charged against Mr. Foy. Congress did not dispense with the mens rea requirement for that felony offense, and it is not a sentencing factor or mere jurisdictional element. The court of appeals, however, held that the express mens rea requirement in Section 2113(b) does not extend to the amount of money required to be stolen.

The various courts of appeals have reached different results about whether mens rea applies to all substantive elements of criminal offenses. But holding otherwise violates this Court's precedent. Not only *Carter*, which holds that the amount of money is a substantive element, but also the cases making clear that mens rea presumptively applies to all substantive elements. The consequence in this case was that a conspiracy conviction was sustained even though the government advanced no evidence that

anyone intended all the facts that fit the underlying offense. The consequence in other cases will be that where police intervene early, defendants will be convicted of conspiracies whose details they never intended. This Court should grant the petition for a writ of certiorari and reverse the decision of the court of appeals.

A. The courts of appeals are divided over whether mens rea is required for all substantive elements of an offense

1. When it comes to crime, intent matters. *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). It always has: American criminal law is rooted in the common-law principles of actus reus and mens rea. Criminal statutes are construed "in light of the background rules of the common law," under which "the requirement of some *mens rea* for a crime is firmly embedded." *Staples* v. *United States*, 511 U.S. 600, 605 (1994). To that end, the "existence of a mens rea is the rule of, rather than the exception to, the principles Anglo-American criminal jurisprudence." *Dennis* v. *United States*, 341 U.S. 494, 500 (1951). By contrast, criminal offenses requiring no mens rea have a "generally disfavored status." *Gypsum*, 438 U.S. at 437–438. Indeed, some offenses, like conspiracy, are *entirely* matters of intent.

2. Although many circuit courts presume that mens rea is required for all substantive elements of an offense, some do not. That difference means that the definitions of offenses (like felony bank theft in this case) differ among circuits—as does what the government needs to prove to convict a defendant.

a. Multiple circuit courts agree with the common-law tenet that the presumption of mens rea applies to every substantive element of an offense. The Fourth, Fifth,

Eight and Eleventh Circuits have all applied that presumption.

The Fourth Circuit remanded a conviction for "knowingly" violating the Clean Water Act for "failing to require mens rea with respect to each element of an offense defined by the Act." *United States* v. *Wilson*, 133 F.3d 251, 253–254 (1997). Applying "common law principles regarding mens rea," *Wilson* reasoned that knowledge of "the facts that make [a defendant's] conduct illegal" "must generally be proven with respect to each element of the offense"—even if the *illegal status* did not. *Id.* at 261–262 (emphasis omitted). Because the jury instructions did not "adequately impose on the government the burden of proving knowledge *with regard to each statutory element*," a new trial was required. *Id.* at 264–265. Other cases from the Fourth Circuit have likewise made clear that the government "is generally required to prove a defendant's *mens rea* with respect to substantive elements of a crime," even if "such proof is not required for" non-substantive exceptions such as "a jurisdictional element." *United States* v. *Taylor*, 942 F.3d 205, 214 (2019); see also *United States* v. *Langley*, 62 F.3d 602, 616 (4th Cir. 1995) (Phillips, J., concurring in part) (noting the starting "presumption of application [of mens rea] to all substantive elements").

The Fifth Circuit likewise vacated and remanded a conviction for "knowingly" violating the Clean Water Act because the jury had not been instructed that mens rea applied to each element of the underlying offense. *United States* v. *Ahmad*, 101 F.3d 386, 389–391 (1996). The court of appeals explained that, "[w]ith the exception of purely jurisdictional elements, the *mens rea* of knowledge applies to each element of the crimes." *Id.* at 391. The court considered it "eminently sensible" that mens rea "should

uniformly require knowledge as to each of [the violated provision's] elements rather than only one or two." *Id.* at 390. And it observed along the way the "severe penalties" that supported applying the presumption. *Ibid.* The result was that the defendant needed to know not only *that* he was discharging a substance but *what* he was discharging.

The Eight Circuit remanded where the jury had not been instructed that a conviction for sexual abuse required showing a defendant's "knowledge of [a] victim's incapacity or inability to consent." *United States* v. *Bruguier*, 735 F.3d 754, 757, 760–763 (2013) (en banc). The court of appeals rejected the dissenting view that "knowingly," the express intent element in that statute, applied only narrowly to one other element, reasoning that such a view neglected the presumption that a mens rea requirement "applies to each element." *Id.* at 762. That presumption had not been rebutted by Congress, and so it applied. See also *United States* v. *Little*, 961 F.3d 1035, 1038 (8th Cir. 2020) (applying *Bruguier* to extend express mens rea requirement to all elements).

The Eleventh Circuit acknowledged the "traditional rule that the government must prove mens rea for each substantive element of the crime," but held that the presumption of mens rea did not extend to knowledge of a defendant's factual status—a misapplication of the rule that this Court reversed. *United States* v. *Rehaif*, 888 F.3d 1138, 1146 (2018), reversed, 139 S. Ct. 2191, 2200. In another case, that same court of appeals applied the presumption to require that, to convict for smuggling, the government needed to show that a defendant had knowingly brought an alien to the United States. *United States* v. *Dominguez*, 661 F.3d 1051, 1068 (2011).

The approach of the First, Second, and Sixth Circuits is only slightly different: those courts distinguish between

"substantive" elements (which require mens rea) and "jurisdictional" elements or sentence-enhancing factors (which do not). See, *e.g.*, *United States* v. *Mitchell-Hunter*, 663 F.3d 45, 51 (1st Cir. 2011) (jurisdiction does not relate to the necessary mens rea); see also *United States* v. *Escalera*, 957 F.3d 122, 130 (2d Cir. 2020); *United States* v. *Bunn*, 154 F. App'x 227, 229 (2d Cir. 2005); *United States* v. *Blackmon*, 839 F.2d 900, 907 (2d Cir. 1988) (distinguishing jurisdictional versus substantive elements for mens rea); *United States* v. *Pinckney*, 85 F.3d 4, 6 (2d Cir. 1996); *United States* v. *Houston*, 683 F. App'x 434, 437 (6th Cir. 2017) (no mens rea requirement for jurisdictional, non-substantive, element). But see *United States* v. *Shim*, 584 F.3d 394, 395–396 (2d Cir. 2009) (requiring mens rea for interstate-commerce element of Mann Act violation).

Likewise, some circuit courts have rejected defendants' mens rea arguments specifically because they concerned aspects of the offense *other* than "substantive elements." *E.g.*, *United States* v. *Muza*, 788 F.2d 1309, 1311–1312 (8th Cir. 1986); *United States* v. *Murillo*, 826 F.3d 152, 159 (4th Cir. 2016) (while "courts generally interpret criminal statutes to require that a defendant possess a *mens rea* … as to every element of an offense," this is not so "with respect to jurisdictional elements" (cleaned up)). Alternatively, some circuit courts have considered the presumption but, after analysis, found it to have been rebutted under the specific circumstances of a particular provision. *E.g.*, *United States* v. *Washington*, 743 F.3d 938, 943 (4th Cir. 2014) (reasoning that the "special context" surrounding the nature of a victim's underage statute was "sufficient to rebut the general presumption that a specified *mens rea* applies to all elements of the offense"); *United States* v. *Daniels*, 685 F.3d 1237, 1248–

1249 (11th Cir. 2012) (similar, noting "historical exception to the presumption" for sex offenses).

In all of those courts of appeals, Mr. Foy's appeal in this case would have come out differently, because *Carter* has already made clear that the valuation element of Section 2113(b) is a substantive element of that offense and the government did not show that Congress rebutted the common-law presumption that mens rea applies to that element.

b. Other courts of appeals, in contrast, have held that the "element" label is not meaningful for mens rea and that the presumption does not generally apply to all substantive elements of an offense.

The D.C. Circuit most clearly articulated the contrary view—over the dissent of then-Judge Kavanaugh—and held that it was "misguided" to suggest that whether something is an "element" of an offense is "determinative of the *mens rea* requirement." *United States* v. *Burwell*, 690 F.3d 500, 505 (2012) (en banc). The D.C. Circuit reasoned that the presumption of mens rea applied only to the minimum fact needed to differentiate *entirely* lawful from criminal conduct. *Id.* at 506–507. The majority did so despite Judge Kavanaugh's dissent pointing out that this Court had never limited the common-law principle in that way. *Id.* at 529 (Kavanaugh, J., dissenting). The D.C. Circuit noted that the Third and Seventh Circuits' views aligned with its own. *Id.* at 508 (citing *United States* v. *Jackson*, 443 F.3d 293, 299 (3d Cir. 2006); *United States* v. *Dimas*, 3 F.3d 1015, 1022 (7th Cir. 1993)).

Like the D.C. Circuit, the Seventh Circuit does not require intent for all substantive elements. That court in *United States* v. *Schnell*, 982 F.2d 216 (1992), for instance, concluded that Congress could have made a sentencing factor into a substantive element instead without requir-

ing mens rea. *Id.* at 222. Likewise, in *United States* v. *Fox*, 845 F.2d 152 (1988), the court of appeals concluded that to convict a defendant of knowingly possessing a "weapon or object that may be used as a weapon," only a general criminal intent was required—intent regarding possession of the item, not intent regarding its status as a weapon. *Id.* at 153, 156. That was so even though the offense included, as its actus reus, that the object was "capable of being used as a weapon." *Id.* at 154. The Seventh Circuit's opinion in this case confirms that the court does not apply mens rea to substantive elements. See App., *infra*, 9a–10a (acknowledging that valuation is an "element" but nonetheless not requiring mens rea).

The Ninth Circuit has also rejected an all-elements mens rea presumption. *United States* v. *Price*, 980 F.3d 1211, 1215 (2019). In *Price*, the relevant statute criminalized knowingly engaging in sexual conduct with a person without that person's permission on an international flight. *Id.* at 1215. The government argued that it needed to prove only the victim's actual lack of consent; the defendant argued that the government had to prove that he knew that the victim did not consent, and argued that he thought that she had. *Ibid.* The Ninth Circuit agreed with the government, reasoning that the mens rea presumption applied narrowly, reaching only the particular facts that made the defendant's conduct "wrongful" in general—not the facts that made it fit the offense. *Id.* at 1219. *Price*, however, garnered a separate opinion criticizing the majority's holding as "contrary to" a legislative "understanding that mens rea would apply equally to every element of the offense." *Id.* at 1236–1237 (Gilman, J., concurring in the result for "a totally different reason"). Likewise, in *United States* v. *Sablan*, 92 F.3d 865, 868–869 (1996), the Ninth Circuit held that the only mens rea required for a computer-fraud conviction was that

needed for "wrongful intent" generally, and that the fact of accessing a federal computer without authorization was enough—even though the offense also required that the defendant damaged computer files. In *United States* v. *Speach*, 968 F.2d 795, 796–797 (1992), the Ninth Circuit required, for a conviction for transporting hazardous waste, that a defendant knew that it lacked a permit—specifically because the conduct would have been otherwise legal or "innocent." And in *United States* v. *Olson*, 856 F.3d 1216, 1220 (2017), the Ninth Circuit applied the mens rea presumption to require, in convicting under a misprision statute, that the defendant knew the assisted person to be a felony. That application was based not on the substantive-element presumption but on whether, absent knowledge of felon status, the conduct would be "blameworthy" in a general sense. *Id.* at 1220–1221.

3. This issue is important. Disagreement on the scope of mens rea has the potential to elevate identical conduct that would be a misdemeanor (or no crime at all) in one jurisdiction into a felony in another. A uniform understanding of the fundamental mens rea requirement is necessary for consistent application of the law and due process to criminal defendants.

The issue is doubly serious for crimes that are primarily about intent, such as conspiracy. This Court has held that, "in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *United States* v. *Feola*, 420 U.S. 671, 686 (1975). The courts of appeals interpret that proposition to mean that a conspiracy conviction requires the exact same mens rea as the underlying offense—and no more. *E.g.*, *United States* v. *Zarattini*, 552 F.2d 753, 760 (7th Cir. 1977); *United States* v.

Mauro, 501 F.2d 45, 51 (2d Cir. 1974). That presents a serious threat to due process if a mens rea requirement is incorrectly left out of an underlying offense, because a conspiracy charge is all about the criminality of a defendant's intended conduct. This is such a case.

B. The decision below is incorrect

The Seventh Circuit held that mens rea does not apply to § 2113(b)'s valuation element, even though this Court has held that the valuation requirement is a substantive element of the offense. That was error. The Seventh Circuit's decision directly conflicted with this Court's precedent that the mens rea requirement applies to all elements of an offense unless Congress provides otherwise. This Court should reverse the Seventh Circuit and resolve the circuit split discussed above.

1. Mens rea applies to all substantive elements of an offense, with narrow exceptions

Under this Court's precedent, mens rea presumptively applies to all substantive elements of a criminal offense—not only the bare minimum needed to separate conduct from that which is otherwise entirely innocent. Although there are narrow exceptions to the ultimate mens rea rule, a court must start by applying the presumption before deciding whether it is rebutted.

a. The presumption of mens rea is a longstanding canon of statutory interpretation. *Burwell*, 690 F.3d at 531 (Kavanaugh, J., dissenting) (citing *Staples*, 511 U.S. at 605–606). The fundamental nature of mens rea is precisely why this Court has repeatedly read a state-of-mind component into criminal offenses, even when the statute did not, by its terms, contain such language. *E.g.*, *Staples*, 511 U.S. at 605; *Rehaif* v. *United States*, 139 S. Ct. 2191, 2197 (2019); *United States* v. *X-Citement Video Inc.*, 513 U.S. 64, 70 (1994).

"The deeply rooted presumption of *mens rea* generally requires the Government to prove the defendant's *mens rea* with respect to each element of a federal offense, unless Congress plainly provides otherwise." *Wooden* v. *United States*, 142 S. Ct. 1063, 1076 (2022) (Kavanaugh, J., concurring) (citing *Rehaif,* 139 S. Ct. at 2195)); *Flores-Figueroa* v. *United States*, 556 U.S. 646, 652 (2009); A. Scalia & B. Garner, Reading Law 303–312 (2012)); see generally *Burwell*, 690 F.3d at 531–533 (Kavanaugh, J., dissenting) (reviewing history of the presumption). An element of an offense is a fact necessary to constitute the definition of the offense. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 239 (1998); see also *Staples*, 511 U.S. at 608 n.3.

The traditional presumption of mens rea means that, unless Congress plainly indicates otherwise, the government must prove the defendant's intent for *every* element of the offense. *Burwell*, 690 F.3d at 528 (Kavanaugh, J., dissenting).

b. Exceptions to the presumption are narrow, specific, and few. They include (1) jurisdictional elements, (2) sentencing factors, and (3) elements of public-welfare or regulatory offenses.

First, elements that are solely jurisdictional function only to establish jurisdiction on the federal courts. *Feola*, 420 U.S. at 676–677 & n.9. They are therefore not truly part of the definition of the offense, and so the presumption of mens rea does not apply. For example, a defendant receiving stolen property must know only that the property was stolen, not that it was stolen from an interstate shipment. That interstate-commerce aspect solely serves a jurisdictional purpose. See *Luna Torres* v. *Lynch*, 578 US. 452, 468 (2016). Another common example is that an offender who intentionally assaults an individual need not

know the federal affiliation of that individual for the charge to rise to the jurisdiction of the federal courts under statute prohibiting assault on a federal officer. *Feola*, 420 U.S. at 693. There, the offense is just assault; federal status simply gives the federal government a legitimate legislative interest.

Second, sentencing factors are intended to increase punishment for a proven offense. *Almendarez-Torres*, 523 at 228. They are not part of the definition of the offense itself and do not alone trigger the presumption of mens rea. *Dean* v. *United States*, 556 U.S. 568 (2009). Although this Court has not resolved the question, then-Judge Kavanaugh has suggested that mens rea should apply, as a constitutional matter, to sentencing factors that also must be proven to a jury. *Burwell*, 690 F.3d at 540 n.13 (Kavanaugh, J., dissenting) (citing, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 491 (2000), which held that certain sentencing-enhancing factors must be proven to the jury).

Third, so-called public welfare or regulatory offenses, which impose strict criminal liability, have been found to dispense with the conventional mens rea requirement. *Staples*, 511 U.S. at 606. But this narrow exception typically involves statutes that impose light sanctions and regulate plainly "potentially harmful or injurious items." *Id.* at 607. In any event, such strict-liability statutes are "disfavored" and require "some indication of congressional intent, express or implied," before dispensing with mens rea. See *id.* at 606.

c. Applying the presumption of mens rea does not require that conduct otherwise be completely non-culpable. The Court has never limited the presumption to "appl[y] only when necessary to avoid criminalizing apparently innocent conduct"—*i.e.*, conduct that would otherwise violate no criminal statute at all. *Burwell*, 690 F.3d at 529

(Kavanaugh, J., dissenting). While the mens rea requirement is *particularly* vital when failing to apply it would criminalize otherwise completely nonculpable conduct, "the Court has never held that avoiding such a result is the only reason to do so." *United States* v. *Villanueva-Sotelo*, 515 F.3d 1234, 1242 (D.C. Cir. 2008). The presumption also applies when "necessary to avoid convicting the defendant of a more serious offense for apparently less serious criminal conduct." *Burwell*, 690 F.3d at 529 (Kavanaugh, J., dissenting). Under such circumstances, the requirement is satisfied if the defendant "know[s] the facts that make his conduct fit the definition of the offense." *Staples*, 511 U.S. at 607 & n.3 (citing the maxim *ignorantia facti excusat*).

2. A mens rea requirement applies to Section 2113(b)'s valuation element

As discussed above, at least the Fourth, Fifth, Eighth, and Eleventh Circuits have applied the presumption of mens rea to require that the government prove mens rea with respect to all substantive elements of an offense. This case would have come out differently in those circuits, and should have come out different under this Court's precedent.

a. The presumption of mens rea applies to the valuation element of the federal *felony* bank-theft offense that is described in the first paragraph of 18 U.S.C. § 2113(b). This Court has already held in *Carter* that the valuation requirement is a substantive element. It is not a sentencing factor, and no other exception to the mens rea presumption applies.

Mr. Foy was convicted of a felony (under 18 U.S.C. § 371) for conspiring to commit *felony* bank theft under § 2113(b). That underlying provision made it a felony to "take[ ] and carr[y] away, with intent to steal or purloin,

any … money … exceeding $1,000 … in the care, custody, control, management, or possession of any bank." 18 U.S.C. § 2113(b). The language "money … exceeding $1,000" is that felony provision's so-called valuation element. *Carter*, 530 U.S. at 273. That element is the only separation of felony bank theft from the "distinct offense" of misdemeanor bank theft. *Id.* at 273. The mens rea presumption therefore applies to that substantive element.

The valuation requirement of § 2113(b) is an "element" of the offense and not a "sentencing factor" as this Court explained in *Carter*. 530 U.S. at 272–273. Each of the two paragraphs of § 2113(b) describes its own "distinct offense." *Ibid.* The first, a felony, involves property or money exceeding $1,000, and the other, a misdemeanor, involves property or money not exceeding $1,000. *Ibid.* The only difference between the two offenses is the value of the property.

Nor is the valuation requirement jurisdictional. Jurisdictional elements are those that "confer jurisdiction on the federal courts." *Feola*, 420 U.S. 676 & n.9. But the amount of money in § 2113(b) ¶ 1 does not establish a federal interest, because a theft of less than $1,000 from a bank is federally criminalized too—albeit as a different offense. Instead, it is a subject bank's federally insured status that gives the offense its federal nature. See 18 U.S.C. § 2113(f) (defining "bank" as used in § 2113(b) to include insured status with the Federal Deposit Insurance Corporation).

The element is also not part of a "public welfare" or "regulatory" offense. As mentioned above, "public welfare" or "regulatory" offenses are recognized in limited circumstances. These typically result in "only light penalties such as fines or short jail sentences." *Staples*, 511 U.S. at 616. Section 2113(b) imposes a potential decade in

prison—and felon status that comes with loss of valuable civic rights.

b. There is no textual indication—or "clear command," *Morissette* v. *United States*, 342 U.S. 246, 255 & n.14 (1952)—that Congress dispensed with the mens rea presumption for any substantive element of the felony offense under § 2113(b).

i. This Court applies the presumption of mens rea either (1) if a statute is silent about mens rea or (2) if it has an express mens rea requirement for one element but is silent or ambiguous about mens rea for others. See *Liparota* v. *United States*, 471 U.S. 419 (1985); *X-Citement Video*, 513 U.S. at 65–68. "[S]ome indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Staples*, 511 U.S. at 605–606.

Additionally, this Court has recognized that, as a matter of ordinary English usage, a phrase in a criminal statute that is introduced with an adverb or similar modifier—like the word "knowingly"—typically applies to each element thereafter. Thus, the mens rea requirement of the specific-intent element ("intent to steal or purloin") applies to elements that are listed separately. *Rehaif*, 139 S. Ct. at 2195–2199. Even in more complicated examples, this Court has found "knowingly" to modify a phrase that is not even the direct object of the modified verbs. *X-Citement Video,* 513 U.S. at 68–69.

ii. The text of § 2113(b) contains no indication that mens rea is not required. Indeed, it shows the opposite.

The statutory language of § 2113(b) contains explicit specific-intent language—namely, "intent to steal or purloin." "[S]teal" then has a direct object in the same provision: "property or money or any other thing of value exceeding $1,000." Accordingly, the statute requires a

specific intent to steal more than $1,000. That makes sense, because the only thing that differentiates a felony bank-theft conspiracy and the distinct offense of a misdemeanor bank-theft conspiracy is the amount of money intended to be stolen.

Even assuming that the express specific-intent element itself does not apply to the valuation element, Congressional silence does not dispense with the presumption of mens rea. *Morissette*, 342 U.S. at 263. "Money … exceeding $1,000" is a substantive element, and thus it is part of the definition of the offense. Under the conventional rule, a defendant must "know the facts that make his conduct fit the definition of the offense" to establish mens rea. *Staples*, 511 U.S. at 607 n.3; see also *id.* at 605.

c. The presumption of mens rea has particular force when penalties are high. As then-Judge Kavanaugh has explained, the presumption applies when "necessary to avoid convicting of a more serious offense for apparently less serious criminal conduct." *Burwell*, 690 F.3d at 543 (Kavanaugh, J., dissenting); see also *id.* at 543–544 (explaining that it would "make no sense at all" not to apply mens rea to an element that elevates the "defendant's mandatory minimum punishment from 10 years to 30 years").

The valuation element of § 2113(b) creates not only a separate offense but also a drastic difference in punishment. The consequence is more than length of time in prison: people convicted of felonies lose valuable civil rights—including constitutional rights—that people convicted of misdemeanors do not.

And the presumption is especially important in a conspiracy case like this one where no underlying crime was committed, because intent is *all there is* to the charged crime. And indeed, in this case a valuation less than $1,000

would mean no conviction at all for the offense charged in the indictment, because Mr. Foy was not charged with attempt and did not steal anything. He was charged with felony conspiracy, which required that he conspired *to commit a felony*—not a misdemeanor. The government chose not to charge conspiring to commit a misdemeanor, it chose not to charge attempt, and it chose not to leave him to state property-damage prosecution. Mr. Foy was overcharged, and the government should have been held to proving the elements of the charge that it brought.

C. The question presented is recurring and important, and this case is an ideal vehicle

This case is an ideal vehicle for resolving the question presented. It squarely and cleanly presents the issue, and the outcome of that legal question is dispositive.

1. The issue is narrow and clearly defined. The question is whether there is a mens rea requirement *at all* for conspiring to commit felony bank theft. If the answer to the question presented is "yes," then Mr. Foy's conviction must be vacated because the government made absolutely no showing of mens rea and has not argued that it did. Mr. Foy preserved that argument at every stage of the proceeding below.

Answering the question presented in the affirmative will not frustrate the purpose or the statute. Courts might be concerned by the prospect of a strict knowledge requirement: for instance, defendants might intentionally blind themselves to the money they take or at least might not know for a fact the exact amount of money they meant to steal. But willful blindness, recklessness, or another standard may be sufficient to satisfy mens rea. And it is also possible that a jury could fairly infer from the amount of effort and risk in a defendant's conduct that he meant to take more than $1,000—courts have relied on circum-

stantial evidence for similar showings. See, *e.g.*, *United States* v. *Donato-Morales*, 382 F.3d 42, 47–49 (1st Cir. 2004) (inferring from conduct that defendant specifically intended that he was taking "thing of value" for purposes of 18 U.S.C. § 641). Those legal doctrines and inferences serve as a safety valve in other similar contexts, and they may apply to the bank-theft statute. But this is not such a case. This Court need not resolve the level of mens rea that is required, or whether the evidence could support an inference of such a level of intent. The government presented no evidence at all and never urged another standard. The applicable standard can be developed in the district and circuit courts when appropriate facts are presented. The issue here is only whether a mens rea requirement exists at all.

2. The issue is dispositive. The government did not argue that it had satisfied a mens rea requirement—not even in the alternative. The government did not present any evidence of mens rea with respect to the amount of money. Nor did the government argue that a reasonable factfinder could infer that mens rea. It made its case entirely on the absence of that requirement.

3. The question presented is important and will recur frequently. The presumption of mens rea applies to all substantive elements of an offense, and so the effect of that presumption reaches every criminal prosecution involving at least one element lacking a specific mens rea requirement. See, *e.g.*, *Staples*, 511 U.S. at 605–606 (considering presumption where statute entirely lacked statutory mens rea requirement); *Ruan* v. *United States*, 142 S. Ct. 2370, 2377–2378 (2022) (considering presumption where statute included general mens rea provision); *Rehaif*, 139 S. Ct. at 2195.

Further, this case involved conspiracy to commit a crime that never came to pass because law enforcement quickly intervened. Because of advances in technology, that situation is increasingly common.

Here, the crowd assembling around the ATM triggered a motion-sensitive digital camera that recorded video in detail. App., *infra*, 2a. It is no surprise that police were rapidly alerted because cell phones are now ubiquitous. Callers to 911 now expect as a routine matter that their phones transmit their locations. And law enforcement agencies broadly have capitalized on technology to try to reduce response times. See, *e.g.*, National Sheriffs' Association, *Embracing Technology to Decrease Law Enforcement Response Time* (Feb. 28, 2016) (noting smartphone applications used to reduce response time);[1] City of Chicago Office of Inspector General, *The Chicago Police Department's Use of Shotspotter Technology* 4–5 (Aug. 24, 2021) (noting police use of acoustic ShotSpotter technology to rapidly alert police to gunshots).[2]

Other advances mean that law enforcement can quickly anticipate and head off crimes before they happen—sometimes known as "predictive policing." See, *e.g.*, Andrew Guthrie Ferguson, *Predictive Policing and Reasonable Suspicion*, 62 Emory L.J. 259, 266–270 (2012). Police departments can allocate patrols to certain areas based on data-driven activity forecasting. Ferguson, *supra*, at 268. Movement patterns can be tracked not only by cell phones but by public social-media activity. See, *e.g.*, International Association of Chiefs of Police & Urban Institute, *2016 Law Enforcement Use of Social Media Survey* 3 (Feb. 2017) (reporting that 70% of sur-

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[1] https://perma.cc/5ZUH-ND8S

[2] https://perma.cc/32SD-AA9U

veyed law-enforcement agencies use social media for investigations).[3] Motion trackers or aggregated GPS data can alert law enforcement to assembling crowds. Social-media posts could identify individuals in groups suspected of impending unlawful activity. Ferguson, *supra*, at 284. Technology enables facial identification of individuals among large crowds—a technique that was used to identify many arrested in connection with the events of January 6, 2021, as well as many arrested among the George Floyd protests. See FBI, *Capitol Violence Images*;[4] United States Government Accountability Office, *Facial Recognition Technology*, GAO-21-518, at 17 (June 2021).[5]

While those advances are promising for law enforcement's ability to stave off danger, they come with the risk that defendants are charged and convicted on less evidence than Congress expected when it originally enacted the underlying statutes. They also permit law enforcement to move on the basis of a particularly small volume of circumstantial evidence, and they risk imposing guilt by association. And the risks are particularly stark where over-prosecution would threaten citizens' rights of assembly or speech. Procedural due process is the appropriate countervailing safeguard, but that safeguard means little if courts do not enforce the need to show *all* the mens rea required for a criminal offense. This case is an ideal vehicle to make sure that safeguard remains in place.

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[3] https://perma.cc/Y4G9-CL92

[4] https://perma.cc/8ZTC-TVHW

[5] https://perma.cc/XT39-KV6D

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2, 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 21-2753

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICKIE FOY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 20-cr-00268-2 — Thomas M. Durkin, *Judge*.

Argued September 13, 2022
Decided October 3, 2022

Before FLAUM, BRENNAN, and SCUDDER, *Circuit Judges*.

FLAUM, *Circuit Judge*.

Rickie Foy was among a group of individuals whose attempt to forcibly break into a Chicago ATM during summer daylight hours was recorded by the machine's security camera. After Foy's arrest, federal charges were brought against him, and he was found guilty of

conspiracy to commit bank theft in violation of 18 U.S.C. §§ 371 and 2113(b). On appeal, Foy raises three issues: first, that the government was required to show evidence of intent to steal more than $1,000, rather than just intent to steal; second, that the government fell short of establishing a conspiracy at trial; and third, that the district court impermissibly considered the civil unrest in the wake of George Floyd's death as an aggravating factor in sentencing Foy. For the following reasons, we affirm Foy's conviction and sentence.

I. Background

A. Factual Background

On June 1, 2020, a group of individuals attempted to steal money from a Bank of America ATM located in an ALDI grocery store parking lot in Chicago, Illinois. The ATM was equipped with a surveillance video camera which captured video, but not audio, from the scene. The footage shows a group of people—including Foy (clad in a neon construction vest) and his co-defendants Pierre Harvey and Chyenne Simpson—surrounding the ATM at approximately 7:10 PM.[1] For roughly the next eight minutes, the group used an assortment of tools, including a hammer, crowbar, and rod, to attempt to break open the ATM and access its contents. The individuals passed these tools among the assembled group, appearing to direct one another on how to utilize them. The group damaged the outside cover of the ATM but ultimately failed to gain access to the cash inside.

At approximately 7:18 PM, Chicago Police Department ("CPD") officers arrived on the scene and arrested Foy, Harvey, and Simpson. According to Bank of America

[1] At trial, the parties stipulated that the video timestamps incorrectly reflect one hour earlier than the actual time of the incident.

records, the vandalized ATM held over $190,000 in cash. The FDIC insured Bank of America at the time of the incident.

B. Procedural Background

In June 2020, a criminal complaint charged Foy with violating 18 U.S.C. § 371 by conspiring to commit an offense against the United States, specifically bank theft in violation of 18 U.S.C. § 2113(b). Section 371—the conspiracy count— provides that:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 2113(b)—the federal bank robbery statute—states that:

> 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.

A grand jury returned a single-count indictment on June 17, 2020, charging Foy with conspiring "to commit an offense against the United States, namely, to take and carry away with the intent to steal money exceeding $1,000 in value belonging to … Bank of America" in violation of §§ 371 and 2113(b). Foy pleaded not guilty at his arraignment on June 23, 2020, and he remained in federal custody through his trial.

In December 2020, Foy waived his right to a jury trial and opted to resolve his case by bench trial. Both parties consented to conducting the trial remotely via videoconference, which was held on February 10, 2021. At the trial, which lasted less than three hours, the government played the ATM's surveillance video. Foy moved for judgment of acquittal at the close of the government's case, arguing that, even taking the evidence in the light most favorable to the government, speculation and guessing were required to determine what was taking place in the silent video footage.

The district court found Foy guilty on February 16, 2021, denying his motion for acquittal. Foy moved for a new trial on March 8, 2021. His arguments included that the government failed to prove beyond a reasonable doubt that he intended to steal more than $1,000 because "perhaps the defendants, whether acting alone or together would have been satisfied with, and therefore intended to steal[,] less than $1,000," and that the government failed to prove beyond a reasonable doubt that the defendants conspired with each other because they were conceivably

"independent actors seeking to achieve the same goal at the same time." The district court rejected Foy's intent argument, reasoning that the intent to steal money or property, as that language appears in § 2113(b), "is not a specific intent to steal property or money exceeding $1,000" and "[t]hus the statute does not require the government to prove beyond a reasonable doubt that Mr. Foy had the specific intent to steal an amount exceeding $1,000, or that he knew how much money was in the ATM." The district court also rejected Foy's association argument, reaffirming that the surveillance footage and still images from the ATM show the defendants working together to tear apart the machine, in part "by sharing crowbars and rods."

Prior to the sentencing hearing, Foy objected to the government's proposed dangerous weapon enhancement and intended loss calculation included in the Presentence Investigation Report ("PSR"). Ultimately, the government did not pursue the dangerous weapon enhancement and the parties agreed to an actual loss calculation equivalent to the cost to replace the ATM, which led to a revised range of thirty to thirty-seven months' imprisonment under the Sentencing Guidelines. On September 10, 2021, the district court sentenced Foy to thirty-seven months' imprisonment, and three years' supervised release, in addition to restitution. Foy now appeals.

II. Discussion

Addressing Foy's issues on appeal: first, that the government was required to show evidence of intent to steal more than $1,000, rather than just intent to steal generally; second, that the government's video evidence fell short of establishing a conspiracy to commit bank theft; and third, that the district court impermissibly invoked

the ongoing civil unrest in June 2020 as an aggravating factor in his sentencing.

As relevant to the first two issues, Foy moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, and later for a new trial under Federal Rule of Criminal Procedure 33. Under Rule 29, after the close of the government's case, the court must, on a defendant's motion, "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Under Rule 33, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). We review the district court's denial of a motion for acquittal under Rule 29 de novo, and the denial of a motion for a new trial under Rule 33 for abuse of discretion. *United States v. Wilbourn*, 799 F.3d 900, 910 (7th Cir. 2015). As relevant to the final issue, any sentencing challenges that are forfeited, rather than waived, are reviewed for plain error. *United States v. Hyatt*, 28 F.4th 776, 782 (7th Cir. 2022). We address each issue in turn.

A. Required Intent

The first issue presents the question of what intent is required to satisfy the mens rea element of felony bank theft conspiracy: intent to steal or intent to steal more than $1,000. Foy argues that the district court erred in denying his Rule 33 motion for a new trial in part because it held that the government need only show intent to steal. We review this question of statutory interpretation de novo. *United States v. Miller*, 883 F.3d 998, 1003 (7th Cir. 2018).

Beginning with the substantive offense underlying Foy's conspiracy conviction, the federal bank robbery

statute distinguishes between property or monetary values above and below $1,000:

> 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.

18 U.S.C. § 2113(b) (emphasis added). Under the $1,000 value threshold, the violation is classified as a misdemeanor. 18 U.S.C. § 3559(a)(6).

There is no dispute that the record is bereft of evidence that Foy specifically intended to steal more than $1,000. Instead, at trial, the government relied on a stipulation that there was more than $1,000 in the ATM. Foy argues that the intended amount matters: "[I]f the conspiracy was to steal less than $1,000, the intended underlying bank theft would be a misdemeanor, and a felony conspiracy charge could not stand." The government argues that § 2113(b)'s scienter element only requires an intent to steal, while Foy argues that it requires an intent to steal more than $1,000.

First, we look to the plain language of the statute. *United States v. Sanders*, 909 F.3d 895, 901 (7th Cir. 2018). We are unconvinced by Foy's argument that §

2113(b) involves "a straightforward, parallel construction" and thus the $1,000 valuation modifier "applies to the entire [preceding] series." Unlike other statutes where the relevant modifier has been interpreted to "hang[] together as a unified whole, referring to a single thing," *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018), § 2113(b)'s dollar valuation modifier is separated from the intent language, which is offset by commas. Thus, by declining to read the dollar-amount modifier into the intent clause, we are not doing something "odd" or "apply[ing] the modifier … to only a portion of [a] cohesive preceding clause." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021) (applying a modifier to the entire series where it followed a "concise, integrated clause").

Second, and in line with the above textual interpretation, the Supreme Court has analyzed this statute in a different context and indicated that the dollar-amount modifier stands as a separate element. In *Carter v. United States*, 530 U.S. 255 (2000), the Court compared § 2113(a) and (b). In discussing the statute's intent requirements, the Court stated that "subsection (b) requires that the defendant act 'with intent to steal or purloin,'" with no mention of monetary constraints. *Id.* at 262. The Court also clarified that "the first paragraph of subsection (b) requires that the *property* have a 'value exceeding $1,000,'" with no indication that the specific intent applies to the valuation requirement. *Id.* (emphasis added). The Supreme Court had every opportunity in *Carter* to hinge the requisite intent on the statutory valuation requirement, but it did not do so. In fact, the Court in *Carter* did the opposite—it recognized the valuation requirement as its own element. *Id.* at 273. Following the Supreme Court's direction, we need not wade into the intricacies of the parties' linguistic arguments.

Third, the pattern jury instructions align with this interpretation. "Pattern instructions are presumed to accurately state the law." *United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019). For bank theft, the pattern instructions include four necessary elements:

> 1. The defendant took and carried away [property; money; something of value] belonging to or in the [care; custody; control; management] of [name bank, credit union, or savings and loan named in the indictment]; and
>
> 2. At the time the defendant took and carried away such [property; money; something of value], the deposits of the [bank; credit union; savings and loan] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration]; and
>
> 3. The defendant took and carried away such [property; money; thing of value] with the intent to steal; and
>
> 4. Such [money; property; thing of value] exceeded $1,000 in value.

Pattern Criminal Jury Instructions of the Seventh Circuit (2020) at 749. While the instructions are not dispositive, the fact that their presentation of the elements aligns with this Court's statutory interpretation and the Supreme Court's guidance simply provides additional support.

Finally, Foy's proposed interpretation would lead to impractical and illogical results. Requiring the government to prove beyond a reasonable doubt that a defendant specifically intended to steal a certain amount of money or that a defendant knew how much money was in an ATM before robbing it would be unworkable. *See Molzof v.*

United States, 502 U.S. 301, 309 (1992) (rejecting proposed interpretation that "would be difficult and impractical to apply"). Moreover, this Court will not interpret § 2113(b) to absolve those who rob an ATM but did not have a specific intent regarding the amount of money they intended to steal. *See United States v. Nania*, 724 F.3d 824, 837 (7th Cir. 2013) (interpreting Guidelines in a way that "avoids a potentially absurd result").

For these reasons, the district court did not err in concluding the government was only required to show that Foy and his co-conspirators intended to steal money, not that they specifically intended to steal more than $1,000. Because we affirm the district court's interpretation of the § 2113(b) mens rea requirements, we need not separately analyze intent under § 371. *See United States v. Feola*, 420 U.S. 671, 686 (1975) ("[T]o sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself."); *United States v. Zarattini*, 552 F.2d 753, 760 (7th Cir. 1977) ("The mental state required for a conspiracy conviction is no greater than that necessary to commit the underlying substantive offense.").

B. Evidence of Agreement

Foy's second argument on appeal is that the government produced insufficient evidence to prove the existence of an agreement to commit felony bank theft beyond a reasonable doubt. "We review challenges to the sufficiency of the evidence in a bench trial under the same deferential standard that applies to a jury verdict: we reverse only if we conclude, after viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *United States v. Medina*, 969 F.3d 819,

821 (7th Cir. 2020) (citations and internal quotation marks omitted). In doing so, we may not "reweigh evidence or reassess witness credibility and may uphold a conviction based on circumstantial evidence." *Id.* "A verdict will be overturned on appeal only if the record is devoid of evidence from which a rational trier of fact could find guilt beyond a reasonable doubt." *Freed*, 921 F.3d at 722 (citation and internal quotation marks omitted).

To sustain a conspiracy conviction under § 371, the government must prove the following elements beyond a reasonable doubt: "(1) an agreement to commit an offense against the United States; (2) an overt act in furtherance of the conspiracy; and (3) knowledge of the conspiratorial purpose." *United States v. Jones*, 993 F.3d 519, 531 (7th Cir. 2021) (citation omitted). The "essence of a conspiracy … is to join an agreement, not a group." *United States v. Curry*, 977 F.2d 1042, 1053 (7th Cir. 1992). "As we have often noted, '[a]n agreement need not be explicit; a tacit agreement may support a conspiracy conviction.'" *United States v. Avila*, 557 F.3d 809, 815 (7th Cir. 2009) (alteration in original) (quoting *United States v. Handlin*, 366 F.3d 584, 589 (7th Cir. 2004)). Circumstantial evidence may be enough to prove an agreement—for example, evidence "aimed at showing that the co-conspirators embraced the criminal objective of the conspiracy, the conspiracy continued onward towards its common goal," and the relationship among the co-conspirators was a cooperative one. *Handlin*, 366 F.3d at 589. However, "[w]here the jury is left with two equally plausible inferences from the circumstantial evidence, guilty or not guilty, it must necessarily entertain a reasonable doubt." *United States v. Vizcarra-Millan*, 15 F.4th 473, 507 (7th Cir. 2021), *cert. denied sub nom. Grundy v. United States*, 142 S. Ct. 838 (2022).

On this issue, our review is a deferential one. The evidence at trial, specifically the surveillance video footage, clears the bar for sufficient evidence. Even without audio, the footage shows Foy, Harvey, Simpson, and others taking cooperative steps to reach the ATM's protected contents. The group shared tools, passing them back and forth, as various people took turns attempting to break open the ATM. The individuals also at times jointly exerted force and directed each other's actions. As such, regardless of whether they came to the ATM together or as strangers, they acted as a group, working cooperatively toward the common goal of stealing money from the ATM. Therefore, while there is no evidence of a spoken agreement, it is rational to conclude that the footage does not present two equally plausible inferences. Viewing the footage in the light most favorable to the government, a rational trier of fact could have found that it more plausibly demonstrates that Foy entered into a tacit agreement with his co-conspirators to rob the ATM.

We see no error in the district court's conclusion and thus affirm Foy's conviction for conspiracy to steal money from the Bank of America ATM.

C. Sentencing

The third and final issue on appeal is whether the district court erred in relying on the contemporaneous protests in response to the killing of George Floyd as an aggravating factor in sentencing Foy. Defendants may challenge the sentencing procedure and the substantive reasonableness of the resulting sentence. *United States v. Figueroa*, 622 F.3d 739, 743 (7th Cir. 2010). Foy raises only a procedural objection—that the district court connected his offense to the widespread looting sparked by George Floyd's death without sufficient evidence to do so. In response, the government asserts that Foy waived any

challenge to the district court's consideration of the civil unrest as procedural error.

The parties agree that Foy did not raise this objection below, but they disagree about whether the argument was waived or forfeited. The answer dictates our standard of review. "Waiver occurs when a party intentionally relinquishes a known right and forfeiture arises when a party inadvertently fails to raise an argument in the district court. We review forfeited arguments for plain error, whereas waiver extinguishes error and precludes appellate review." *United States v. Flores*, 929 F.3d 443, 447 (7th Cir. 2019) (citation omitted).

Generally, "mere failure to make a particular objection on a specified ground during a sentencing hearing" constitutes forfeiture and "result[s] in plain error review on appeal." *United States v. Walton*, 255 F.3d 437, 442 (7th Cir. 2001). However, failing to make a particular objection may result in waiver "when the defendant had a targeted sentencing strategy that led him to waive certain other sentencing arguments." *Flores*, 929 F.3d at 448. "Because the waiver principle is construed liberally in favor of the defendant, we are cautious about interpreting a defendant's behavior as intentional relinquishment." *United States v. Barnes*, 883 F.3d 955, 957 (7th Cir. 2018).

The government's initial sentencing memorandum argued that Foy's offense was sufficiently serious under 18 U.S.C. § 3553(a)(2)(A) because it contributed to the widespread looting that occurred following the killing of George Floyd. Specifically, the memorandum stated:

> The looting by defendant (and others) during the days following the death of George Floyd required the expenditure of a significant amount of public resources. Further, the looting caused

> reputational harm to the City of Chicago; undercut the message of peaceful protestors; and shook many Chicago residents' fundamental sense of security and faith in society. Defendant's offense is therefore very serious.

This information was also included in the government's version of the offense attached to the PSR.

In response to the PSR, Foy filed a sentencing memorandum arguing that the § 3553(a) factors warranted a lowGuidelines sentence. In doing so, he "acknowledge[d] [that] the conduct of which he was found guilty indirectly had an incalculable impact on the public." In a subsequent sentencing memorandum, Foy objected to the government's intended loss calculation and noted that his crime took place "against a backdrop of looting and heavy civil unrest" in Chicago.

At the sentencing hearing, Foy made no additional objections to the PSR. The district court declined to apply the dangerous weapon enhancement, accepted a revised intended loss calculation agreed to by both parties, and otherwise adopted the PSR. Before announcing its sentence, the district court set out its sentencing rationale, discussing both mitigating and aggravating factors. The district court pointed to the fact that Foy's crime occurred "during the days following the death of George Floyd" as "one of the most important aggravating factors" in his case. The district court paraphrased the government's sentencing memorandum—noting that Foy's crime contributed to "the expenditure of [a] significant amount of public resources" and that the widespread "looting caused reputational harm to the City of Chicago, undercut the message of peaceful protesters, and shook many Chicago residents' fundamental sense of security and faith in society." In concluding that his conduct was "extremely

aggravating," the district court noted that Foy and those alongside him "took advantage of a wounded city that was doing its best to both allow peaceful protests and keep people from going out and committing crimes." Foy now argues that "there was no actual record evidence tying the acts at issue to the protests," and therefore, the district court procedurally erred by making that connection based solely on the government's articulation of the offense.

"The lines between waiver and forfeiture are not always clear." *United States v. Robinson*, 964 F.3d 632, 640 (7th Cir. 2020). However, construing the record liberally in Foy's favor, no waiver occurred here. Although Foy's sentencing memoranda referenced the looting taking place in Chicago at the time of his offense, he never "actively disclaimed the position[] he now raises"—that the record does not sufficiently demonstrate his offense was *connected to* the widespread looting to warrant its consideration as an aggravating factor. *United States v. Seal*, 813 F.3d 1038, 1045 (7th Cir. 2016) (holding defendant "forfeited, but did not waive" arguments concerning the court's application of sentencing enhancements, where his objections at sentencing "hinged on a single argument" but "he never actively disclaimed the positions he now raises").

Foy's two references to the widespread looting appear to have been made in response to arguments advanced by the government. In making those references, Foy did not expressly adopt the government's characterization of his offense or advocate its adoption. *Cf. Barnes*, 883 F.3d at 958 (concluding that defendant waived an objection to the inclusion of certain offenses in his criminal history calculation by "specifically and repeatedly t[elling] the district court that it was appropriate to assign him a criminal history point for each of the … offenses"). While it is

challenging to ascertain the purpose—strategic or accidental—of Foy's failure to object when viewing a cold record, we conclude that he did not knowingly and intentionally waive his objection to the district court's reliance on the widespread looting that occurred in the aftermath of George Floyd's death as an aggravating factor.

So, we will review Foy's forfeited objection for plain error.

Plain-error review involves four steps:

> First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant.... Second, the legal error must be clear or obvious, rather than subject to reasonable dispute.... Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings.... Fourth and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

Hyatt, 28 F.4th at 782 (alterations in original) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). If all steps are satisfied, "[r]emand for resentencing is appropriate on plain-error" grounds. *United States v. Burgess*, 22 F.4th 680, 686 (7th Cir. 2022).

"Our task is to ensure that the district court committed no significant procedural error, such as incorrectly calculating the guidelines range, failing to consider the section 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to explain adequately

the chosen sentence." *United States v. Salgado*, 917 F.3d 966, 969 (7th Cir. 2019) (citation and internal quotation marks omitted). A sentencing court is "entitled to rely on the factual information contained in the PSR" when a defendant does not challenge the factual accuracy of the PSR in their sentencing memorandum. *United States v. Anaya*, 32 F.3d 308, 313 n.2 (7th Cir. 1994). The court "must adequately explain the chosen sentence," *Gall v. United States*, 552 U.S. 38, 50 (2007), but may not "venture[] too far from the record" in doing so, *United States v. Smith*, 400 F. App'x 96, 99 (7th Cir. 2010). Furthermore, "it is inappropriate to blame [a defendant] for issues of broad local, national, and international scope that only tangentially relate to his underlying conduct." *United States v. Robinson*, 829 F.3d 878, 880 (7th Cir. 2016) (alteration in original) (citation omitted).

Foy argues on appeal that the court erred in linking Foy's conduct to the George Floyd protests "without any evidence in the record that showed that these two were in fact connected in any meaningful way." The PSR notes that Foy's "actions took place in the days following the death of George Floyd" and cites two newspaper articles in support of its assertions regarding the damage caused by the "widespread looting" occurring at the time. At trial, a CPD officer testified that on the day of Foy's offense, there was "rioting, looting, [and] destruction of property [occurring] throughout the entire city and the Seventh District of Chicago," where Foy's offense took place.

Considering this information, we conclude that the district court did not commit error, let alone a clear or obvious one, in finding that Foy's brazen act contributed to the widespread looting and property destruction taking place in Chicago at the time. Foy's conduct was more than "tangentially relate[d]" to the George Floyd protests,

Robinson, 829 F.3d at 880 (citation omitted); as he himself argued to the district court, his attempt to rob an ATM in broad daylight took place "against a backdrop of looting and heavy civil unrest" in Chicago and "the conduct of which he was found guilty indirectly had an incalculable impact on the public." Thus, we do not see the district court's comments as "so far out of bounds" as to entitle Foy to resentencing. *Figueroa*, 622 F.3d at 744. Instead, they were relevant to the offense and supported by the record. As such, we affirm Foy's sentence. *Cf. United States v. Hatch*, 909 F.3d 872, 875 (7th Cir. 2018) (affirming sentence and concluding district court did not commit procedural error by "merely situat[ing] [defendant's] offense against the backdrop of statistics and observations about widespread gun violence in Chicago").

III. Conclusion

For the reasons explained above, we AFFIRM Foy's conviction and sentence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 20 CR 268
Chicago, Illinois
February 10, 2021
9:44 a.m.

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICKIE FOY, ET AL.,

Defendants.

TRANSCRIPT OF VIDEOCONFERENCE
PROCEEDINGS - Bench Trial

BEFORE THE HONORABLE
THOMAS M. DURKIN

APPEARANCES:

For the Government:	MR. MATTHEW F. MADDEN MR. RAMON VILLALPANDO U.S. Attorney's Office in the Northern District of Illinois 219 South Dearborn Street, 5th Floor Chicago, Illinois 60604
For Defendant Rickie Foy:	MR. RICHARD KLING Chicago-Kent Law Offices 565 West Adams Street, Suite 600 Chicago, Illinois 60661
ALSO PRESENT:	MR. RICKIE FOY

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United States District Court
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(Proceedings had via videoconference:)

THE COURT: Emily, please call case.

THE CLERK: This is Case No. 20 CR 268, United States versus Rickie Foy.

Could I please have the attorney speaking on behalf of the United States state their name.

MR. MADDEN: Good morning, Your Honor. Matthew Madden and Ramon Villalpando on behalf of the United States.

THE CLERK: And on behalf of the defendant.

MR. KLING: Good morning, Your Honor. Richard Kling for Mr. Foy. And Mr. Foy is on screen.

And may I also suggest, Rickie, if there's any time you can't hear us, raise your hand and let us know.

THE COURT: All right. Are the parties ready to proceed with a bench trial?

MR. MADDEN: Yes, Your Honor.

MR. KLING: Yes, sir.

THE COURT: Okay. Mr. Foy, we had talked last time before we had technical difficulties, a week or two—a couple weeks ago about your right to have a jury trial and your right to have even a bench trial occur in a courtroom.

We went through in a lot of details your right to proceed with a jury and your waiving it, and your right to proceed in a courtroom as opposed to doing it by video, and you agreed to waive that.

I'm not going to go through those admonitions again because you had knowingly waived your right to a jury trial—and anybody who's on this line who's not part of the people on the screen right now, please make sure you mute your phone.

So we went through your right to a jury trial, which you've waived, and your right to appear in a courtroom even for a bench trial, and you waived that. So I'm not going to go through that again unless you have any questions.

Sir, do you agree to proceed by way of a bench trial and agree to proceed by way of a bench trial virtually as we are today?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. I find the defendant has knowingly waived his right to a jury trial and knowingly waived his right to proceed in a courtroom as opposed to proceeding virtually as we are today.

With that, the government may make its opening statement.

MR. MADDEN: Thank you, Your Honor.

OPENING STATEMENT
ON BEHALF OF THE GOVERNMENT

MR. MADDEN: On June 1, 2020, Rickie Foy had his orange construction vest on and he was ready to work, but the work he did that day was not traditional construction work. Instead of building something that day, he was tearing something apart. He and nine other men were tearing the guts out of an ATM trying to get to the cash that was inside.

And as they say, Your Honor, a picture is worth 1,000 words. And this picture here, Your Honor, tells the story in this case, and the story is that the defendant and these men were trying to steal thousands of dollars from the ATM.

You can see the defendant here on the screen, Your Honor. He's wearing the orange construction vest on the right-hand side. He's wearing a blue—excuse me—a

gray-colored Chicago Bulls hat with a dark bill, and there's nothing subtle about what they're doing.

As you can see here, the defendant and the man in the blue hat are both holding a long dark-colored crowbar and slamming that crowbar into the ATM using their combined physical strength to try to breach the ATM.

The defendant and these other men conspired with each other that day, carrying that crowbar and other tools to try to get at the money that was in that ATM.

Because the defendant worked together with the man in the blue hat, with his codefendants, and with the other men that day to try to breach the ATM, he was charged in Federal Court with conspiracy to commit bank theft.

Over the next five minutes or so I'd like to talk a little bit more about what happened that day and the evidence that the government will present to you in this case.

On June 1, 2020, it was open season on banks, ATMs, and stores in Chicago, and Rickie Foy was not going to miss out. With CPD occupied with other looters, a free-standing ATM in the middle of a parking lot on the South Side was too good of an opportunity to pass up. Shortly before 7:10 p.m. that night, the defendant and approximately nine other men, which included Codefendants Chyenne Simpson and Pierre Harvey, arrived at the ATM at the Bank of America ATM in an Aldi's parking lot at 620 West 63rd Street in Chicago.

THE COURT: Mr. Madden, let me interrupt you for one minute. I don't see Mr. Kling on the screen.

Mr. Kling, are you there? It may just be because we're sharing the screen.

MR. KLING: I am there.

THE COURT: All right. Very good.

Proceed, Mr. Madden.

MR. MADDEN: Thank you.

Over the next eight minutes they worked together towards a common goal, to breach that ATM with all the tools that they were sharing. Initially, the defendant was the one who had the long dark-colored crowbar in his hands and he tried to breach the ATM with it. Then for several seconds the defendant and the man in the blue hat both had their hands on that crowbar and tried to break into the ATM.

The defendant then let go and the man in the blue hat tried to breach the ATM with it. The man in the blue hat later gave that same crowbar to Codefendant Chyenne Simpson, and Chyenne Simpson grabbed the crowbar and slammed it into the ATM to try to get the cash that was inside.

The men shared other tools as well: A yellow crowbar, a hammer, a bolt cutter, a smaller dark-colored crowbar.

And at one point, Your Honor, the defendant had the hammer in his hand, passed the hammer to a second man, and then that second man, in turn, passed the hammer to a third man. The third man then proceeded to slam that hammer into the ATM numerous times.

And I'll show you that sequence here on the screen. This is Government Exhibit 5A. And, again, there's the defendant at the top of your screen, Your Honor, in the orange construction vest with the Bulls hat on. It looks like he's got a cigarette in his mouth. In his right-hand he's got a hammer in his hand.

And then this next photo is just about a second later, you see the defendant with his right hand is open. He's just passed the hammer to the man in the black sweatshirt with the white gloves on.

Then this next exhibit, Your Honor, which is Exhibit 5C, you see that same man just a second later with his left hand is passing the hammer to a man in a blue sweatshirt with the hood up right in front of the ATM. I don't have the video here in the opening, but you'll see on the video, that man grabs the hammer and just starts slamming it into the ATM.

Your Honor, the Bank of America ATM video has no sound, but it unmistakably tells the story, and the story is that the defendant and those other men were conspiring together in a common enterprise, combining their—using their combined wits and their combined strength to try to get into that ATM to get at the cash as soon as possible.

I want to show you one more still shot here, Your Honor, that really tells the story in this case. This is a close-up a little bit later during the video. The defendant again is at the top, easily recognizable in his orange construction vest. You've got no fewer than three or maybe even four men using construction tools here. The man in the black with the blue surgical mask has the bolt cutter and he's whacking away at the ATM machine. Then you see the yellow crowbar where the man with the blue hat stands, then you see the long crowbar that another man has, and then the man at the bottom of the screen appears to have another tool in there.

So ultimately, Your Honor, these men were unsuccessful, but it certainly wasn't for lack of trying.

The defendant and his coconspirators were right, that the ATM was a worthwhile target for them. Turns out that there was more than $190,000 in cash in that ATM and they worked hard for eight minutes to try to get to that cash. And even though they weren't successful, they made good progress towards their goal. You'll see at the end of the video they ripped off the front of the ATM and they

were—they were digging the guts of the ATM out. But before they could actually get to the cash, CPD arrived on the screen. When CPD arrived, the defendant and the other men started running and the defendant was arrested after a short foot pursuit.

I'd now like to describe the types of evidence that we're going to present to you during this trial. First, Your Honor, you'll hear the testimony of Officer John Nemec. He arrived on the scene when the defendant and the other men were running away from the ATM. He chased the defendant and arrested him after a short foot pursuit.

Second, Your Honor, of course, we are going to play the Bank of America ATM video and display numerous still shots from that video.

Third, Your Honor, the government will publish CPD officer body-worn camera that reflects the defendant's postarrest interview. During that interview the defendant admitted that he was there and he admitted that he told the other men when the police arrived on the scene, but he lied and claimed he wasn't that close to the ATM. Toward the end of the interview one of the officers showed the defendant the couple of still shots, and the interview concluded.

Of course, Your Honor, as you know, the parties entered into a number of stipulations in this case. We stipulated about the amount of money that was in the ATM, about Bank of America's FDIC insurance status, and we stipulated to the authenticity of the videos and the still shots from Bank of America.

Your Honor, as I noted at the beginning, a picture is worth 1,000 words. At the end of this trial, the government will ask for you to find that the (unintelligible) in this case leads to one word: Guilty.

THE COURT: All right. Mr. Kling, do you wish to make an opening statement?

MR. KLING: Yes, sir.

THE COURT: Proceed.

OPENING STATEMENT
ON BEHALF OF DEFENDANT

MR. KLING: Judge, most respectfully, I've assured Mr. Foy that you will base a decision not on speculation and guessing, but based on cold, hard evidence. And in order to come to the conclusion that Mr. Foy is guilty of the conspiracy, you would have to base your decision on speculation rather than cold, hard evidence. There's no question there are a bunch of people around that ATM and that Mr. Foy is one of them.

Let me give you an example, Judge. If a bunch of people ran into a candy store simultaneously and started emptying the shelves of Hershey bars, they would all—they would all be intended potential thieves. And maybe Mr. Foy was a potential intended thief, but that doesn't make him a coconspirator. The government must show beyond a reasonable doubt, as you know, that there was some type of an agreement with the other people. The government wants you to speculate that because they were all around the ATM machine, they must have had some type of an agreement.

The government submitted a position paper, which we agree with, and it includes the position with respect to the law of conspiracy and it includes the position with respect to the Seventh Circuit instructions on conspiracy. And I take no quarrel—we take no quarrel with the law or the instructions, but this is not a case which will be based on the law or construction. This is a case which will be based on cold, hard facts, Judge.

There's no audio; you have no idea what these people are saying. Mr. Madden makes the hypothesis that they're obviously all working together. Well, you'll have an opportunity to view the video yourself and come to that—whatever conclusion you're going to come to.

Maybe Mr. Foy should have been charged on the State basis with looting. Maybe Mr. Foy should have been charged by the State or even by the United States with a charge of attempt theft. And, in fact, the attempt theft, as you know, is the overt act charged in the indictment. But those are not the charges that you're asked to deliberate on. You were asked to decide whether the government proved beyond a reasonable doubt that Mr. Foy conspired, agreed with the other individual to attempt to steal the money from the ATM.

Based on all of the evidence, Judge, based on the hard evidence, rather than speculation and hypothesis, I will ask you to find Mr. Foy not guilty because I believe the evidence is insufficient to find him guilty beyond a reasonable doubt.

THE COURT: All right. Thank you, Mr. Kling.

The government may call its first witness.

MR. MADDEN: Your Honor, at this time the government would like to read stipulations into evidence and move to admit into evidence certain exhibits, if that's okay.

THE COURT: Go ahead.

MR. MADDEN: Exhibit No. 1: The deposits of Bank of America which owned and operated an ATM located at 620 West 63rd Street, Chicago, Illinois, were insured by the Federal Deposit Insurance Corporation, or FDIC, at all times during the year 2020, including on June 1, 2020.

Government Exhibit 1 is a true and accurate copy of Bank of America's FDIC certificate and a proper foundation exists for its admission into evidence.

So stipulated?

MR. KLING: So stipulated.

MR. MADDEN: Government Stipulation No. 2: Government Exhibit 2 is a true and accurate copy of a Bank of America video surveillance taken by cameras on June 1, 2020, between approximately 7:09 and 7:20 p.m. at or around the Bank of America ATM at 620 West 63rd Street, Chicago, Illinois.

Government Exhibits 3 through 13 are true and accurate still shots from Government Exhibit 2. The proper foundation exists for the admission of Government Exhibits 2 through 13 into evidence.

So stipulated?

MR. KLING: So stipulated.

MR. MADDEN: On June 1, 2020, the Bank of America ATM located at 620 West 63rd Street, Chicago, Illinois, contained approximately $15,850 in $10 bills; $19,100 in $20 bills, $156,500 in $100 bills; and deposits of $86,174.66.

The funds in the Bank of America ATM belonged to and were in the care, custody, control, management, and possession of Bank of America.

So stipulated?

MR. KLING: It is agreed to and stipulated that's what the evidence would show.

MR. MADDEN: Stipulation No. 4: Government Exhibit 14 is a true and accurate copy of CPD Sergeant Nicholas Forte's body-worn camera footage captured on June 1, 2020, near the Bank of America ATM located at 620 West 63rd Street, Chicago, Illinois. The proper

foundation exists for the admission of Government Exhibit 14 into evidence.

So stipulated?

MR. KLING: So stipulated.

MR. MADDEN: Stipulation No. 5: Government Exhibit 15 is a true and accurate copy of Chicago Police Department Officer Danielle Symons', S-Y-M-O-N-S, body-worn camera footage captured on June 1, 2020, near the Bank of America ATM located at 620 West 63rd Street, Chicago, Illinois. The proper foundation exists for the admission of Government Exhibit 15 into evidence.

So stipulated?

MR. KLING: So stipulated?

MR. MADDEN: Stipulation 6, which is the last one, Your Honor: Government Exhibit 16 is a true and accurate copy of Chicago Police Department Nicholas Forte's body-worn camera footage captured on June 2, 2020, in the CPD Seventh District police station. A proper foundation exists for the admission of Government Exhibit 16 into evidence.

So stipulated?

MR. KLING: So stipulated.

MR. MADDEN: Your Honor, at this time the government moves to admit into evidence Government Exhibits 1 through 13 and Government Exhibit 16. Just for your notes, we've decided not to admit—enter into evidence Exhibits 14 and 15.

THE COURT: All right. Any objection to 1 through 13 and No. 16, government exhibits?

MR. KLING: No objection.

THE COURT: They're all admitted without objection.

(Government Exhibits 1-13 and 16 admitted in evidence.)

MR. MADDEN: Thank you, Your Honor.

May we call our first witness?

THE COURT: You may.

MR. VILLALPANDO: I'm going to call Officer John Nemec, who's currently not logged into the Webex meeting. It will take me a moment to go log him in, if I can.

THE COURT: That's fine.

MR. VILLALPANDO: Thanks, Judge.

MR. KLING: Judge, this is—this is Richard Kling. While he's being logged in, I would move to exclude witnesses and ask that the police officer make sure that he does not have reports or any other documents in his hands when he is testifying.

THE COURT: All right. I think Mr. Villalpando—well, Mr. Madden, can you agree to that?

MR. MADDEN: Yes, that he won't have a report in front of him, we'll confirm that. And if he needs to refresh his recollection at any time, we'll ask him to make that clear.

THE COURT: All right. And was he excluded from the opening statements?

MR. MADDEN: Yes, he was. He wasn't on the Webex.

THE COURT: All right. That's fine. So the motion by defense is granted.

And he's your only live witness. Is that correct?

MR. MADDEN: Correct, Your Honor.

THE COURT: Okay. What is his name again?

MR. MADDEN: It's John Nemec, and Nemec is spelled N-E-M-E-C.

THE COURT: Okay. Emily, you're on? You'll be able to swear the witness?

Okay. Thank you.

(Pause in the proceedings.)

THE COURT: All right. If Officer Villalpando can unmute himself. I'm sorry. Officer Nemec, can you—okay.

The screen has Mr. Villalpando's name underneath it, but obviously it's Officer Nemec.

THE WITNESS: Yes, sir.

THE COURT: All right. Emily, please swear in the witness.

(The Witness was sworn.)

THE WITNESS: I do.

THE COURT: Okay. We'll wait until Mr. Villalpando gets back to the screen and then he can begin direct examination.

All right. Mr. Villalpando, the witness has been sworn and you may begin your direct examination when you are ready to do so.

MR. VILLALPANDO: Thank you, Judge.

JOHN NEMEC, GOVERNMENT WITNESS, DULY SWORN

DIRECT EXAMINATION

BY MR. VILLALPANDO:

Q. Sir, can you please state your name and spell it for the record.

A. My name is Officer John Nemec. That is N-E-M-E-C.

Q. Did you hear the opening statements in this case?

A. I did not.

Q. Do you have an exhibit binder near you?

A. I do.

Q. What do the exhibits in the binder appear to be?

A. Photos of the incident.

Q. Do you have any reports or other written documents in front of you?

A. I do not.

Q. If at any point you need to refresh your recollection with a report or document, can you please let us know?

A. I will.

Q. Are you currently employed?

A. I am.

Q. Where do you work?

A. With the Chicago Police Department. I'm an officer, but I teach at the training academy now.

Q. And what are your responsibilities at the training academy.

A. I train (inaudible) police officers in use of force.

Q. What were your responsibilities as a CPD officer on or about June 1, 2020?

A. I was working in the Seventh District of the Englewood district near Chicago as a TAC officer.

Q. What do you mean by a TAC officer?

A. I'm sorry. Could you please repeat the question? You broke up.

Q. Of course.

What do you mean by a TAC officer?

A. We would focus on getting narcotic-related to (inaudible) in the district.

MR. KLING: And this is Kling, Judge, (inaudible), that's not coming through on my sound.

THE COURT: Mr. Kling, I was going to ask you to mute yourself and if you make an objection late, I'll—I won't hold it against you. I'll allow it to count.

MR. KLING: Great. I'm now muted.

THE COURT: So I think everyone's muted except Mr. Villalpando and the witness. I think that's the best we're going to do with reception.

Go ahead, Mr. Villalpando.

BY MR. VILLALPANDO:

Q. I'll back up.

Officer Nemec, what do you mean by being a TAC officer?

A. We would focus on gang and narcotic activity more so than just being on patrol at the Seventh District in Englewood.

Q. Were you in law enforcement before joining CPD?

A. I was not.

Q. What did you do?

A. I was in the Army for ten years.

Q. I draw your attention to the evening of June 1, 2020.

Were you on duty as a CPD officer on June 1, 2020?

A. I was.

Q. At a high level, what, if anything, do you recall happening in Chicago on June 1, 2020?

A. There was several (inaudible) rioting, looting, destruction of property throughout the entire city and the Seventh District of Chicago.

Q. I want to draw your attention to approximately 7:00 p.m. that night.

What, if anything, do you remember happening at around that time?

A. There was a call to dispatch for a disturbance. An ATM at approximately 620 West 63rd Street was being vandalized, destroyed, broken into.

Q. What, if anything, did you do in response to those calls?

A. I responded with my partner at the time as an assist officer for the officers that were going to be handling the call that came out.

Q. When you say "responded," did you drive to the scene of the ATM?

A. Yes. I was the passenger in the vehicle that day, but we drove there in our unmarked police vehicle.

Q. Were you in uniform?

A. I was.

Q. And as you drove to the scene of the ATM, did you or your partner turn on the siren?

A. Yes, the siren was activated.

Q. At approximately what time did you arrive on scene?

A. Approximately 1915 hours, around that time.

Q. And does that convert to about 7:15 p.m. or so?

A. Yes, sir.

Q. Do you know what other law enforcement vehicles arrived on the scene?

A. There were multiple officers on the scene.

Q. Did those officers arrive before you did at the scene?

A. It was roughly around the same time, yeah.

Q. Can you please turn to what's been marked as Government Exhibit 17A in the exhibit binder.

A. Okay.

Q. Do you recognize what's depicted in Government Exhibit 17A?

A. I do.

Q. What's depicted in the exhibit?

A. It is the Bank of America ATM in the parking lot that's on the—kind of middle (inaudible) to the left, and then behind that, which is the Walgreens building, and that's just the parking lot of the Aldi's at approximately 620 West 63rd Street.

Q. How do you recognize what's in the exhibit?

A. I recognize it from being on patrol and being in the Englewood neighborhood for multiple years and after having been there hundreds of times.

Q. Is it fairly—

MR. KLING: Judge, this is Richard Kling. His last answer got muddled. Can he repeat it or have the court reporter repeat it?

THE COURT: Yeah, I prefer it be asked again and answered again.

Go ahead, Mr. Villalpando.

BY MR. VILLALPANDO:

Q. Officer Nemec, how do you recognize what's depicted in Government Exhibit 17A?

A. I had been working in the Englewood district for several years and had driven by and been in that location probably hundreds of times.

Q. Does the exhibit fairly and accurately depict the area of the Bank of America ATM located at or about 620 West 63rd Street in Chicago on June 1, 2020?

A. It does.

MR. VILLALPANDO: Your Honor, the government moves to admit Government Exhibit 17A into evidence.

THE COURT: Any objection?

MR. KLING: No objection.

THE COURT: It's admitted without objection.

(Government Exhibit 17A admitted in evidence.)

MR. VILLALPANDO: I've placed on the screen—Your Honor, can you see the exhibit?

THE COURT: Yes.

MR. VILLALPANDO: Mr. Kling, can you see it?

MR. KLING: I can. May I just inquire that Mr. Foy—whether he can see it as well.

MR. VILLALPANDO: Yes. Mr. Foy?

THE DEFENDANT: I see it.

MR. VILLALPANDO: Thank you.

BY MR. VILLALPANDO:

Q. Officer Nemec, can you see what's been marked as Government Exhibit 17A on the screen?

A. Yes, I can.

Q. Can you please describe where the Bank of America ATM is located on this exhibit?

A. It is all the way to the left and middle towards the screen.

Q. Are you able to see my cursor on the scene?

A. I can.

Q. Using Government Exhibit 17A, can you describe where you arrived on the scene?

A. I would say behind the Bank of America ATM machine in the Walgreens building. And my partner and I arrived in the rear of the building on the—went there to assist the officers (inaudible).

Q. Officer, for my benefit, can you please repeat that answer? I was dealing with a tech issue on my side.

A. I approached—or I—I arrived on scene at the rear of the building where the Walgreens is which is directly behind the ATM machine, and—

Q. When you're referring to the Walgreens, can you see my cursor here?

A. Yes.

Q. It is the tan building on the left-hand side of Government Exhibit 17A?

A. It is.

Q. And where approximately in relation to that building did you arrive?

A. Kind of where the trees are. There's an opening that you can walk through from where the building ends to where the street begins, and we arrived in our vehicle where that opening is.

Q. What, if anything, did you see when you first arrived on the scene?

A. I observed officers running after people, pursuing them on foot from the direction of the ATM machine towards—which would be northbound, kind of where the houses are in the back of this photo at the parking lot.

Q. After you arrived on scene, what, if anything, happened --happened next?

A. I observed that foot pursuit with the officers running after multiple individuals from the Bank of America ATM.

Q. What did you do?

A. I engaged them in trying to assist them with stopping the individuals. I observed an individual wearing a bright orange safety construction-type vest running from the location and pursued him.

Q. By foot?

A. Yes, I was running after him on foot.

Q. What happened next?

A. The individual I was running after on foot made it past the houses and the alley across on Englewood Avenue. And once I was able to catch up to the individual in the alley, I was able to place him into custody.

Q. Was it a—was it a long foot chase?

A. No. It was just the parking lot, across the street, and then the length of a house until we reached the alley.

Q. Do you know if other CPD officers arrested any other individuals?

A. There—there were other individuals arrested. One individual I know was a juvenile, and then the other two were Codefendant Chyenne Simpson and Codefendant Pierre Harvey.

Q. Can you please turn to what's been marked as Government Exhibit 17B in the binder.

A. Okay.

Q. Do you recognize what is depicted in Government Exhibit 17B?

A. I do. It's a (inaudible) map image of the location.

Q. How do you recognize what's depicted in the exhibit?

A. From where the Walgreens is and then 63rd Street, Englewood Avenue.

Q. And how do you recognize this area?

A. Just from working that area over multiple years and having been in that area over, you know, several years working in the Englewood district.

Q. Does this exhibit fairly and accurately depict the area of the Bank of America ATM located at or about 620 West 63rd Street in Chicago?

A. It does.

MR. VILLALPANDO: The government moves to admit Government Exhibit 17B into evidence.

MR. KLING: No objection.

THE COURT: It's admitted without objection.

(Government Exhibit 17B admitted in evidence.)

MR. VILLALPANDO: I'm sharing on the screen what's been marked as Government Exhibit 17B. If anyone can't see Government Exhibit 17B, please let me know.

BY MR. VILLALPANDO:

Q. Officer, using Government Exhibit 17B, can you please describe where you arrived on the scene.

A. Yeah. There's a building in the bottom left portion of the photo that has a Western Union and a Citibank and like a Walgreens identifier on it. I would have arrived just behind the Walgreens building on the north end of it.

Q. Where on this exhibit is the Bank of America ATM?

A. The Bank of America ATM is to the right of where that Walgreens building is, and that Citibank ATM machine is located just to the right of the parking lot?

Q. Are you able to see my cursor on the screen?

A. Yes.

Q. Are you able to see me circling an object here on Government Exhibit 17B?

A. Yes, I can.

Q. Is that the location of the Bank of America ATM?

A. It is.

Q. Now, using Government Exhibit 17B, can you please describe where you—where you chased this individual with—with the orange vest and where you ultimately arrested him?

A. The individual would have been running from the officers and the ATM machine northbound through the parking lot towards Englewood Avenue, went across Englewood Avenue, went through one of the gangways or empty lots into the alley and where I was eventually able to catch up to the subject—or—and place him into custody in the alley behind the houses in the—well, in the alley that runs parallel to Englewood Avenue.

Q. Officer, are you able to see my cursor on the screen?

A. Yes.

Q. Am I circling the alley that you just testified about?

A. It is.

Q. And was it in that alley where you arrested the individual with the orange vest?

A. That is where I placed the individual into custody, yes.

Q. I'm sorry. Can you please repeat that?

A. Yes, that was where I placed the individual into custody.

Q. What happened after you placed that individual with the orange vest in custody?

A. I brought him back to the location where I initially believe that he arrived behind the Walgreens and he was identified by other officers as being the person that was there in front of the ATM that tried to break into it and he was then placed in a transport vehicle and taken to the station to process.

MR. KLING: Judge, I would object to his statement regarding the other officers' identification as hearsay and move to strike that answer.

THE COURT: Sustained. Sustained. Reask the question or move on.

MR. VILLALPANDO: I'll move on, Judge.

BY MR. VILLALPANDO:

Q. Officer, do you know if the Bank of America ATM was equipped with a surveillance camera on June 1, 2020?

A. Yes, it was.

MR. VILLALPANDO: I'm going to stop here on Government Exhibit 17B.

BY MR. VILLALPANDO:

Q. Have you viewed the video footage taken from the Bank of America ATM surveillance camera on June 1, 2020?

A. I have.

MR. VILLALPANDO: Your Honor, at this point, the government would like to play what's been entered into evidence—what's been admitted into evidence as Government Exhibit 2. It's the surveillance video from the ATM.

For the record, the exhibit—the video does not have audio. It does have a zoom function and I would ask for the Court's permission to zoom in and out at certain points while playing the video.

THE COURT: You may. Proceed.

(Video played.)

MR. VILLALPANDO: I've paused the video here at the 180959 time stamp using the marker on the bottom right-hand side of the—of the—of the video here.

BY MR. VILLALPANDO:

Q. Officer, are you able to see the video?

A. I am.

Q. I want to direct your attention to the individual in the video with the orange vest. Do you recognize that person?

A. I do.

Q. Who is he?

A. He is the defendant, Rickie Foy.

Q. Is that the person who you arrested in the alley on June 1, 2020?

A. It is.

MR. VILLALPANDO: Your Honor, at this point I'm going to stop sharing the video momentarily and I'm going to ask Officer Nemec if he sees the person in the orange vest on our Webex video conference. The government would ask the Court to ask anyone who's wearing a mask at this point to remove their mask for that purpose.

MR. KLING: Judge, I'll stipulate to in-court identification based on the video.

THE COURT: All right. The record will reflect that the witness identified the defendant, Rickie Foy.

Proceed.

BY MR. VILLALPANDO:

Q. Officer Nemec, was the defendant identified during the booking process after his arrest on June 1, 2020?

A. He was.

MR. VILLALPANDO: Your Honor, at this point the government would like to play the remainder of the video. There are points at which I will stop the video—or I would like to stop the video and ask the witness questions about the video with an intent to walk the witness—ask the witness some questions about still images that have been admitted into evidence taken from the surveillance video.

May the government proceed in that manner?

THE COURT: You may. I may have misspoken earlier. The record should reflect that the defense stipulated that this witness could identify the defendant.

Proceed.

MR. VILLALPANDO: Your Honor, just so I'm clear, the stipulation is as to his ability to identify the defendant or that he's identified the defendant?

THE COURT: Why don't we just have him identify the defendant.

MR. VILLALPANDO: Okay.

BY MR. VILLALPANDO:

Q. Officer Nemec, do you see the person who you arrested on June 1, 2020, in the alley on the Webex video conference today?

A. I do. It's the individual wearing a striped with either pink or light red shirt.

THE COURT: All right. The record will reflect that the witness has identified the defendant, Rickie Foy.

Proceed.

MR. VILLALPANDO: I'm going to begin sharing the video again.

BY MR. VILLALPANDO:

Q. Officer Nemec, are you able to see the video?

A. I am.

Q. I've kept the video paused at the 180959 time stamp.

What do you see here?

A. The defendant, Rickie Foy, and another individual with a blue hat on holding a large crowbar, wedging in into the ATM machine.

MR. KLING: Judge, I'm going to object to the officer's conclusion that he's wedging it into the ATM machine.

THE COURT: Overruled. That's his—what he believes he observed. You can cross-examine.

MR. VILLALPANDO: I'll continue running the video at this point.

(Video played.)

MR. VILLALPANDO: I'm going to stop it here again at the 181009 mark.

BY MR. VILLALPANDO:

Q. Are you still able to see the video, Officer?

A. I can.

Q. All right. I want to direct your attention to a person who has an—at the top portion of the video screen wearing what appears to be a dark shirt. Do you see him?

A. I can.

Q. Okay. Are you able to see my cursor circling around that individual at the very top of the screen here?

A. Yes.

Q. In what direction does that individual appear to be looking?

A. The individual appears to be looking eastbound towards 63rd Street, the traffic.

MR. VILLALPANDO: I'm going to run the video.

(Video played.)

MR. VILLALPANDO: I've paused the video here at the 181224 time stamp.

BY MR. VILLALPANDO:

Q. Officer, do you see the video on the screen?

A. I do.

Q. What do you see here?

A. I see the defendant, Rickie Foy, in the orange safety vest looking towards the street, and then the Codefendant Chyenne Simpson, who is wearing a white T-shirt—yeah, your cursor's on it—and then Codefendant Pierre Harvey who has the camouflage hooded sweatshirt, which your cursor is on, using a large pry bar to manipulate the machine to try to open it.

Q. I want to draw your attention to the very top here of the video. Do you see an individual with a black shirt?

A. Yes.

Q. Do you see my cursor circling that individual?

A. Yes, I do.

Q. And what direction does it appear that that individual is looking?

A. East towards 63rd Street.

Q. And does it appear to be the same individual that you testified about a few minutes ago?

A. It is.

Q. All right. I'm going to keep moving on the video.

(Video played.)

MR. VILLALPANDO: So I stopped the video at approximately 181335 time stamp on the marker on the bottom right-hand side here of the video.

BY MR. VILLALPANDO:

Q. I'm going to—

MR. KLING: Judge, this is Richard Kling. I didn't hear the time stamp where it was stopped. That didn't come through.

MR. VILLALPANDO: I will repeat it.

181335 on the bottom right-hand side.

MR. KLING: Thank you.

MR. VILLALPANDO: You're welcome.

I'm zooming in here a bit on the video.

BY MR. VILLALPANDO:

Q. Officer Nemec, can you see the video on your screen?

A. I can.

Q. Do you see an individual with an orange vest?

A. I do.

Q. Do you recognize that person?

A. I recognize that person as the defendant.

Q. And that's the person you arrested on June 1st?

A. Yes.

MR. VILLALPANDO: I've started running the video again.

(Video played.)

MR. VILLALPANDO: I've paused the video at the 181544 time stamp here on the bottom right-hand side.

BY MR. VILLALPANDO:

Q. Officer, are you still able to see the video?

A. I am.

Q. What did you just observe in the video?

A. The defendant, Rickie Foy, passed the gentleman with the blue hat on his left shoulder and was pointing towards the machine where he had the—the individual in the blue hat had the large crowbar, pry bar, wedged into the ATM machine.

MR. VILLALPANDO: I'm going to run the video again.

(Video played.)

MR. VILLALPANDO: I've paused the video at the 181645 time marker on the bottom right-hand side of the video.

BY MR. VILLALPANDO:

Q. Officer, are you still able to see the video?

A. I can.

Q. What did you just see?

A. Multiple people on scene removing like the face or the cover off of the ATM machine.

COURT REPORTER: I'm sorry; can you repeat that, please?

THE WITNESS: I observed multiple people on scene removing the face or cover off of the ATM machine.

MR. VILLALPANDO: I'm going to run the video again.

(Video played.)

MR. VILLALPANDO: I've stopped the video here at the 181737 time stamp.

BY MR. VILLALPANDO:

Q. What do you see here, Officer?

A. I see multiple people—multiple people in front of the ATM machine and the defendant, Rickie Foy, standing behind them.

Q. Are you able to tell from what direction the defendant came from?

A. I believe it would be east and north.

Q. I'm going to keep running the video at this point.

THE COURT: I think he got out of a car. Is that what the witness observed?

MR. VILLALPANDO: I'm rewinding the video here and changing the perspective slightly here. I'm going to run it.

(Video played.)

A. The—the vehicle came from the east and then approaching from the north, south towards the ATM machine.

BY MR. VILLALPANDO:

Q. Officer, does the defendant at any point leave the scene?

A. Yes. A few moments ago in the video, the defendant left the—the—the scene where the ATM is and then came back to the vehicle.

Q. And is that what's currently reflected on the—on the screen right now at the time stamp 181738 of the video?

A. Yes.

MR. VILLALPANDO: I'm going to run the video to the end.

(Video played.)

MR. VILLALPANDO: The video stops here at the 182000 time stamp. I'm going to stop sharing the video at this point.

BY MR. VILLALPANDO:

Q. Officer Nemec, do you know if the defendant was interviewed by Chicago police after he was arrested?

A. He was.

Q. Do you know if the interview was video- and audio-recorded?

A. It was.

MR. VILLALPANDO: Your Honor, may the government play what's been admitted into evidence as Government Exhibit 16?

THE COURT: Proceed.

MR. VILLALPANDO: And for the record, I note that the audio does not start on the video until approximately 90 seconds into the video.

(Video played.)

MR. KLING: Judge, this is Richard Kling. May I inquire? Is something being shared, because on my screen nothing is being shared anymore.

THE COURT: It is being shared, so let's pause for a minute and—

(Indiscernible crosstalk.)

MR. KLING: I have a blank screen which says "cannot view media file. Switch to desktop application." It was working fine a moment ago, but now I have nothing in terms of the video.

MR. VILLALPANDO: So, Judge, the—we were using a different—there are a couple of ways on Webex that you can use to share video and we tried using this approach where you actually share the file. It's a little easier to hear the audio when you use that approach. So I think I'll revert back to the approach that we were using before, but to the extent that the Court or counsel or Mr. Foy have difficulty hearing the audio, just let me know and we'll try to find a fix for it.

THE COURT: All right. Proceed that way.

MR. VILLALPANDO: I apologize. Mr. Kling, can you see the video?

MR. KLING: Yes.

MR. VILLALPANDO: Okay. I'm going to keep running it.

(Video played.)

MR. VILLALPANDO: I'm going to pause the video there at the two-minute five-second mark just to make sure that people are able to hear what's being said on the video.

Judge, are you able to—to make out what's being said?

THE COURT: Not at all. I haven't heard anything.

MR. VILLALPANDO: Okay.

THE COURT: If there's been audio so far, I've not heard it.

MR. KLING: And this is Richard Kling; nor have I.

MR. MADDEN: If we could go off the record for a moment to discuss the best way to do this, if that's all right.

THE COURT: Let's go off the record.

(Off the record.)

THE COURT: I think you're only supposed to hear it right now, rather than the video. Is that right, Mr. Madden?

MR. MADDEN: Audio and video.

THE COURT: Mr. Kling, you've seen this body cam before. Is that correct?

MR. KLING: I have.

THE COURT: Have you reviewed it with your client?

MR. KLING: I have seen it. I have not reviewed it with my client, but, yes, I've seen it.

THE COURT: All right. Is there any contested factual issue about what's said on this video?

MR. KLING: No—

THE COURT: We're on the record right now.

MR. KLING: No, there is not.

THE COURT: All right. We can play it, but if there's difficulty in hearing it, can there be a stipulation as to what was said by the officer and what was said by Mr. Foy? Even if it's not verbatim, but the stipulation as to what in general was said. I already heard in the opening what people think was said.

MR. KLING: It's up to Mr. Foy.

THE COURT: Any objection to that by the government?

MR. KLING: Obviously, the audio is the critical aspect as opposed to—

THE COURT: Can you do that, Mr. Villalpando?

You're on mute.

MR. VILLALPANDO: The other option if this doesn't work would be for Mr. Kling just to pull up the exhibit

himself and play it on his computer. He should have it and he can run it parallel to us running it on the Webex.

MR. KLING: Well, my other issue is the foundation issue (inaudible) written foundation. Other than that, it's fine.

THE COURT: I don't know why we need a foundation.

MR. KLING: It is (inaudible).

THE COURT: Well, why don't you try it that way, Mr. Villalpando. And, Mr. Kling, if you can't hear it, so note it.

(Video played.)

MR. VILLALPANDO: Mr. Kling, are you able to hear that?

MR. KLING: I heard mumbling in the background (inaudible).

MR. VILLALPANDO: Okay. Can you hear, Judge?

THE COURT: Yeah, I could hear they were advising the defendant of his rights and he was waiving them.

MR. KLING: None of that came in on my end. I have seen the video, however, and I agree that's what was on the (inaudible).

THE COURT: All right. Well, how do you want to proceed? I'm the fact finder. If there's no real dispute as to what was said, you can stipulate to what was said. If there is—

(Indiscernible crosstalk.)

THE COURT: Pardon me, Mr. Kling?

MR. KLING: There is no real dispute, then, Judge.

THE COURT: Why don't we at a break let you talk on the phone and see if you can reach a factual stipulation or testimonial stipulation as to what was said—what this

officer was saying on the video or a factual stipulation as to what was actually said.

MR. KLING: That's fine.

COURT REPORTER: Can we have Mr. Kling switch back to dial-in?

THE COURT: Yes.

COURT REPORTER: Thank you.

(Pause in the proceedings.)

MR. KLING: I am back on the phone.

THE COURT: Okay. You may proceed.

MR. VILLALPANDO: Thank you, Your Honor.

BY MR. VILLALPANDO:

Q. Officer—Officer Nemec, can you please turn to what's been marked as Government Exhibit 18 in the exhibit binder.

A. Okay.

Q. Do you recognize what's depicted in Government Exhibit 18?

A. I do.

Q. What's depicted in the exhibit?

A. The orange safety (inaudible)—

COURT REPORTER: Repeat that, please.

THE WITNESS: Exhibit 18 is an orange safety construction vest worn by the defendant, Rickie Foy, when I took him into custody.

BY MR. VILLALPANDO:

Q. Does Government Exhibit 18 fairly and accurately depict the orange vest that defendant was wearing when you arrested him on June 1, 2020?

A. Yes.

MR. VILLALPANDO: The government moves to admit Government Exhibit 18 into evidence.

MR. KLING: No objection.

THE COURT: It's admitted without objection.

(Government Exhibit 18 admitted in evidence.)

THE COURT: And, Mr. Kling, you should mute your phone if you haven't. Same thing, Mr. Madden.

MR. KLING: I am muting it regularly and just unmuting it for objections.

MR. VILLALPANDO: I'm sharing on the screen what's been marked as Government Exhibit 18.

BY MR. VILLALPANDO:

Q. Officer, do you see it on your screen?

A. I do.

Q. And what does this exhibit depict?

A. The orange vest worn by the defendant, Rickie Foy, when I placed him in custody.

Q. Can you please turn to what's been marked as Government Exhibit 19 in the exhibit binder.

A. Yes.

Q. What's depicted in the exhibit?

A. The orange vest—Rickie Foy wearing the orange safety construction vest that is in Exhibit 18.

Q. Does Government Exhibit 18—or 19 fairly and accurately depict the defendant on June 1, 2020?

A. It does.

MR. VILLALPANDO: The government moves to admit Government Exhibit 19 into evidence.

MR. KLING: No objection.

THE COURT: It's admitted without objection.

(Government Exhibit 19 admitted in evidence.)

MR. MADDEN: Officer, please sit closer to the computer and keep your voice up during your testimony.

THE WITNESS: Yes.

MR. VILLALPANDO: Thank you.

BY MR. VILLALPANDO:

Q. I'm sharing on the screen what's been admitted into evidence as Government Exhibit 19. Do you see it, Officer?

A. I do.

Q. And what is depicted in Government Exhibit 19?

A. The defendant, Rickie Foy.

Q. I'm now displaying on the screen what has been admitted into evidence as Government Exhibit 3A. Do you see it, Officer?

A. I do.

Q. Do you see the defendant in this exhibit?

A. I do. He's holding a large pry bar while still wearing the orange vest.

Q. I'm now displaying on the screen what has been admitted into evidence as Government Exhibit 3B. Do you see it?

A. I do.

Q. Do you see the defendant in this exhibit?

A. I do.

Q. Okay. What do you see in this exhibit?

A. It's the defendant holding the large pry bar and wedging it into the ATM machine while the individual in the blue hat is pointing and where he his (inaudible) pry...

COURT REPORTER: Repeat that, please. You broke up.

THE WITNESS: The defendant is holding the large pry bar while wedging it into the machine while an individual with a blue hat points to where he's wedging it into the ATM machine.

BY MR. VILLALPANDO:

Q. Now, displaying on the screen what has been admitted into evidence as Government Exhibit 3C.

Officer, do you see it in front of you?

A. I do.

Q. What do you see in this exhibit?

A. The individual with the blue hat and then the defendant, Rickie Foy, both using the same pry bar that is wedged into the ATM machine.

Q. I'm now displaying on the screen what has been entered into—what's been admitted into evidence as Government Exhibit 3D.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. The defendant, Rickie Foy, standing there with the orange vest on next to the individual with the pry bar in the blue hat.

Q. And are you able to tell where that individual with the blue hat obtained that pry bar?

A. He obtained it from the defendant.

Q. I'm now displaying on the screen what has been admitted into evidence as Government Exhibit 5A.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. I see the defendant, Rickie Foy, holding a hammer in his hand.

Q. I'm now displaying on the screen what has been admitted into evidence as Government Exhibit 5B.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. The defendant, Rickie Foy, is handing the hammer to an individual with the black-and-white hooded sweatshirt on with white gloves.

MR. KLING: Judge, this is Mr. Kling. The answer did not come through. It broke up.

THE COURT: Repeat the answer.

THE WITNESS: The defendant, Rickie Foy, is passing the hammer or the tool to an individual with white gloves and a black-and-white sweatshirt.

BY MR. VILLALPANDO:

Q. Now displaying on the screen what has been admitted into evidence as Government Exhibit 5C.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. The individual wearing a black-and-white hooded sweatshirt passing the hammer to an individual with a hooded sweatshirt.

Q. Are you able to tell where the individual with the black hoodie and the white gloves obtained that hammer?

A. They obtained it—he obtained it from the defendant, Rickie Foy.

Q. I'm now displaying on the screen what has been admitted into evidence as Government Exhibit 6A.

Officer, do you see Government Exhibit 6A on the screen?

A. I do.

Q. What do you see here?

A. The defendant—the defendant, Rickie Foy, standing behind the Codefendant Chyenne Simpson who has a large pry bar wedged into the machine trying to open it.

Q. Can you please describe what Codefendant Chyenne Simpson is wearing in Government Exhibit 6A?

A. The Codefendant Chyenne Simpson is wearing a white T-shirt with what appears to be black pants and white shoes.

Q. I'm now displaying on the screen what has been admitted into evidence as Government Exhibit 6B.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. I see the defendant, Rickie Foy, now passing the large pry bar in his right hand that was used by the Codefendant Chyenne Simpson.

Q. I'm now displaying on the screen what's been admitted into evidence as Government Exhibit 6C on the screen.

Officer Nemec, do you see Government Exhibit 6C on the screen?

A. I do.

Q. What do you see here?

A. I see an individual with a camouflaged hoodie with another codefendant, Pierre Harvey, now holding the same large crowbar or pry bar that he received from the defendant, Rickie Foy.

Q. Now sharing what's been admitted into evidence as Government Exhibit 6D.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. Defendant, Rickie Foy, holding the large crowbar or pry bar in his right hand.

Q. Are you able to tell where he obtained that pry bar?

A. From the defendant in the camouflaged hooded sweatshirt.

Q. I'm now sharing on the screen what has been admitted into evidence as Government Exhibit 7.

Do you see it, Officer?

A. I do.

Q. What do you see here?

A. I see the defendant, Rickie Foy, with a yellow crowbar in his hand, like wedging it into the bottom of the ATM machine.

Q. I'm now displaying on the screen what has been admitted into evidence as Government Exhibit 10A.

Do you see it, Officer?

A. I do.

Q. What do you see here?

A. The defendant, Rickie Foy, exchanging a hammer with an unknown individual in a striped purple hooded sweatshirt.

Q. I'm now sharing on the screen what has been admitted into evidence as Government Exhibit 10B.

Do you see it?

A. I do.

Q. What do you see here?

A. The defendant, Rickie Foy, grabbing the hammer from an unknown individual in a purple hooded sweatshirt.

Q. Now displaying on the screen what has been admitted into evidence as Government Exhibit 11.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. The defendant, Rickie Foy, holding a hammer and looking toward the (inaudible)—

Q. And are you able to tell where he got that hammer?

A. He received that hammer from the individual in the purple hooded sweatshirt.

THE COURT: Before you move past Government 11, it looks there's something in his left hand. Can you identify that? Or is that just—maybe—or is that just a line in the cement?

BY MR. VILLALPANDO:

Q. Officer, are you able to?

THE WITNESS: I am unable to tell if that's a tool or something in the cement, Your Honor.

THE COURT: All right. Okay. Proceed.

BY MR. VILLALPANDO:

Q. I'm now displaying on the screen what has been admitted into evidence as Government Exhibit 12.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. Multiple individuals in front of the ATM machine and then the defendant, Rickie Foy, walking away eastbound from the ATM machine.

Q. I'm now displaying on the screen what's been entered into evidence as Government Exhibit 13.

Officer, do you see it on your screen?

A. I do.

Q. What do you see here?

A. The defendant, Rickie Foy, standing behind a group of people in front of the ATM machine.

MR. VILLALPANDO: Your Honor, at this point, I'm going to stop sharing my screen, and I would ask the Court for a moment for me to confer with Mr. Madden.

THE COURT: All right. You may have that moment.

MR. VILLALPANDO: Thank you, Judge.

(Counsel conferring.)

THE DEFENDANT: Can I ask for a break for one minute, please?

THE WITNESS: Does the same thing go for me, Your Honor?

THE COURT: Yes. Let's just take a five-minute break for everyone, including me.

(A recess was had from 11:17 a.m. to 11:23 a.m.)

THE COURT: Are we ready to proceed?

THE WITNESS: Yes, sir.

THE COURT: Is the government ready to proceed?

MR. VILLALPANDO: Yes, Your Honor.

THE COURT: And, Elia, are you back on?

COURT REPORTER: I'm back on, Judge.

THE COURT: All right. Mr. Villalpando, you may continue.

MR. VILLALPANDO: Your Honor, at this point the government tenders the witness.

THE COURT: All right. Mr. Kling, cross-examination.

JOHN NEMEC, GOVERNMENT WITNESS, PREVIOUSLY SWORN

CROSS-EXAMINATION

BY MR. KLING:

Q. Officer Nemec, what time was it that you arrived at the scene of the Bank of America?

A. Approximately 7:15 in the afternoon.

Q. By the way, have you subsequently learned that the date—that the time stamps on the ATM machine are not in fact accurate, that they're an hour off?

A. I did not.

Q. In any event, you got there at roughly 7:00 p.m.?

A. Yes. From the report, yes.

Q. And how long had you been on duty?

A. That day?

Q. That day.

A. I don't recall the hours that day. It was during the summer where it was constantly changing depending on what was going on.

Q. When you got to the scene, did you arrive alone or with somebody else?

A. I arrived with my partner.

Q. And your partner was, in fact, the driver, was he not, or she?

A. I believe she was driving that day, yes.

Q. What was your partner's name?

A. Jamie Tomczak (phonetic).

Q. All right. You don't know what time was it, do you, that the person you've identified as Rickie Voy—Foy arrived at the ATM, do you?

A. I'm sorry; could you repeat the question? It—

Q. Let me—let me rephrase the question.

When you got to the scene of the ATM, was Mr. Foy already there?

A. He was.

Q. And you don't know what time he got there. Correct?

A. I don't.

Q. You don't know whether he came alone or with anybody else. Correct?

A. I do not.

Q. You don't know whether he walked to the scene or came in a vehicle. Correct?

A. I—I do not.

Q. How many people altogether were around the ATM machine during the period of time that you were there as a Chicago police officer?

A. Multiple people according to the video. A dozen, if not more.

Q. And you don't know if Mr. Foy came to the ATM alone or with somebody else. Is that correct?

A. I do not.

Q. You don't know if Mr. Foy was related to any of the other individuals who were there. Correct?

A. I do not.

Q. And during the time you were there, you did not hear anything that Mr. Foy said. Is that correct?

A. I do not recall anything the defendant, Rickie Foy, had said, no.

Q. And you did not hear during the period of time that you were there any of the other individuals saying anything to Mr. Foy. Correct?

A. Correct.

Q. You don't know where he went when he—let me start—let me stop that for a moment.

At some time—

A. Could you repeat the question?

Q. Yeah, I stopped—stopped. Let me start over again.

At some time during the playing of the video or during the time that you saw the video, Mr. Foy left and came back. Correct?

A. Yes, correct.

Q. You don't know where he went when he left. Correct?

A. I do not know.

MR. KLING: If I may have one moment, Judge.

BY MR. KLING:

Q. What appeared to be a pry bar and a hammer, were they recovered by Chicago Police Department?

A. I do not recall if those specific instruments were recovered.

Q. Do you have any reports which would reflect the fact that they were recovered?

A. In front of me, no.

Q. You don't know whether the items, the pry bar or the hammer were sent to the Chicago Police Department or Illinois State Police laboratory for fingerprint analysis, do you?

A. I don't.

MR. KLING: Judge, may I have a moment?

THE COURT: You may.

BY MR. KLING:

Q. Were you present for the interview, Officer, that occurred at the Chicago Police Department after Mr. Foy was placed into custody?

A. I was not.

Q. You never saw—there was an individual you identified at various portions who you said appeared to be looking east. He was some distance away from the individuals around the ATM.

Do you remember that testimony?

A. Yes.

Q. You never saw any relationship between Mr. Foy and that individual who was supposedly or purportedly looking east, did you?

A. No, not to my recollection.

Q. From the time that you pursued Mr. Foy until you apprehended him, how long a period of time was that?

A. Approximately a minute.

Q. And were there any other police officers on the scene at that time?

A. Yes, there were multiple officers on scene.

Q. The partner you came with, do you know where she was at the time that you apprehended Mr. Foy?

A. She was with me in the vicinity when I apprehended and placed Mr. Foy in custody.

Q. Now, you didn't see Mr. Foy do any of the things that were caught on the videotape about which you've testified. Is that right?

A. I personally did not, no.

Q. The vehicle you came in was an unmarked car, I believe you testified?

A. It was.

Q. But you were in uniform?

A. I was.

Q. At one time shortly after the video began to run there was a blue car that has appeared in the video that pulled up to the scene.

Do you remember that blue car?

A. A police vehicle or—I—I don't recall—

Q. A blue car appeared to pull in front of the ATM machine at some point shortly after the video began to run.

A. Yes.

Q. And do you know whether—was it a police vehicle?

A. No, I don't believe so.

Q. There was another gray car that came shortly after that blue car. Do you know who—whether that was a civilian vehicle or police vehicle?

A. I believe it was a civilian vehicle.

Q. You were not there at any time those vehicles came, though. Is that right?

A. No.

Q. That's a bad way I froze—phrased the question.

When you say "No," am I correct that you were not there during the time those vehicles came?

A. I was not on scene when those vehicles went through the drive-through at the beginning of the video.

MR. KLING: Judge, may I have a couple of minutes to discuss with Mr. Foy, obviously off camera and off video?

Judge, you are muted. You're not coming through at all.

THE COURT: Yeah, you may. I don't think we need to do anything at our end for you to have that conversation. Correct?

MR. KLING: I don't know what we need to do, other than—Mr. Foy, do you have a cell phone there or you have a phone?

THE DEFENDANT: Yes.

MR. KLING: Okay. Then I'm going to put you on mute and you put yourself on mute, and can you call my cell phone so you and I can talk privately?

THE DEFENDANT: Okay.

THE COURT: And, Mr. Kling, while you're off, I'm going to ask the government to start fashioning a stipulation that you can run by Mr. Kling as to the interview with Mr. Foy.

MR. KLING: Great. So, Rickie, you're going to put your thing on mute, I'm going to put mine on mute, and you're going to call my cell phone.

THE DEFENDANT: Okay.

(Pause in the proceedings.)

THE COURT: All right. Mr. Kling, you may proceed.

BY MR. KLING:

Q. Officer, when you followed Mr. Foy into the alley, you were with your partner. Is that correct?

A. Yes, we were together.

Q. And when you went into the alley and—Mr. Foy raised his hands and surrendered, did he not?

A. Yes, I believe he did. Yeah, at some point he did.

Q. Neither you nor your partner had to yell stop or I'll shoot or physically apprehend him. Is that correct?

A. We were attempting to deescalate the situation, telling him to stop running when we initially started, but at a certain point he did stop, put his hands up, and we were able to place him in custody at that time.

Q. He submitted to the authority of you and your partner. Is that right?

A. He did.

MR. KLING: Judge, nothing further at this point.

THE COURT: All right. Any redirect?

MR. VILLALPANDO: Not based on that, Your Honor. Thank you.

THE COURT: All right. You're excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you, Officer.

All right. The government may call its next witness or proceed as you wish.

MR. MADDEN: The next thing we need to do is to work out a stipulation with Mr. Kling on the video. And so

once we do that, we can read that—about his postarrest statement, which I think we'll just pull out two or three or four key statements.

I imagine we can get a—you know, arrive at a stipulation with Mr. Kling, and then we'll read that into the record and then the government will rest. But we'll probably need, you know, 10 or 15 minutes just to type that up and discuss with Mr. Kling.

THE COURT: All right. It's 11:37 now. Let's take—let's reconvene at 11:55, because Mr. Kling has to talk to his client about that stipulation, too.

MR. KLING: I was—I was just going to say that. Once the stip is drawn up, I need to talk to Mr. Foy.

THE COURT: So we'll reconvene at 11:55.

Mr. Kling, do you expect to call any witnesses?

MR. KLING: No.

THE COURT: Okay. So let's reconvene at 11:55. You can keep your screens open; probably the safest thing to do, and we'll come back 11:55. Thank you.

MR. KLING: And, judge, just so you know, I have discussed extensively with Mr. Foy his right to testify. I indicated that you may ask him a series of questions about that right. As far as I know at this juncture, he still does not wish to testify.

THE COURT: All right. I'll go through the waiver with him once you've made that decision on the record.

MR. KLING: Thank you, sir.

THE COURT: Thank you.

(A recess was had from 11:38 a.m. to 11:59 a.m.)

THE COURT: All right. We're back on the record.

And the government may either call another witness or read a stipulation.

MR. MADDEN: Thank you, Your Honor.

MR. KLING: And, Judge, so the record is clear, I did receive the stipulation from Mr. Madden and I did have a chance to discuss it with Mr. Foy who does agree that it accurately reflects the conversation he had in the police station that Mr. Madden's about to put in.

THE COURT: All right. Thank you, Mr. Kling.

MR. MADDEN: Thank you.

Stipulation No. 7: On June 2, 2020, a recording of a CPD interview of Rickie Foy reflected the following statement, among others:

"FOY: A crowd was trying to get into the ATM.

"OFFICER: Did you walk up to the ATM?

"FOY: I walked that way. I see the police coming. I basically told them, the police coming.

"OFFICER: Were you close enough to touch the ATM?

"FOY: Nope.

"FOY: I'm everywhere.

"OFFICER: Did you touch the ATM?

"FOY: Nope. No, sir. Didn't know nobody over there."

An officer showed Foy two still shots and Foy reviewed the stills.

"FOY: I see what's going on. Y'all gotta do what you gotta do."

So stipulated?

THE COURT: You are muted.

MR. KLING: It is stipulated that if the officer were called to testify, he would testify that that conversation truly and accurately reflects the conversation he had with Mr. Foy.

THE COURT: All right. I'll accept that as a piece of evidence in this case.

MR. MADDEN: Thank you.

THE COURT: All right. Any additional witnesses or evidence by the government?

MR. MADDEN: No, Your Honor. The government rests.

THE COURT: All right. Mr. Kling, any witnesses or evidence you wish to present?

MR. KLING: No, Judge, but I would make a motion.

THE COURT: Yeah, I'm sorry; you may make a motion.

MR. KLING: Judge, most respectfully, even if you take the evidence in the light most favorable to the government, it's still based purely on speculation.

You have to speculate from the videotape what was going on. You have no audiotape. You don't know what was going on, other than your guessing what was going on. And at this juncture, even taking the evidence in the light most favorable to the government, I would ask the Court to find a judgement notwithstanding the government's case.

THE COURT: All right. I'll take that motion under advisement and allow you to present your case.

MR. KLING: Judge, I have discussed with Mr. Foy his right to testify. He has elected not to testify. And I admonished him that you would be probably asking him a

series of questions, which he's prepared to listen to and to answer.

THE COURT: All right. Mr. Foy, please unmute your phone.

Emily, are you on?

Please swear Mr. Foy.

THE WITNESS: I swear.

THE CLERK: Sure.

(Defendant Rickie Foy sworn.)

THE DEFENDANT: Yes, I do.

THE COURT: All right. Mr. Foy, you understand you have a right to testify in this trial?

THE DEFENDANT: Yes, I do.

THE COURT: And do you understand that you also have a right not to testify; and if you don't testify, no inference or suggestion of guilt could be drawn by me if you chose not to testify. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: All right. And is it your choice not to testify in this case?

THE DEFENDANT: Yes, it's my choice not to testify.

THE COURT: Have you discussed that with your lawyer?

THE DEFENDANT: Yes, I have.

THE COURT: Have you had enough time to talk about it with your lawyer?

THE DEFENDANT: Yes, I have.

THE COURT: All right. And are you knowingly waiving your right to testify?

THE DEFENDANT: Yes, I am.

THE COURT: All right. Mr. Kling, do you believe there's any additional questions I should ask your client about his knowing waiver of his right to testify?

MR. KLING: No, sir.

THE COURT: And, Mr. Madden, do you believe there's any additional questions that I should ask the defendant relating to his knowing waiver of his right to testify?

MR. MADDEN: No.

THE COURT: All right. I find the defendant has knowingly and voluntarily waived his right to testify in this bench trial and no inference or suggestion of guilt will be drawn from his failure to testify in this case.

Mr. Kling, any additional evidence or witnesses you wish to present?

MR. KLING: No, Judge. Based on my discussions with Mr. Foy, we would rest.

THE COURT: All right. Any rebuttal case by the government?

MR. MADDEN: No, Your Honor.

THE COURT: All right. Then the proof in this case is closed. Are the parties ready to proceed to closing arguments?

MR. MADDEN: Yes, Your Honor.

MR. KLING: Yes, sir.

THE COURT: All right. Mr. Madden, proceed. Or Mr. Villalpando, whoever is doing the closing.

MR. VILLALPANDO: If you will give me a minute so I can pull up my—my slides here.

THE COURT: All right.

MR. KLING: By the way—and this is Richard Kling again—Ramon, will you agree or let the judge know that the video is one hour off in actual time? I think that's the conclusion that the police gave. It doesn't matter as far as the case but the time stamps are not accurate; they're one hour off.

MR. MADDEN: That's—that's correct, we'll stipulate to that, Your Honor. That's accurate.

THE COURT: All right. So stipulated. I'll recognize that when I review this.

MR. VILLALPANDO: Judge, are you able to see that slide?

THE COURT: I am.

MR. VILLALPANDO: Mr. Kling, are you able to see?

MR. KLING: Yes.

MR. VILLALPANDO: Okay. Judge, may I proceed?

THE COURT: You may.

CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT

MR. VILLALPANDO: On June 1st of last year defendant, Rickie Foy, his Codefendants Chyenne Simpson and Pierre Harvey and others gutted a Bank of America ATM during daylight hours. Their actions that day had a pure goal: to get the cash that was inside the ATM. Their efforts to steal the cash, however, were thwarted when police arrived on the scene. Their brazen actions that day were captured by the ATM surveillance video, and what that video captured is a criminal conspiracy to steal the money from the Bank of America ATM.

Because the defendant worked with others to steal the money from the ATM, he's charged in this federal criminal case with conspiracy to commit bank (inaudible). As in

every criminal case, the government has the burden of proving the defendant guilty beyond a reasonable doubt. We have absolutely met the burden in this case. I'm going to explain how the government has satisfied its burden here.

Starting off with the elements of the charge, Your Honor, there are three here:

First, that the conspiracy as charged in the indictment existed; second, that the defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy; and third, that one of the conspirators committed an overt act in an effort to advance the goal of the conspiracy on or before June 1, 2020.

The overwhelming evidence relative to these elements, Your Honor, I'm going to address each of them separately and in this order.

Starting off with the first element, the fact that the conspiracy charged in the indictment existed. The government here has to prove that the conspiracy as charged in the indictment existed and the government must prove beyond a reasonable doubt that the defendants had an agreement or a mutual understanding with at least one other person to take and to carry away with the intent to steal money exceeding $1,000 in value; Element 2, under the care, custody, control, management, and possession of Bank of America, and the U.S. currency stored in the Bank of America ATM located at 620 West 63rd Street in Chicago, Illinois. That's the conspiracy charged in the indictment.

Now, let's start off with what's stipulated as to this element. First, there was more than $1,000 in the Bank of America ATM. Specifically, there was more than $190,000 in cash in the machine.

Second, the money in the Bank of America ATM belonged to and within the care, custody, control, management, and possession of Bank of America.

And, third, the deposits of Bank of America owned and operated the Bank of America ATM located at 620 West 63rd Street in Chicago were insured by the Federal Deposit Insurance Corporation at all times during the year 2020, including on June 1, 2020.

So what remains after this first element is the government having to prove that the defendant had an agreement or mutual understanding with at least one other person to take and carry away with the intent to steal the money in the Bank of America ATM.

There's no dispute here regarding what the relevant law is. It's laid out in the government's position paper. And as the Court knows, the government doesn't need to prove a formal or express agreement. The government also doesn't need to prove that the defendant knew the other members of the conspiracy here, Your Honor. As the Court knows, a tacit agreement is enough.

THE COURT: Mr. Villalpando, I had a question. Was there ever any indication—I didn't hear it—where these tools came from?

MR. VILLALPANDO: I'm not—I'm not sure, Your Honor, where they came from.

THE COURT: All right. Yeah, they just seemed as if they appeared, and I didn't know—certainly different people are handling them, the defendant's handling them, but I didn't see a tool bag or anything else indicating where they all came from. And also, you know, the videos obviously are choppy.

Is there some kind of a mechanism where they take a picture every 10 seconds or 15 seconds? How does that work?

MR. VILLALPANDO: Your Honor, it's my understanding that the video—that the surveillance video is motion-activated—

THE COURT: Okay.

MR. VILLALPANDO:—so that explains—that explains the initial choppiness at the beginning of the video, but after that, it's—it's—the video captures what happened that day in an unbroken stream, Your Honor.

THE COURT: All right. Proceed.

MR. VILLALPANDO: Your Honor, the central piece of evidence here is that video, and the video is clear and it captured in detail the defendant and his coconspirators attacking the ATM to steal the money inside of it.

Before talking about the evidence that proves that conspiracy, I want to address two points: First, the intent of the conspiracy was to get the money out of the ATM. These individuals did not walk up to the ATM and present (inaudible) to withdraw money from the machine. They used crowbars; they used bolt cutters; they used violence. They tried to break into that ATM to steal the money that was inside. And they knew what they were doing was illegal. That's why when officers arrived on the scene, they ran from the ATM.

The other point here that I want to address briefly is that one of those individuals that you saw in the video is the defendant, Rickie Foy, wearing this orange vest. His identity here has been stipulated and Officer Nemec identified the defendant in court today, Your Honor. So there's no dispute that that individual that you see on the video attacking that ATM and working with others to get into

the ATM to steal the money, that's the defendant, Rickie Foy.

Now, turning to the evidence of the conspiracy here. The video shows this conspiracy in several ways. First, it reflects cooperative relationships among these other individuals and defendant individuals; it shows an embrace of a shared criminal objective, specifically to break into the ATM to get the money; and it shows that the conspiracy continued towards its common goal.

Now, starting off with the cooperative relationships, Your Honor. There's evidence in the sharing of tools, the communication, the use of joint physical effort, and the division of labor.

Now, the defendant, as the video reflects, shared tools with others and those other individuals shared tools with one another. The sharing of those tools to break into the ATM shows that cooperation, and that cooperation is evident of the charged conspiracy in this case.

The defendant and others also communicated with others about breaking into the ATM. The defense is right that there isn't audio attached to this surveillance video, but it does capture individuals gesturing in a manner consistent with them communicating with one another. They weren't operating in silence. It's a reasonable inference that the individuals were out there communicating with one another as to how to break into that ATM.

Here, on this slide before you, Your Honor, we provided one example of this where the defendant walked up to the individual with the blue hat, was trying to break into the ATM, the defendant tapped him on the shoulder and makes a hooking motion with his—with his right arm. The defendant here isn't giving him advice on his golf swing. He's giving him advice as to how to get inside the ATM. Defendant and others were out there communicating with

one another. And that communication, Your Honor, is evident of that cooperation and that cooperation is evident of the charged conspiracy in this case.

THE COURT: Mr. Villalpando, each one of these slides that you're showing contains a screenshot. Those are admitted exhibits. Correct?

MR. VILLALPANDO: Yes, Your Honor. And I should have included the ones with the exhibit stamp on them, but they're in evidence.

THE COURT: Okay. Proceed.

MR. VILLALPANDO: In addition, Your Honor, another piece of evidence here that reflects the conspiracy is the use of this joint physical effort. And, again, we have a still here on this slide that shows multiple individuals using this crowbar to try to get into this—the ATM. The use of their joint physical strength shows that cooperation and, again, that cooperation is evidence of the charged conspiracy.

There is also a division of labor that reflects the conspiracy here and the cooperation that was going on. This division of labor was obviously—was necessary, as it reflected from the video breaking into an ATM in daylight hours in the middle of the city is not easy work.

So we see the conspirators take breaks and others picking up the slack while others took those breaks. We also see people like the defendant serving as lookouts for law enforcement. And that conclusion, with respect to the defendant, is confirmed in his postarrest interview where he basically told officers that he, quote, in effect basically told them the police was coming, Your Honor. And that's just one of the stipulations that was just read into evidence and it's also captured in the postarrest interview that is in evidence, Your Honor. So this division of labor

among these individuals shows cooperation and that cooperation shows and is evidence of the charged conspiracy in this case.

So what else—what else proves the conspiracy here, Your Honor, is this embrace of a shared criminal objective to physically breaking into the ATM to steal the money. The individuals captured on this video wholeheartedly embraced that objective in their actions, and the defendant here especially so, Your Honor. In the postarrest interview he said words to the effect of, I'm everywhere, multiple times. And he's right about that. He's everywhere sharing tools, communicating with others, using his joint physical efforts with others, and serving as a lookout.

And any further evidence of his embrace of the shared criminal objective, Your Honor, the video shows that he leaves the scene of the ATM at a certain point and then returns right back to the scene right before the officers arrive, Your Honor. That shows commitment; that shows the embrace of a shared criminal objective in this case, Your Honor.

And so what else does the video show? It shows that this conspiracy continued towards its common goal. Again, getting into the ATM and getting the money. Sustained joint physical effort by these individuals, including the defendant, caused significant damage to the Bank of America ATM. And that damage reflects the progress that they made towards that common goal. And the reason they were stopped from proceeding any further with their goal was that law enforcement arrived on the scene. So this progress towards that common goal, that is—that is additional evidence of the conspiracy as charged in this case.

Just to summarize, Your Honor, the evidence of the conspiracy that's charged here, the cooperative

relationships, the embrace of shared criminal objective, and that the conspiracy continued towards its common goal.

Your Honor, the government has proven this element beyond a reasonable doubt. The charge—the conspiracy charged in the indictment has been proven beyond a reasonable doubt. That's the first element, Your Honor.

The second element is the defendant's knowing membership of that conspiracy. And here, the evidence overlaps with respect to the first element, Your Honor, but it's clear that the defendant here knowingly became a member of the conspiracy. He wasn't just sitting on the sideline just observing others attack this ATM to break into it. He was an active participant in this conspiracy.

And how do we know he was an active participant in this conspiracy? The video tells the story and his actions are clear as day that he became a member of this conspiracy to advance the conspiracy. And his actions tell the story. He shared the tools, he communicated with others, he worked with others physically to try to break into the ATM, and he served as a lookout, Your Honor.

So, Your Honor, the evidence here satisfies the government's burden of proving beyond a reasonable doubt that the defendant here knowingly became a member of the conspiracy with an intent to advance the conspiracy. And the intent here was to get into the ATM and to hit the jackpot by getting the money that was contained in the ATM.

So we've talked about the first two elements here, Your Honor, and they've been proven beyond a reasonable doubt by the government.

The last element here is that one of the coconspirators committed an overt act in an effort to advance the goals of the conspiracy on or before June 1, 2020.

The indictment charges three separate overt acts, one with respect to each of the defendants named in the indictment. The overt act with respect to the defendant—Codefendants Chyenne Simpson and Pierre Harvey are reflected in the video and those are proven beyond a reasonable doubt, but I want to focus on the overt act that is alleged against the defendant, Rickie Foy, in this case.

The indictment alleges that on or about June 1, 2020, defendant, Rickie Foy, used a rod to attempt to break into the Bank of America ATM and steal the U.S. currency stored in the ATM. Your Honor, that overt act has been proven beyond a reasonable doubt and it's reflected in the still image that is on the slide before the Court. But that is not the only overt act that the defendant took to further this conspiracy of breaking into the ATM and stealing the money. He used other tools, he shared other tools, and he served as a lookout. So this element has also been proven beyond a reasonable doubt.

So, Judge, the evidence that you've heard and that you've seen today, it's not speculation, it's not guesswork. What the cold, hard facts show is that the defendant conspired with others to break into the ATM to steal the money. That's clear as day here, Your Honor. And, therefore, the government—the defendant here is guilty of the charge in the indictment, and the government asks the Court to find him guilty of that charge. Thank you.

THE COURT: I had a couple of questions, Mr. Villalpando.

How many people were arrested? Was it the three defendants in the indictment and then a juvenile, or were

other people in that screen that were viewed as attempting to break into the ATM also arrested?

MR. VILLALPANDO: Your Honor, it's my understanding that those three individuals who were charged in this case and who were arrested were the only three individuals who were—who were ultimately charged. There was an additional individual who was arrested and released on the scene but was not charged.

THE COURT: All right. And is it your view that the coconspirators are a broader group of people than just the defendants in the indictment, but other people included on the video?

MR. VILLALPANDO: Yes, Your Honor. The defendants here conspired with his codefendants and with those others on the scene to try to break into the ATM.

THE COURT: All right. And let me see if I have any another questions before I ask Mr. Kling to give his argument.

And is it your position the individual that was wearing the—I think a black shirt that was towards the top of the screen was a lookout?

MR. VILLALPANDO: Your Honor, it's the government's view that that's a reasonable inference based on—based on the video and based on the relationship between those various individuals. If you see that individual, you see him looking up towards 63rd Street and gesturing to cars that were approaching the ATM, so I believe that's a reasonable inference from the video, Judge.

THE COURT: And what's your view—I heard the witness testify, but what's your view of the question I asked where it appeared that Mr. Foy had a hammer in his right hand but his left hand almost looked like some type of straight tool or it was a line in the asphalt or something?

MR. VILLALPANDO: Your Honor, the video obviously controls, but it's my understanding of the video after having watched it, that that still image that the Court is referring to, it shows Mr. Foy walking away with a hammer on his right hand and a crowbar on his left hand, and then he walks away from the scene and he obtained both of those items from one of his coconspirators. So he walks away with these items and he comes back and it doesn't appear he has those items in his hand. As the Court observed, he walks out of that minivan and returns into the scene.

THE COURT: All right. And when Mr. Foy came back in a car into the scene, did it appear he had anything in his hands when he left the car?

MR. VILLALPANDO: Your Honor, based on my review of the video, and obviously, the video controls, I didn't seen anything in his hands aside from possibly a cigarette.

THE COURT: Okay. Nor did I, but I wanted to see what the government's view was.

All right. Those are all the questions—let me check one more set of notes.

(Pause in the proceedings.)

THE COURT: Those are all the questions I have for the government.

Mr. Kling, you may proceed with your closing argument.

CLOSING ARGUMENT
ON BEHALF OF DEFENDANT

MR. KLING: Judge, let me comment first on a couple of things that you just asked Mr. Villalpando.

Number one, Mr. Foy is walking away. Mr. Villalpando says he's walking away with the tools and comes back without anything in his hands. There is no reason that—you can guess what was going on, you can guess that he thought that this was a crazy operation that he wanted to have nothing to do with and that's the reason he took the tools away and that's the reason when he came back he didn't have the tools in his hands, which would show that this is not a conspiracy.

Regarding the lookout, again—or the purported lookout—that's pure speculation. I know that's what the police officer wanted you to believe or the government wanted you to believe. There's no relationship, there's never one iota of conversation between Mr. Foy or any of the other people who are around the ATM with the person that Mr. Villalpando was contending was a lookout, so that is pure speculation.

I want to read to you a couple of things, one from the indictment and one from the position paper of the government. The thing I want to read from the indictment is in paragraph 2 of the indictment:

On or about June 1, 2020—and then it goes on with the names of the people—defendants conspired with each other and others known and unknown to commit an offense against the United States. And here's the key—here's the thing I want to emphasize—namely, to take and carry away with the intent to steal money exceeding $1,000 in value.

Where is there one piece of evidence, one shred of evidence that there was any intent to steal money in excess of $1,000. There's—I understand the stipulation as to what was in the machine but, obviously, I think the government would agree that Mr. Foy and any of the individuals around the ATM didn't have the slightest idea of what was in the machine. It could have been $1, it could have been $200,000, but the element and the event that the government alleges is that they had the intent to steal money exceeding $1,000, and there's no evidence of that whatsoever.

Secondly, Judge, I want to commend yourself to the -- commend you to the page 3 of the government's position paper. In page 3 of the government's position page, which we did not respond to, because I agree that that is the law, page 3, second paragraph: A conspiracy is an agreement, not a group. To join a conspiracy, then, is to join an agreement, rather than a group.

And the most you have here, arguably, is that Mr. Foy joined a group; did not join a conspiracy, did not participate in a conspiracy. There's no evidence with whom Mr. Foy came to the location; there's no evidence of any relationship between the other individuals who were at the scene. Again, it's pure speculation.

He surrendered to the police when he was confronted in the alley. There is no indication he's working with others. As I said at the beginning of the argument, maybe Mr. Foy was a would-be thief and maybe the others were would-be thieves, and maybe had the government charged him with the attempt theft that is the overt act or with looting or with any one of a number of other offenses that he might have been charged with either under State or Federal jurisdiction, maybe the government would

have a point, but he's charged with conspiracy. And as Mr. Villalpando emphasized, that's an agreement.

Mr. Villalpando said, they're gesturing to each other on that. We have no idea what they're gesturing about. Mr. Foy just as much—just as likely could have been saying, This is crazy. I'm getting the hell out of here. I don't want to have anything to do with you guys. You guys are nuts. That's just as fair a speculation as the government's contention that he's speculating that he's—that Mr. Foy at one point is pointing to the machine as to where the crowbar or the pry bar should be put in.

As you observed, there's no evidence where the tools came from. There is evidence that Mr. Foy took the tools away and then returned without the tools.

Judge, based on the evidence, not on speculation, not on—not on guesswork, based on the evidence, I think the government has abysmally failed to meet their burden of proof beyond a reasonable doubt. There's no proof beyond a reasonable doubt as to the intent to steal money in excess of $1,000.

I agree with Mr. Villalpando and Mr. Madden's articulate argument that conspiracy is an agreement, not a group—to join a conspiracy then is to join an agreement rather than a group. And even if you believe that Mr. Foy joined a group, that doesn't make him a coconspirator. These were a bunch of (inaudible). They were stupid. Maybe they were wrong, maybe they were criminal, but that doesn't make them coconspirators.

Based on the evidence, rather than speculation and—and hypothesis, I would ask you to find that the government has not proven Mr. Foy guilty beyond a reasonable doubt and he should be found not guilty.

THE COURT: All right. Thank you, Mr. Kling.

Is there any rebuttal argument by the government?

MR. MADDEN: Yes, Your Honor. May I proceed.

Your Honor, there's very little in dispute in this case. The defense is not denying identity; they're not denying that the defendant was there that day. I don't think they're even really disputing that he was trying to get into the ATM to get money because that's so obvious from the video and they're not denying that the other men there were trying to do the same thing.

So the defense case seems to be that this was a solo operation or was every man for himself, but the thing is, we know that that's not the case. It is clear as day, because we can see from the video that this was a joint, cooperative, collaborative effort from start to finish. And we know from the video, we know that step by step, minute by minute, tool by tool.

Your Honor, I want to address Mr. Kling's points about—about the indictment before I go into detail about the sub-—about the substance of what happened, because it's a red herring. And I'm going to share my screen which has Seventh Circuit pattern jury instructions. And I take his point to be that we didn't prove that Mr. Foy and his—his confederates knew how much money was in there. I mean, it's obvious—but we—the thing is we only need to prove intent to steal. We don't need to prove that he knew how much money was in there. We just need to prove that there was more than $1,000 in there. And we have done that, because we have the stipulation, but—but what proves that is that the pattern Seventh Circuit jury instruction for 2113(b) in that he's charged with conspiracy to violate 2113(b).

And let me just share my screen so you can see what I'm talking about.

Your Honor, can you see the pattern instruction now?

THE COURT: Yes.

MR. MADDEN: Okay. So this is the Seventh Circuit pattern that I took from the internet for 18 U.S.C. 2113(b), bank theft. And he's charged with a 371 violation, conspiracy to commit a bank theft. And if you look at this, the instruction—in terms of intent—intent—you have to prove intent to steal. It's very clear that that's what they were out there doing, intent to steal. Of course, they hoped there was a lot of money in there, but we don't need to prove that the defendant and his confederates knew how much money was in there.

To prove a substantive violation of the statute, you look at paragraph 4. We have to prove that such money exceeded $1,000 in value. And so for the conspiracy, we need to prove that, that—that if it was completed, if they were successful, then that—that's what would have happened. And so there's no—there's no requirement that we prove that they knew how much money was in there. It's just we have to prove the fact that there was $1,000 or more, and that's been stipulated to. So that—that argument is a red herring.

In terms of their actions, though, going back to the conspiracy, the basic defense is that there is not a conspiracy here. So I just want to read the Seventh Circuit jury pattern instruction on what a conspiracy is:

A conspiracy is an express or implied agreement between two or more persons submit to commit a crime. It's very simple. And, of course, there was no express agreement here. They weren't sitting down with their attorneys and, you know, putting it down in writing what they were going to do. It was an opportunity that these guys saw and they all came together in the moment, and the video shows

a very clear tacit agreement that they were going to work together to do this.

And one thing that hasn't been mentioned is there was a real advantage for them to work together because they were racing against the clock the entire time. And the reason there's a clock there is because there's a constant potential for CPD to arrive on the scene.

Foy, Simpson, and Harvey and the other guys had a way better chance of success if they worked together. Right? Because if Foy was there by himself with all of his tools, it would have taken him a lot longer to make that progress that he made. But, instead, it was those guys working together to—to commit the crime. And that's what makes conspiracies dangerous is because when groups of people get together and work together, that's a distinct evil that oftentimes does increase their chance of success. And it did here, even though they weren't successful.

And the—what really struck me about this case, though, Your Honor, was they were out there for eight full minutes. And we have very, very clear video. It wasn't like—it would be one thing if this was like 15 seconds of video or 30 seconds of video, then I could see Mr. Kling's point. Then you have to wonder exactly what was happening.

But when you see them out there for eight minutes—and Mr. Kling talked about him walking away. That was no withdrawal. He clearly just left and came back. He was back there at the end and he was there 90 percent of the time. He was back there at the end, and he took off running from CPD, just like everyone else who was involved.

But—but the—but what struck me really was the incredible detail that we have on some of these still shots,

Your Honor, that so clearly shows them working cooperatively from start to finish.

So let me just share my screen on some of what I thought were the absolute most telling videos here—or still shots.

Your Honor, this is Government Exhibit 7. And here you can see—this is towards the end. I mean, I call this the huddle photo. These guys are huddled together just like an NFL team huddles before every play, putting their heads to try and figure out how to advance the ball. And advancing the ball here together is clearly, how are we going to get into this ATM as soon as possible? And the—we don't know what they're saying. It's very clear that they are talking to each other, they're gesturing to each other. They weren't sitting there silently, and we don't know what they're saying, but we don't need a Title III wiretap or audio to be able to see exactly what they're doing and to know what they're doing.

We have one, two, three, four—at least four men here with their hands on tools. And Foy is—Foy is probably talking to them. We don't know for sure, but regardless of what he's saying or doing, he is clearly in the thick of this, and it's clearly—it's clear from this photo that they are all working together, and really they are working together from start to finish.

One of the other exhibits that really stood out to me that just shows a very clear conspiracy is, of course, this first one, which was Government Exhibit 3C. This is at about 7:10 p.m., the defendant and the man in the blue hat both have their hands on the long crowbar and are slamming it into the ATM. Working together, they've got a greater chance of destroying that ATM faster, and it's very clear that they are using their combined physical strength to try to get into the ATM.

Your Honor, to your question about the tools, we—we don't know for sure who brought the tools that day, but what we do know is the tools were in Foy's hands a lot, maybe more than any other person out there. And, in fact, it appeared to me when I was watching the video, I was thinking about this today during the testimony, people keep handing the tools back to Foy. Foy is in his construction vest. This isn't in evidence so you can't consider it, but we know he does construction work, and the tools keep going back to Foy and he walks away from the scene with the tools.

I think it's likely—we don't need to prove it beyond a reasonable doubt, but it appears to me that he—those tools were likely his tools, at least some of them, because people are handing them back to him, he has them in his hands, and he walks away from the scene with them.

And in terms of those tools, this is Government Exhibit 5, Your Honor, very clear, he's at the top back corner. He has got the hammer in his right hand. He then hands it to the guy in the black sweatshirt. You see his right hand is open there. He's handing it to guy No. 2 in the black sweatshirt, one of his unnamed coconspirators. We absolutely believe a number of these other guys are coconspirators. Your Honor, they weren't caught. CPD ran after these guys. They didn't catch everyone. These four guys got caught and three were charged. One was a juvenile so, of course, that was not a federal case.

Then here's number—the third part of this is that it goes from the guy in the black sweatshirt. He's handing it over in his left hand to the guy with the blue sweatshirt there. And then on the video, I don't know if you noticed this on the video, that guy is left-handed in the blue sweatshirt. He just starts slamming that hammer against it. And so that's just a microcosm of the conspiracy. Foy has

a tool, he wants them—everyone to get into the ATM. It looks like Foy's looking out to see if anyone's coming, as he does a number of times.

He hands the tool to guy No. 2. Guy No. 3 gets it and he starts slamming it. That's just a—you know, a 15-second clip of those three people working together to try to get into the ATM. And it clearly was hard work for them to be using these really heavy tools to try and get in there, and it's clear that they were getting tired and handing off the tools to other people to try to keep the progress going.

So one other—in terms of the lookout point, Your Honor, it's clear that the guys are looking up towards 63rd Street at various points, including Foy. And there is that one guy who does appear to be the lookout. But Foy admitted to CPD that he told the people that the police were coming. Why would he make that up? I mean, he did lie to CPD. We know that he lied to CPD when he said: Did you touch the ATM? He said, Nope, no, sir. We know that's false because of the video, of course. But earlier—earlier in the recording, he said, I walked that way. I see the police coming. I basically told them, the police is coming.

He admitted that he told the other guys that the police were coming. That shows them working together. That's great evidence of conspiracy when he is taking an interest in whether or not the people he's working with get caught as well, and then they all take off.

We don't know if these—Mr. Kling, of course, highlighted in his cross-examination and in his argument that we don't know if these men knew each other. That's true. Of course, we don't know. We don't know if Foy went to high school with these guys or lived in the same block with them or if he never set eyes on them before he showed up there. But we don't need to prove that. We only—conspiracy, of course, is focused on an agreement, and the video

in this case tells the story. There is plenty of evidence on that video that shows them working cooperatively from start to finish, sharing those tools, trying to increase their chances of success before CPD showed up.

Your Honor, the bottom line is, this was a cooperative effort, and the video proves that Foy was a key player in this effort. He was not a bench warmer. He was a key player on this group of men who were trying to get into the ATM. They weren't successful, but we know it's black letter law that you don't need to be successful to be a part of a conspiracy. But we have proved that there was a conspiracy because they were working together, that Foy was a member of the conspiracy, and there were numerous overt acts that were taken by Foy and others in furtherance of the conspiracy. So we, respectfully, request that you find him guilty of the charged offense.

THE COURT: All right. Thank you. Well, I'm not going to render a verdict today. I'd like to review the exhibits. I'd like the government to email to my courtroom deputy your PowerPoints, both from closing and rebuttal. Make sure Mr. Kling gets them also, unless you gave them to him before the arguments, but make sure he gets them.

I'd like a hard copy of your stipulation. It doesn't have to be signed, but just, you know, an email that sets forth what you read into the record on that. I believe I have all your exhibits and they're in a form I can view.

Emily, I think we were talking about possibly next Tuesday at 11:00 central?

THE CLERK: Yes, that should work.

THE COURT: How does that work? First for the government?

MR. MADDEN: That works for me, Your Honor.

THE COURT: And Mr. Kling?

MR. KLING: Tuesday, the 16th at 11:00 is fine.

THE COURT: All right. And do you want your client by video or on the phone?

MR. KLING: I would prefer video, Judge, but if it can only be on the phone, it'll be on the phone.

THE COURT: Emily, is that a day we can get Mr. Foy on the video?

THE CLERK: Yes, it is, Judge.

THE COURT: Okay, good. Let's get him by video, then.

So we'll reconvene on Tuesday at 11:00, and I'll render a verdict at that time. And I'd ask the government to provide the materials that I asked for to my courtroom deputy making sure that anything you send to me Mr. Kling has a copy of.

MR. MADDEN: Will do, Your Honor.

THE COURT: All right. Any questions? First by the government.

MR. MADDEN: No, Your Honor.

THE COURT: By defense?

MR. KLING: No, sir.

THE COURT: Okay. Thank you, all. We'll see you next week.

MR. KLING: Thank Emily for all her hard work.

MR. MADDEN: Yes, thank you, Emily, very much. We appreciate it.

THE COURT: Fine. Thank you.

(Time noted: 12:43 p.m.)

CERTIFICATE

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

/s/ Elia E. Carrión
Elia E. Carrión
Official Court Reporter

14th day of November, 2021
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 20 CR 268
Chicago, Illinois
February 16, 2021
11:03 a.m.

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICKIE FOY, ET AL.,

Defendants.

TRANSCRIPT OF VIDEOCONFERENCE
PROCEEDINGS - Bench Trial Verdict

BEFORE THE HONORABLE
THOMAS M. DURKIN

APPEARANCES:

For the Government:	MR. MATTHEW F. MADDEN MR. RAMON VILLALPANDO U.S. Attorney's Office in the Northern District of Illinois 219 South Dearborn Street, 5th Floor Chicago, Illinois 60604
For Defendant Rickie Foy:	MR. RICHARD KLING Chicago-Kent Law Offices 565 West Adams Street, Suite 600 Chicago, Illinois 60661
ALSO PRESENT:	MR. RICKIE FOY

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(Proceedings had via videoconference:)

THE COURT: Emily, please call the case.

THE CLERK: This is Case No. 20 CR 268, United States versus Rickie Foy.

Could I please have the attorney speaking on behalf of the government state their name.

MR. MADDEN: Good morning, Your Honor. Matthew Madden and Ramon Villalpando on behalf of the United States.

THE CLERK: And on behalf of the defendant.

MR. KLING: Good morning, everybody. Richard Kling for Mr. Foy who is also [indiscernible] via virtual program.

THE COURT: All right. Good morning. Well, we're here for a verdict. I'm going to render a verdict for the bench trial that I heard last week.

The defendant was charged with a single count indictment. He was charged on or about June 1, 2020. The FDIC insured the deposits of Bank of America, which owned and operated an ATM at 620 West 63rd Street, Chicago.

And it's alleged that on June 1, 2020, Mr. Foy, along with Mr. Simpson and Mr. Harvey, conspired with each other and others to commit an offense against the United States; namely, to take and carry away with the intent to steal money exceeding $1,000 in value, belonging to and in the care, custody, control, management, and possession of the Bank of America; namely, the United States currency stored in the

Bank of America ATM located at 620 West 63rd Street. And

that's in violation of 18 U.S.C. Section 2113(b).

And one of the overt acts charged in that indictment was that on or about June 1, 2020, Defendant Rickie Foy used a rod to attempt to break into the Bank of America ATM and steal the United States currency stored in the ATM.

The law in this case that applies to a conspiracy is pretty straightforward, and I think agreed to by the parties.

The government must prove the following three elements beyond a reasonable doubt: The conspiracy as charged in the indictment existed; the defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy; and the defendant committed an overt act in an effort to advance the goal of the conspiracy.

To join a conspiracy, the Seventh Circuit has made clear is to join an agreement rather than a group. And the agreement need not be explicit. A tacit agreement may support the conspiracy provision.

And conspiracy is an express or implied agreement between two or more persons to commit a crime. Conspiracy may be proven even if its goal was not accomplished. And in deciding whether a charged conspiracy existed, I need to consider all the circumstances, including the words and acts of each of the alleged participants.

And to be a member in a conspiracy, the defendant does not need to join it at the beginning, does not need to know all the other members or all the means by which the illegal goal of the conspiracy was to be accomplished.

The government must prove beyond a reasonable doubt the defendant was aware of the illegal goal of the conspiracy and knowingly joined the conspiracy. And a defendant is not a member of the conspiracy just because

he associated with people who were involved in it, knew there was a conspiracy, was -- and in deciding whether defendant joined the charged conspiracy, I must base my decision only on what the defendant did or said.

In this case, he -- the evidence related to what he did primarily -- although he did say something in the interview with the Chicago Police after he was arrested -- and to determine what the defendant did, I have to consider the defendant's own acts.

So the defendant need not prove -- the government, rather, need not prove the defendant knew each detail of the conspiracy or the defendant played a minor role in the conspiracy.

And, finally, to establish the existence of a conspiracy, the government need not establish an agreement that is express or formal. A tacit agreement may support a conspiracy conviction.

Conspiracy may be proved by circumstantial evidence and reasonable inference is drawn therefrom concerning the relationship of the parties or overt acts and the totality of the conduct.

A conspiracy may be proved by circumstantial evidence and showing that the conspirators -- coconspirators embraced the criminal objective of the conspiracy and the conspiracy continued towards its common goal, which was to break into the ATM through cooperative relationships.

One issue came up relating to Mr. Foy leaving the scene. I should note, the withdrawal from a conspiracy -- in order to successfully withdraw from a conspiracy, the defendant must completely terminate the active involvement in the conspiracy, as well as take steps to defeat or disavow the conspiracy's objectives. That's *U.S. v. Wilson*, 134 F.3d 855, 863, 7th Circuit 1998.

The other statements of law that may have been taken from the instructions that were provided before trial, I don't believe there's any significant objection to those instructions, but even if there were, they are generally pattern instructions or instructions that are faithful to the description that was provided in the Seventh Circuit cases that annotated those instructions.

All right. So I've considered the -- all the exhibits offered by the government and the defendant's statement and the stipulations.

This is a challenging case, not a traditional conspiracy where words are spoken. It's entirely based on a nine-minute video with no sound, along, again, with the statement of the defendant after he was arrested.

The evidence showed that on June 1, 2020, at a parking lot at 620 West 63rd Street in Chicago in the Northern District of Illinois, a group of people tore apart a Bank of America ATM around 7:00 P.M., a little bit after.

The defendant was identified as the person in the video of that nine-minute -- nine-minute video depicting the events at the ATM.

The defendant was identified in the video wearing an orange construction vest. Because of what he was wearing, spotting him in the crowd of people trying to break into the ATM was not difficult.

I'll note, too, this verdict will not be based on speculation because I believe the defendant's actions were clear on the video and not capable of misinterpretation. The still shots from the video associated with the ATM are damning evidence of the defendant's participation and conspiracy to commit the acts alleged in the indictment.

A defendant -- the defendant didn't just wander over to a group of people robbing the ATM and watched them.

If he had, if he had not participated actively in it, he was standing there watching the events, he would be found not guilty. He was an active participant.

I was a little skeptical, 'cause I agree with Mr. Kling, this was easier proven as a state court looting or robbery case for reasons the government explained earlier they charged it the way they did. But -- and I was a little skeptical that a conspiracy could be proven simply with the -- with the video that was played. But the still shots of those videos were extremely relevant and I believe showed the defendant's guilt.

Government Exhibit 3A shows the defendant holding a large pry bar right outside the -- right next to the ATM.

Government 3B: Defendant's using that large pry bar to assist others in cracking open the ATM, wedging it into the ATM.

The person with the blue hat points to where the defendant should put the pry bar.

Government 3C: The defendant and the person with the blue hat both holding that pry bar together attempting to open the ATM.

3D: The person with the blue hat then gets the pry bar from the defendant.

Government 5A: The defendant had a hammer right next to the ATM.

Government 5B: The person with the black hoodie and white gloves is given the hammer and has the hammer after it was handed to him by the defendant.

Government Exhibit 5C: That same person with the black hood passes the hammer to another person with a blue hood.

6A: Defendant is standing behind Codefendant Simpson who's in a white T-shirt. Simpson has a large crowbar or pry bar.

6B: Defendant is then holding a large crowbar that Defendant Simpson handed to him.

6C: Codefendant Harvey, in the camouflage hoodie, is holding that same large crowbar he got from the defendant.

Government 6D: Defendant is holding a large crowbar in his right hand having gotten it from Codefendant Harvey.

Government 7: Defendant's using a yellow crowbar to get into the bottom of the ATM. The person in the black hat was at that same time using a bolt cutter to get into the ATM. A person with the blue hat was at that same time using another yellow crowbar. And a person in a blue hoodie was using a long dark crowbar, all four of them trying to get into the ATM using various tools.

There's even a person with a gold brass -- gold bracelet, rather, he's either pointing to the ATM -- pointing to where someone could put a tool to get it open or he's using another tool. It's a little unclear from the picture, but he's -- there's yet another person participating in this collective effort to get the ATM open.

Government Exhibit 10A: The person in purple-striped clothing hands the hammer to the defendant.

Government Exhibit 10B: The defendant grabs that hammer from the person with the purple stripes.

Government Exhibit 11: The defendant's holding a hammer.

Government Exhibit 12 shows the defendant walking away from the ATM.

For the reasons I just outlined, that is not a withdrawal from the conspiracy. He did not withdraw from the conspiracy, take steps to thwart his progress. He was simply walking away.

Frankly, had he walked away and not come back, it wouldn't change my ruling.

Government Exhibit 13: Defendant's standing behind a group at the ATM.

If that's all he did, I would find him not guilty. But, of course, he did much more than that, as I just outlined.

Finally, the parties stipulated the defendant told the police that he said he told people around the ATM that the police were coming.

The evidence showed that he worked with other people to rob an ATM, shared tools, and jointly worked with some of those tools.

Three or more people all used various construction tools to break into the ATM, they helped each other out for the common objective of breaking into it, which was stipulated to that the ATM had over $190,000 in it, a stunning amount of money.

And it was, of course, stipulated that it was insured by the FDIC.

And, finally, as I said, he warned everyone the police were coming.

This was an eight-minute conspiracy. I agree with the government's argument that they were racing the clock. Many people looking around and easy to conclude they were worried about getting caught.

Of course they were. They were using a hammer, crowbars, and a bolt cutter to break into an ATM in broad

daylight in the middle of a parking lot. Of course they were looking around hoping not to get caught.

It made a better chance of being successful to break into that ATM and get in and open it by working together, which the evidence showed beyond a reasonable doubt they did.

So I find that the conspiracy as charged in the indictment existed, that the defendant knowingly became a member of the conspiracy with an intent to advance it, and that he committed an overt act in an effort to advance the goal of the conspiracy, which is using a crowbar to break into the ATM.

I find this without hearing any words on that tape, because the tapes were crystal clear and the screenshots or the different photos taken from it showed the cooperative relationships he embraced with a shared criminal objective and shared tools, joint effort, division of labor, and that, in fact, as I said, the defendant, Rickie Foy, used a rod to attempt to break into the ATM -- Bank of America ATM and steal the currency located in it.

So for all those reasons, I find that the elements of -- that are required that be proven for a conspiracy has been proven beyond a reasonable doubt and defendant is guilty as charged.

Any questions? First from the government.

MR. MADDEN: No, Your Honor.

THE COURT: From the defense.

MR. KLING: No questions.

THE COURT: And, of course, by that verdict, I denied the motion for judgment of acquittal.

We need to set a sentencing date. The presumptive sentencing date for a finding of guilty on February 16th is May 11, 2021.

Emily, is that a date we can sentence someone?

THE CLERK: Looking at that on the calender right now, Judge.

Yes, that date does work.

THE COURT: How does that date work for you, Mr. Kling?

MR. KLING: At this point, that date is fine.

I assume, Judge, that you will be ordering a PSR.

THE COURT: Yeah. I'll be doing that in a second.

MR. KLING: Okay.

THE COURT: So May 11, 2021, at 10 o'clock. How's that work for the government?

MR. MADDEN: Looks like it works for Mr. Villalpando, Your Honor.

THE COURT: All right. I'll order the presentence report to be prepared by April 6, 2021; any objections to the presentence report and any pretrial -- any sentencing memorandums to be filed by April 27th; and finally, any response to those objections by May 4th.

Any additional matters we need to discuss? I'll ask first the government.

MR. MADDEN: No, Your Honor.

THE COURT: And anything else, Mr. Kling, on behalf of the defense?

MR. KLING: Judge, I request 21 days to file my motion for a new trial. And also given the fact that I'm appointed counsel, I assume the Court will order the transcript be prepared under the CJA.

COURT REPORTER: I'm having trouble getting that.

THE COURT: Yeah, you'll have 21 days -- okay. I'll restate it.

Mr. Kling asked for 21 days to file his motion for a new trial or for judgment of acquittal. He will have that.

Emily, 21 days is when?

THE CLERK: 21 days would be March 9th.

THE COURT: And he asked that a transcript be prepared, as he is appointed counsel, and be prepared under the Criminal Justice Act. That will be allowed.

MR. KLING: And, Rickie, you can hear me, I will call you later and let you know, and I'll translate and give you the information on what happened and what's going to happen.

THE DEFENDANT: All right. Thanks.

THE COURT: Okay. Thank you all.

MR. MADDEN: Your Honor, one question.

THE COURT: Yes.

MR. MADDEN: Do you -- do you order probation to disclose the sentencing recommendation to both parties?

THE COURT: Thank you. Yes.

And let me -- just a couple other things on that.

I will order that the recommendation of the probation office be disclosed to both sides.

Mr. Foy, you'll be asked to give information for the presentence report, and your attorney may be present if you wish. You must be truthful and cooperate completely with the probation officer in connection with the presentence investigation.

All right. Anything else, then, from either side?

MR. MADDEN: No, Your Honor.

MR. KLING: Everybody stay safe.

THE COURT: Okay. Thank you all.

(Time noted: 11:20 a.m.)

(Which were all the proceedings heard.)

CERTIFICATE

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

/s/ Elia E. Carrión	28th day of February, 2021
Elia E. Carrión	Date
Official Court Reporter	

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 20 CR 268
Chicago, Illinois
July 27, 2021
10:04 a.m.

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICKIE FOY, et al.,

Defendants.

TRANSCRIPT OF VIDEOCONFERENCE PROCEEDINGS - Sentencing

BEFORE THE HONORABLE
THOMAS M. DURKIN

APPEARANCES:

For the Government:	MR. RAMON VILLALPANDO U.S. Attorney's Office in the Northern District of Illinois 219 South Dearborn Street, 5th Floor Chicago, Illinois 60604
For Defendant Rickie Foy:	MR. RICHARD KLING Chicago-Kent Law Offices 565 West Adams Street, Suite 600 Chicago, Illinois 60661
ALSO PRESENT:	MR. MICHAEL ALPER United States Probation Office 230 South Dearborn Street Chicago, Illinois 60604

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APPEARANCES (Continued:)

ALSO PRESENT: MR. RICKIE FOY

MR. JOSH WINER

MR. ROBERT LOEB

(Proceedings had via videoconference:)

THE COURT: Okay. Let's call the case.

THE CLERK: All right. This is Case No. 20 CR 268, *United States v. Rickie Foy*.

Could I please have the attorneys speaking on behalf of the government state their name.

MR. VILLALPANDO: Good morning, Your Honor. Ramon Villalpando on behalf of the United States.

THE CLERK: And on behalf of Mr. Foy.

MR. KLING: Good morning, Your Honor. Richard Kling for Mr. Foy. And the gentleman to my right is Josh Winer, W-I-N-E-R, who is a 711 law student with Mr. Foy's permission for—along with your permission—to address some of the issues.

THE COURT: All right.

MR. KLING: He's licensed under Illinois Supreme Court Rule 711, which (inaudible)—

THE COURT: Mr. Kling, you're kind of muffled.

MR. KLING: Let me try it again. How is this? Better?

THE COURT: Somewhat. We had this problem I think during the bench trial, too.

MR. KLING: We did.

Let me try it again. This is Richard Kling. I represent Mr. Foy. I'm in my office. Seated to my right is Josh Winer who is a student licensed under Illinois Supreme Court Rule 711 working under my supervision, and with Mr. Foy's permission will be addressing one of the issues with respect to loss.

THE COURT: All right. He has permission to do so.

MR. ALPER: Good afternoon, Your Honor. Michael Alper, U.S. Probation.

THE CLERK: Okay. And Mr. Foy is appearing by video. Mr. Foy, can you hear me all right?

THE DEFENDANT: Yes.

THE COURT: Someone else is on the video. Who is that?

MR. LOEB: Yes, Judge, this is Robert Loeb. I am for the most part spectating. I represent Codefendant Chyenne Simpson, who is similarly situated and I'm here to observe—is similarly situated as to loss amount.

THE COURT: Okay. That's fine.

Okay. First, Mr. Foy, you should understand that the sentencing today can take place in my courtroom. There's no obligation for this to take place by video. We can do it in my courtroom with you face to face with me and your attorney in court and the government attorney and the probation officer.

The law has been changed to allow a sentencing to take place as we are proceeding today by video, just as your trial was by video, live video, and if—but you can waive your right to have this take place in the courtroom.

And are you, in fact—do you wish to proceed by video today rather than have you brought to the courtroom to have the sentencing take place in my presence, in my physical presence?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Kling, have you discussed this with your client and do you believe he is knowingly and voluntarily waiving his right to have the sentencing take place in my courtroom and instead have it take place by video?

MR. KLING: Yes, sir.

THE COURT: All right. And, Mr. Villalpando, any additional questions I should ask on this subject?

MR. VILLALPANDO: None from the government, Your Honor. Thank you.

THE COURT: Can you repeat that, please? I couldn't hear you.

MR. VILLALPANDO: None from the government, Your Honor. Thank you.

THE COURT: All right. I find the defendant has knowingly and voluntarily waived his right to have this sentencing take place in my courtroom and instead is proceeding by video.

All right. The first thing I need to address is the motion for a new trial. And for that I'm going to read you an opinion relating to that because there was a timely motion for new trial filed by the defendant.

On June 4, 2020, Defendant Rickie Foy was charged by complaint with conspiracy to commit—hang on. Everyone should mute their phones—or mute their devices right now, including anyone on the phone. All right. I'm going to start over.

On June 4, 2020, Defendant Rickie Foy was charged by complaint with conspiracy to commit bank theft in violation of 18 U.S.C. § 371 and 2113(b). The charge stemmed from his attempt to steal cash from an FDIC-insured ATM located in a parking lot at 620 West 63rd Street in Chicago on June 1, 2020.

On June 17, 2020, a grand jury returned an indictment against Mr. Foy and his codefendants charging them with conspiracy to commit bank theft. As to the overt acts, the indictment alleged that the defendants, including Mr. Foy, used a crowbar or a rod to attempt to break into the ATM.

A bench trial occurred on February 10, 2021, and about a week later, on February 16, 2021, I found that the required elements for conspiracy had been proven beyond a reasonable doubt and that Mr. Foy was guilty as charged. By rendering that verdict, I simultaneously denied Mr. Foy's motion for judgment of acquittal.

On March 8th, Mr. Foy filed this motion for a new trial. Federal Rule of Criminal Procedure 33 provides that "upon the defendant's motion, the Court may vacate any judgment and grant a new trial if the interests of justice so requires."

The Seventh Circuit has instructed courts to grant a motion for a new trial "only if the evidence preponderates heavily against the verdict such that it would be a miscarriage of justice to let the verdict stand." That's *U.S. v. Swan*, 486 F.3d 260, at 266, Seventh Circuit 2007.

Put differently, a new trial is warranted only in "rare cases in which consideration of the evidence leaves a strong doubt as to the defendant's guilt of the charged offense." It's *U.S. v. Peterson*, 823 F.3d 113 at page 1122, Seventh Circuit 2016.

Mr. Foy argues first that the government failed to prove beyond a reasonable doubt that he had the requisite intent under 18 U.S.C. § 2113(b) to "take and carry away in excess of $1,000" as charged in the indictment.

More specifically, Mr. Foy claims that even though the government proved at trial that there was an excess of $190,000 in the ATM, no evidence was introduced to prove that Mr. Foy knew about that amount, or any amount, nor was evidence introduced to prove that Mr. Foy intended to steal in excess of $1,000.

The text of 18 U.S.C. § 2113(b) does not support Mr. Foy's argument. As relevant here, the statute provides

that "whoever takes and carries away with intent to steal or purloin any property or money exceeding $1,000 belonging to or in the custody—care, custody, control, management, or possession of any bank, shall be fined under this title or imprisoned." The intent to steal money or property—property or money as that language appears in the statute is not a specific intent to steal property or money exceeding $1,000.

Indeed, the intent to steal money or property and that property or money being worth $1,000 or more are two separate elements of the offense. Thus the statute does not require the government to prove beyond a reasonable doubt that Mr. Foy had the specific intent to steal an amount exceeding $1,000, or that he knew how much money was in the ATM. Instead, the statute requires the government to prove, as the government did, that Mr. Foy had the intent to steal property or money, and that the property or money was worth an amount more than $1,000.

The reading of the statute comports with the Seventh Circuit pattern jury instructions, which lists the elements for 18 U.S.C. § 2113(b) as follows: One, the defendant took and carried away money belonging to a bank; two, at the time that defendant took and carried away such money, the deposits of the bank were insured by the FDIC; three, the defendant took and carried away the money with the intent to steal; and four, such money exceeded $1,000 in value.

While the pattern jury instructions are not binding on this Court, the Seventh Circuit has said that the instructions are "presumed to accurately state the law." That's *U.S. v. Freed*, 921 F.3d 716 at 721, Seventh Circuit 2019. I believe the jury instruction for Section 2113(b) provides a

better reading of the statute than Mr. Foy's interpretation.

Furthermore, and as a practical matter, Mr. Foy's argument would lead to a strange result where the government can only prosecute individuals who know how much money is in a bank or an ATM at the time of the taking. That can't be right.

Therefore, I reject Mr. Foy's first argument for a new trial.

Mr. Foy also argues that the government failed to prove beyond a reasonable doubt that he and others conspired with each other to commit an offense against the United States. Mr. Foy concedes that the government proved that he and others worked at the same time to achieve the same goal, but he argues that working at the same time does not mean they were coconspirators. He says that he and others could have been independent actors, with no agreement, who happen to come together at the same time to individually achieve the same goal.

I rejected this argument at trial and I reject it again now.

As an initial matter, the Seventh Circuit has held that an agreement "need not be explicit. A tacit agreement may support a conspiracy conviction." That's *U.S. v. Handlin*, 366 F.3d 584 at page 589, Seventh Circuit 2004. Such an agreement may be proved by circumstantial evidence showing that the coconspirators embraced the criminal objective of the conspiracy and/or engaged in cooperative relationships.

Furthermore, a conspiracy may be proved using reasonable inferences drawn from evidence of the parties' relationships, overt acts, and the totality of their conduct. That's *U.S. v. Kaczmarek*, 490 F.2d 1031 at page 1035,

Seventh Circuit 1974. Both Handlin and Kaczmarek are cited in the position paper that the government filed before trial that Mr. Foy did not object to.

The surveillance footage and still images from the event showed that a group of people, including Mr. Foy, who was wearing an orange construction vest at the time, worked together in tearing apart the ATM by sharing crowbars and rods.

More specifically, Government Exhibit 3A shows Mr. Foy holding a large pry bar right next to the ATM. Government Exhibit 3B shows Mr. Foy using that large pry bar to assist others in cracking open the ATM, wedging it into the ATM, while a person with a blue hat points to where Mr. Foy should put the bar. Government Exhibit C shows Mr. Foy and the person with the blue hat both holding the pry bar together attempting to open the ATM. And Government Exhibit 3D shows the person with the blue hat then get the pry bar from Mr. Foy.

And that's just some of the evidence presented at trial. When I read the verdict, I walked through the entire list of still images and explained how they showed beyond a reasonable doubt that Mr. Foy entered into an agreement with others to tear open the ATM machine and how the group worked together by sharing various tools and dividing up the labor.

Since this is not one of those rare cases in which consideration of the evidence leaves a strong doubt as to Mr. Foy's guilt, his motion for a new trial is denied.

All right. For sentencing I have the following documents. I want to make sure I have everything I should have.

I have a presentence investigation report; I have a recommendation from the probation office; I have a

sentencing memorandum for Rickie Foy, Document 99; I have a sentencing position paper by the government, Document 100; I have a—the Foy sentencing memorandum regarding intended loss, Document 119; I have a government supplemental sentencing memorandum, Document 121, which includes a number of emails relating to the cost of repair or replacement of this ATM, and then, finally, Document 126, which is Foy's supplemental response to the government's supplemental memorandum. And since it was referred to, I've also looked at Document 123, which is Defendant Simpson's sentencing memorandum since it was referred to in one of the submissions by Defendant Foy.

Is there anything else I should have for this sentencing? First, I'll ask the government.

MR. VILLALPANDO: No, Your Honor. The emails that were submitted yesterday you've referenced in connection with the government's supplemental memorandum, so from the government's perspective, that's everything.

THE COURT: All right. And, Mr. Kling, anything else I should have?

MR. KLING: No, Judge, but may I inquire—I mean, I have Mr. Foy's relatives trying to get on and I don't have—she doesn't have the correct password, which I sent her. If Emily could give me that, I would be very much appreciative.

THE COURT: All right. Emily is in her office, but I believe she's listening in. You need it emailed to you?

MR. KLING: It can be emailed or she can tell me orally. I sent the password I had, but apparently it's not working for this—the wife and the mother.

THE COURT: Emily, if you could do that, if you can hear me.

She heard me and she's going to either email them to you or she'll come into the call and give you the information.

MR. KLING: Thank you. I appreciate that.

THE COURT: Mr. Alper, are there any other documents I should have?

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

THE COURT: Okay. All right. Before we get much further on this, the—there seems to be a clear disagreement as to the amount of loss. The government is not seeking intended loss and the defense believes intended loss is not appropriate. And I'm not going to use intended loss as the loss figure for the guideline calculations. But the government is seeking that the replacement cost basically, or the actual loss, which is caused by the damage to the ATM, should be used.

And the government's position on that is some one hundred and—what was the amount, Mr. Villalpando?

MR. VILLALPANDO: Your Honor, the number is 108,798.

THE COURT: All right. And the defense position, and it's also Mr. Simpson's position, which is why his attorney's on this call, but the defense position is that the replacement cost for buying an ATM is significantly less than the over $100,000 figure that the government has put forth based on figures they got from Bank of America. I can't decide that.

I think the government has a lot of backup in these emails as to the amounts—and I do have questions about them. But if the defense is going to contest that and say that an ATM such as this doesn't cost more than 10- or

$15,000 or maybe $20,000 at the maximum, that makes a big difference on the amount of loss for purposes of the guideline calculations. I have to get the guideline calculation right.

I'm happy to proceed with the sentencing today, but I don't know how I can resolve that unless the defense wishes to concede the amount the government is putting forward which I—Mr. Kling, I assume you're opposing that?

MR. KLING: That is correct.

THE COURT: And unless the government agrees with the amount the defense is suggesting—and I assume, Mr. Villalpando, you're objecting to that?

MR. VILLALPANDO: Yes, Your Honor.

THE COURT: Then I would think I need a witness from Bank of America to come in and testify as to the amounts of the repair costs and/or replacement. And if I find the government has met its burden by a preponderance, that they've proven up that loss amount after that witness has been cross-examined and after the defense has a chance to put on their own evidence, not websites telling me what a sample ATM would cost, but something which would suggest that the ATM involved in this case would cost 10- or $20,000. I don't know how I can resolve this loss issue today.

And if you've got suggestions otherwise, I'm prepared to go forward, but I don't think that we can resolve this disagreement on the papers.

If people feel differently, I'm happy to hear you out on that.

Mr. Villalpando, I'll let you go first.

MR. VILLALPANDO: Your Honor, from the government's perspective, you know, at sentencing, you know,

the Court is to determine, you know, loss amounts based on viable information making reasonable estimates based on that information. I submit that the government has provided that information based on those emails. This issue of contesting this loss amount is something that was raised, you know, yesterday with respect to Mr. Foy. The number was raised in the PSR that was issued on April 2nd of this year.

So from the government's perspective, you know, there's enough here to arrive at the—the eight-level enhancement for purposes of the loss amount, but, Your Honor, I agree with you, just for purposes of, you know, having a clean record on this issue, if they're going to, you know, contest this issue despite, you know, the clear evidence supporting the number—and I can walk through the attachment to see whether or not further explanation helps address any additional controversies about that. But if Your Honor wants to resolve this issue, I agree we should have a witness here just to have a clean record on it.

THE COURT: All right. And I'll note—and I'll hear from Mr. Kling in a minute—but I'll note this is an issue that, you know, will carry through to Mr. Simpson, so it's not just today. But this is a—I'll give Mr. Loeb even—possibly give him a chance if there is a witness to come in and further cross-examine such a witness so that we don't need to do two hearings, but my findings as to the amount of loss will apply to each defendant in this case.

Mr. Kling, what do you have to say on this issue?

MR. KLING: Judge, I have a question, which I think the plot has thickened based on the email that Mr. Villalpando sent to you and us yesterday. If the—I'm not clear if the government is claiming as loss both the damage to the ATM and housing, as well as the new ATM and

housing, which would seem to be double cost, either you replace it or you don't. That's another issue that I think is going to have to be addressed.

THE COURT: Well, I agree. I was going to ask Mr. Villalpando about that today because—and—and I just need a—there seems to be some replacement and there seems to be some repair. And it may very well be it was both; they had to replace certain parts and repair other parts. The replacement being because it was so destroyed it couldn't be repaired. The thing was torn apart. Anybody watching that video can plainly see that.

The question is how much is there that was salvageable and how much was not, and I don't know if there was—I doubt there was double-counting, but I don't know that. You can read it that way, just as Mr. Kling did. I read that same thing and I was going to have questions today about when it says repair and then it says replace, you can't double count. You either replace something or you repair it or it may have been a combination where certain parts were replaced and certain parts were repaired.

And that would, obviously, either Mr. Villalpando was going to have to explain that today to my satisfaction or a witness would have to explain that. As a preview from what the hearing's going to look like, if we have a hearing, but a witness would have to explain that because, of course, Mr. Kling's right, there can't be double-counting. But I could see a scenario where you're repairing part of it and replacing part of it, but you can't do both.

Go ahead.

MR. VILLALPANDO: Your Honor, if I—

THE COURT: Yeah.

MR. VILLALPANDO:—if I may briefly explain. That issue is—or that question is a question that I had when I

received that spreadsheet initially. And that's why the government submitted Exhibit B yesterday, which is that email chain that verifies that portions of that amount are the book value of the ATM that was actually destroyed last year, and that counts and that is permissible under the guidelines for purposes of calculating the loss.

Other portions of it are, you know, the new ATM that was included—or that had to be installed because the old one was completely destroyed, and that portion is also properly considered for purposes of the loss calculation under the guidelines.

THE COURT: So if I have it right, did they completely replace the ATM at that location?

MR. VILLALPANDO: That's—that's my understanding, Judge.

THE COURT: So they tore out the old one, took it off the anchors, and put a new one in?

MR. VILLALPANDO: That's my understanding, Judge, and that's reflected in Exhibit B.

THE COURT: All right. Well, I'll be interested in the argument about what that cost actually was. Do you know that amount from here? It says "New ATM $28,203."

MR. VILLALPANDO: Yes, Your Honor. That's that $29,960 and, also, as part of that exhibit I think there's an actual invoice on the second page of that attachment that supports that number and the new housing number.

THE COURT: All right. And the housing is part of the cost of replacement. Correct?

MR. VILLALPANDO: Correct, Judge.

THE COURT: All right. And then the rigger, what's a rigger?

MR. VILLALPANDO: I'm not sure, Judge, but we'll ask the witness that question, but it's my understanding that everything below the damaged amounts on that exhibit are amounts that were incurred in connection with replacing the ATM.

THE COURT: All right. Including the freight and tax, et cetera, those are all actual costs out of Bank of America's pocket to install a new ATM.

I'm curious and what is the—in the loss, what is the argument—and I'm not going to resolve this today, so—but what is the argument as to the bank loss as to the damaged ATM and housing? How does that comport with the guidelines to on the one hand you buy a new ATM, on the other hand you lost the—you lost the old ATM because it was destroyed, is there an element of double-counting by using both under the guidelines?

MR. VILLALPANDO: Your Honor, this is Ramon Villalpando. I think there isn't. I mean, this but for what—what Mr. Foy and his coconspirators did on June 1st of last year, Bank of America would not have incurred these costs. They had this asset; that asset was destroyed. And they had to incur money and resources to replace it and that's Guideline 2 point—Section 2B1.1 Application Note 3(C), you know, has some examples of the types of costs that are—that can be included for purposes of determining the loss amount. The costs to repair damaged property is included, the fair market value of property unlawfully taken, copied, or destroyed. You know, those two cover the two buckets of costs that we've, you know, discussed here in terms of that exhibit, Judge.

So there's no—no issue of double-counting here from the government's perspective. Were it not for that criminal activity, Bank of America would not have been out this money.

THE COURT: All right. Well—

MR. KLING: Judge, this is Richard Kling—

THE COURT: Mr. Kling, let me just finish and then I'll hear from you 'cause there is a lot you can say on this.

I'll note that that section you noted, Mr. Villalpando, talks about these being factors for me to consider. I don't know they're mutually exclusive. I don't know that they're not. And I don't know the parties have addressed that in any of their extensive briefing on this.

So with that, Mr. Kling, go ahead.

MR. KLING: Judge, Mr. Winer was going to address the issue with your permission as to an Eleventh Circuit case, which apparently does address this issue.

THE COURT: Go ahead.

MR. WINER: Good morning, Your Honor. If we look at Eleventh Circuit, *United States v. Cedeño*, that involved a case where—

COURT REPORTER: Please slow down.

THE COURT: You need to slow down and why don't you repeat that case. Is that in your—one of your supplemental memos?

MR. WINER: Yes, it is cited in the supplemental memo; the response to the government's supplemental memo.

THE COURT: What document number is yours, just so I have it in front of me?

MR. WINER: I believe that would be covered on Document 121. I—it's after—it's after 120. I don't remember the—

THE COURT: I think it's Document 126. You're talking about *U.S. v. Cedeño*, the Eleventh Circuit case?

MR. WINER: Yes.

THE COURT: Okay. Go ahead.

MR. WINER: *U.S. v. Cedeño* covered a case where there is theft of a number of valuable watches, and the district level court gave a loss amount above the attempted repairs that the watch renderer tried to do on some of the watches, and then added onto it the retail value of the watches as well for replacing them. And the Eleventh Circuit ruled that—that such—such a loss calculation was not valid and that the most theft—the most loss that a person could reasonably expect is complete and total destruction to assess that the retail value and the fair market value of the—the watches.

And I believe that kind of—that principle applies exactly in this case. Both repairs and the fair value of the ATM shouldn't be added like they were with the watches, instead should be, just as the Eleventh Circuit ruled, that either the repairs or the replacement because it's, again, avoiding the—the double-dipping issue.

THE COURT: Well, I understand the—well, go ahead. Were you going to say something else?

MR. WINER: No, that was it, Your Honor.

THE COURT: Okay. I see—I saw your cite to Cedeño, and I understand why repair costs can't exceed the fair market value. The question here, though, can the replacement cost be added to the destroyed asset to begin with? In other words, there was an asset, its value became zero because it was destroyed, is that a loss? Certainly, the hard copy—the hard dollar figure that Bank of America had to pay to get the new ATM, I don't know how anybody can credibly claim that's not a loss. That's the replacement value. That certainly seems like a valid figure to work off of.

The more interest—not interesting, but the more difficult question is, does the destroyed value get put into the loss calculation? I don't know that *Cedeño* necessarily addresses that because you're talking about the repair cost. And I'll look more closely at the case. I appreciate your raising it, but it may not be directly on the point we have to decide here, which is that—that original destroyed asset, is that figure for the value of that as it was held on Bank of America's books when it had a value and then had no value, given the guideline, the first comment—the first section under 2B1.1 in the commentary under Application Note 3 and under the Section C and then the small 1, "the fair market value of property unlawfully taken, copied, or destroyed. Or if the fair market value is impractical to determine or inadequately measures the harm, the cost to the victim of replacing that property."

It would seem that coupled with small 3, "a cost of repairs to damaged property," there's an argument that the government's going to have to address about whether or not this is double-counting to add in the value that was lost by Bank of America as opposed to the cost of—for them to buy the new one.

I don't think that was addressed necessarily by the parties, and I need to resolve that. It's a critical issue because the guidelines are—have to be calculated correctly or we're going to be doing this again.

So I'm not sure as I'm talking it through here that this is necessarily something where we need a witness from Bank of America. I had thought that these costs related to repairing part of the ATM and replacing part of it.

Apparently, Mr. Villalpando, they replaced the whole thing. Correct?

MR. VILLALPANDO: That's my understanding, Judge.

THE COURT: All right. And unless there's a real dispute by the defense as to what the value of this was on the books of Bank of America and unless you're contesting the backup for the actual cost of a new one, it's really a legal issue of whether we include the value of what the—these things were carried on the books of Bank of America in the loss calculation. That to me seems like a legal issue more than a factual issue.

But I'll hear first from Mr. Kling, or his colleague, and then Mr. Villalpando on whether you agree with that.

MR. WINER: We agree that the numbers as given in the spreadsheet, we don't—we do not object to them.

I do want to clarify, and I hope this might answer your question regarding the cost versus the fair market value: The Cedeño case did add the fair market value, including of the repaired watches on top of the repair costs themselves, if that helps clarify what your question was.

THE COURT: So they did include the cost of repair—say that again. Say it again.

MR. WINER: The loss was calculated by the—there were a certain number of watches. Repairs were attempted on a number of them, and the—that was then added to the loss. And then the same watches, including the ones with repairs on them, were then added in addition to their fair market value. And that's what the Eleventh Circuit ruled was not—not—not in accordance with the sentencing guidelines.

THE COURT: Okay. Okay. Well, you're not going to be contesting on the defense side the figures that were given. It's just a question of whether I count the—the book value of these and the loss amount. Is that correct? 'Cause if that's the case, we don't need a witness.

MR. WINER: That is correct.

THE COURT: Okay. How about the government? Do you agree with that?

You're muted. You're muted, Mr. Villalpando.

MR. VILLALPANDO: All right. There we go.

That sounds right from the government's perspective, Your Honor, so long as they're not contesting the numbers in the exhibit.

THE COURT: All right. Then I think what we need—and I hate to keep postponing this—but I think we need some briefing on this singular issue. I can't resolve it today. I simply am not going to do that. I'm sorry to disappoint people who were hoping the sentencing would take place today. But as I said, this is a critical issue that's going to apply also to Mr. Simpson and I want to get it right.

How do you want to proceed on briefing on this? It shouldn't take long because the—for instance, I did not have the government's response, nor did I expect one, because otherwise we'd have endless briefing, but I don't have the government's response to the Cedeño case. And if there's other cases that may address this issue, and anyone that's interpreted that comment, the application that we just spoke about, and looked at that.

MR. VILLALPANDO: Your Honor, this is Ramon Villalpando.

I don't know if it's proper at this point maybe to have Mr. Loeb chime in for Mr. Simpson just because of the overlap in the issue with the defendants.

THE COURT: Sure.

MR. VILLALPANDO: Like if he's going to contest the amount—and I don't think he's even seen the exhibit—but if he's contesting them, then, you know, we should have a witness.

THE COURT: Mr. Loeb, do you agree with the process we're following here? I know your client's not present and it won't be without prejudice where you—or with prejudice where you can't change your mind, but do you have any reason to—for us to have to call in the Bank of America witness?

I know I think you thought that the replacement was cheaper than what Bank of America put, but that you were comparing what you were getting online as to cost of an ATM versus the over $100,000, which includes in it a fair amount of the book value.

So are you going to be requiring a Bank of America witness at your hearing?

MR. LOEB: Judge, I do believe that my client is on the phone part of the call, but that doesn't change anything.

I have not had a chance to review the exhibits to which Mr. Villalpando referred, and so I'd like to at least have the opportunity to review that. Now, if—if you were to give us a briefing schedule and I found that I did want to contest those figures, I would certainly include that position in my submission—

THE COURT: All right. Okay.

MR. LOEB:—if that helps solve that.

THE COURT: All right. Well, that's—I think, Mr. Villalpando, why don't you take the opening oar on this one, and I'll give you a week, two weeks.

How much time do you need?

MR. VILLALPANDO: If Mr. Kling and Mr. Loeb are amenable to it, and the Court, obviously, two weeks would be great.

THE COURT: Any objection to that, Mr. Kling?

MR. KLING: No, sir.

THE COURT: And Mr. Loeb?

MR. LOEB: No, Judge.

THE COURT: So, Emily, two weeks.

THE CLERK: That would be August 10th.

THE COURT: All right. And then I'll give both Mr. Loeb—and that'll be a joint filing in the Simpson and Foy case—I'll give Mr. Kling and Mr. Loeb two weeks to respond, if that's enough time for both of you.

MR. KLING: Judge, I'm sure it will be as to Mr. Foy.

THE COURT: Okay.

MR. LOEB: Okay. I have no objection for Mr. Simpson.

THE COURT: Okay. So two weeks?

THE CLERK: That would be August 24th.

THE COURT: Okay. If I think I need a reply brief, I'll ask for one, but, otherwise, we should set the case for a sentencing early September.

Do we have any time at all?

THE CLERK: Let me take a look at that.

MR. KLING: Judge, while she's looking, I have a sentencing in front of Judge Pallmeyer on the 7th and 8th, and possibly the 9th, so those dates are out for me.

THE COURT: Okay.

MR. LOEB: And I—and I should point out, Judge, that Mr. Simpson's sentencing is presently scheduled for the 10th of September. We may or may not have to tweak that depending on the date for this hearing.

THE COURT: Well, he's not in custody, so I'm not as concerned about his sentencing.

MR. LOEB: That's correct.

THE COURT: Mr. Foy is so we ought to sentence him, since he is sitting in jail, as expeditiously as we can while resolving this very critical issue.

Can we do it on the 10th?

THE CLERK: I'm sorry; did you say the 10th?

THE COURT: Well, Mr. Kling, was the 10th a date you could do?

MR. KLING: Yes, sir.

THE COURT: Could we do it on the 10th?

THE CLERK: Yes. If Mr. Simpson's—

THE COURT: We'll have to kick over the Simpson sentencing.

THE CLERK: Yeah, that is the only sentencing we have that day, so we could put Foy on the 10th and move Simpson.

THE COURT: Okay. Let's do Mr. Foy at 10 o'clock on the 10th.

Does that work for the government?

MR. VILLALPANDO: Yes, Judge, it does.

THE COURT: Mr. Alper, does that work for you?

MR. ALPER: 10 o'clock on September 10th, Your Honor?

THE COURT: Yes.

MR. ALPER: Yes.

THE COURT: And, Mr. Kling, to confirm, 10 o'clock on the 10th works for you and your colleague?

MR. KLING: Yes, sir.

THE COURT: Okay. That'll be the date of that.

Mr. Loeb, I think we're just going to have to put your sentencing off until after this date. I don't like to do two sentencings in one day. I start a trial the following Monday that's going to run through Thanksgiving, but I'm taking Fridays off so I can do other matters, and we'll have to have your client's sentencing on one of those Fridays.

MR. LOEB: Judge, I have no problem with postponing the actual sentencing, but I'm wondering, because we'll be filing a joint brief on the issue of loss amount, shouldn't Mr. Simpson officially be part of the hearing on that issue on the 10th?

THE COURT: Well, if we have a witness, yes; if it's a witness that's going to apply to you. If as I expect it's going to be is simply legal arguments, I'll hear the arguments. I'll give you a chance to weigh in on them if you want, but it's really legal arguments that Mr. Kling and his colleague and the government have to address.

My findings don't bind me—as a practical matter they do—but they don't legally bind me if you were to argue the same issue on behalf of your client at a later date. I doubt I'd change my mind.

So as a practical matter, if you want, you can participate in the legal arguments that day, and your client can be present by—by phone if he wants to be present for it.

MR. LOEB: That would work for us, Judge. Thank you.

THE COURT: Okay. So that's the—and if I need a reply brief from the government, I'll ask for one. And otherwise, we will continue this sentencing now until September 10th at 10 o'clock.

Any questions? First by the government?

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

THE COURT: And by the defense?

MR. KLING: Judge, I appreciate you accommodating a soon-to-be lawyer, Mr. Winer. No questions.

THE COURT: All right. He did a fine job.

MR. ALPER: Your Honor?

THE COURT: Yes.

MR. ALPER: Will the sentencing on the 10th be by video conference?

THE COURT: It will be unless the defendant decides he wants to do it in person but—

MR. ALPER: Thank you, Judge.

THE COURT: Mr. Kling, if there's any change in your client's position, we'll assume it's going to be by video, but if he changes his mind, make sure you give us notice two or three days in advance so we can get him over here.

MR. KLING: Yes, sir. Thank you.

THE COURT: Okay. Thank you all.

(Proceedings adjourned until September 10, 2021, at 10:00 a.m.)

CERTIFICATE

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

/s/ Elia E. Carrión
Elia E. Carrión
Official Court Reporter

28th day of November, 2021
Date

APPENDIX E
RELEVANT STATUTORY PROVISIONS

Section 371 of the United States criminal code, 18 U.S.C. § 371, provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

* * * * *

Section 641 of the United States criminal code, 18 U.S.C. § 641, provides:

Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

* * * * *

Section 2113 of the United States criminal code, 18 U.S.C. § 2113, provides:

Bank robbery and incidental crimes

(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, 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.