

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2023

ALISON LEE GENDREAU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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Federal Defender
***MICHAEL DONAHOE**
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SUBMITTED: February 14, 2024

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 17 2023

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALISON LEE GENDREAU,

Defendant-Appellant.

No. 22-30136

D.C. No.
2:21-cr-00022-DLC

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Submitted September 15, 2023**
Seattle, Washington

Before: W. FLETCHER, R. NELSON, and COLLINS, Circuit Judges.

Defendant Alison Lee Gendreau pleaded guilty to five counts of violating 18 U.S.C. § 1343. Gendreau was the accounting manager of the Yellowstone Harley-Davidson franchise in Belgrade, Montana. Gendreau admitted both to the owners

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of the Harley-Davidson franchise and a sheriff's deputy that she had been embezzling money. She was subsequently indicted on five counts of wire fraud in an amount totaling \$13,095.56. Gendreau pled guilty. At sentencing, the government sought restitution under the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, for the full amount that the Harley-Davidson franchise owners testified was missing. Gendreau argued both that the government could only recover restitution for the amount listed in the indictment and that she embezzled only from the payroll account. The district court found by a preponderance of the evidence that Gendreau had stolen \$306,419.72 and awarded that amount in restitution. Gendreau timely appealed.

We have jurisdiction under 28 U.S.C. § 1291. “[T]he legality of a restitution order” is reviewed de novo. *United States v. Peterson*, 538 F.3d 1064, 1074 (9th Cir. 2008). If the restitution order “is within the bounds of the statutory frame-work” the order “is reviewed for an abuse of discretion.” *United States v. Hackett*, 311 F.3d 989, 991 (9th Cir. 2002) (internal quotation marks omitted). “Factual findings supporting an order of restitution are reviewed for clear error.” *Id.*

Gendreau argues that the MVRA permits restitution only up to the amount set forth in the indictment to which she pleaded guilty. We have squarely held that

the MVRA permits restitution for “an entire scheme, including uncharged conduct.” *United States v. Grice*, 319 F.3d 1174, 1177–78 (9th Cir. 2003) (per curiam); accord *In re Her Majesty the Queen in Right of Can.*, 785 F.3d 1273, 1276 (9th Cir. 2015) (per curiam).

Gendreau argues that this application of the MVRA violates the Fifth Amendment’s Grand Jury Clause because only five wire transactions were charged in the indictment. However, wire fraud requires the government to prove “a scheme to defraud.” *United States v. Hussain*, 972 F.3d 1138, 1143 (9th Cir. 2020) (internal quotation marks omitted). As a result, “the fraudulent scheme as a whole” is “part of the charged offense” of wire fraud. *United States v. Loftis*, 843 F.3d 1173, 1177 (9th Cir. 2016).

Gendreau also contends that she had a right to a jury trial on the amount of restitution. Our precedent forecloses this argument. *See, e.g., United States v. Dadyan*, 76 F.4th 955, 961 (9th Cir. 2023) (collecting cases).

Finally, Gendreau argues that there was inadequate proof that she skimmed cash. We find no clear error in the district court’s findings of fact. The Harley-Davidson franchise’s owners provided detailed accounting that revealed significant amounts of cash missing. Gendreau also admitted to a sheriff’s deputy that she

skimmed cash. There were no further discrepancies in the company's accounts after Gendreau was fired.

AFFIRMED.

**UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA BUTTE DIVISION**

UNITED STATES OF AMERICA

v.

ALISON LEE GENDREAU

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 21-22-BU-DLC-1

USM Number: 62425-509

Michael Donahoe

Defendant's Attorney

THE DEFENDANT:

<input checked="" type="checkbox"/>	pleaded guilty to count(s)	I-V of the Indictment
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense

18 U.S.C. § 1343 - Wire Fraud

18 U.S.C. § 1343 - Wire Fraud

18 U.S.C. § 1343 - Wire Fraud

18 U.S.C. § 1343 - Wire Fraud

18 U.S.C. § 1343 - Wire Fraud

Offense Ended

05/31/2019

05/31/2019

05/31/2019

05/31/2019

05/31/2019

Count

1

2

3

4

5

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

- The defendant has been found not guilty on count(s)
- Count(s) is are dismissed on the motion of the United States

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

August 10, 2022

Date of Imposition of Judgment



Signature of Judge

Dana L. Christensen, District Judge

United States District Court

Name and Title of Judge

August 11, 2022

Date

DEFENDANT: ALISON LEE GENDREAU
CASE NUMBER: CR 21-22-BU-DLC-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **16 months as to Counts I–V, to run concurrently.**

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

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

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

at a.m. p.m. on

as notified by the United States Marshal.

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

before 2 p.m. on

as notified by the United States Marshal; or

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ALISON LEE GENDREAU
CASE NUMBER: CR 21-22-BU-DLC-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **3 years at to Counts I–V, to run concurrently.**

MANDATORY CONDITIONS

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

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

DEFENDANT: ALISON LEE GENDREAU
CASE NUMBER: CR 21-22-BU-DLC-1

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at <https://www.mtp.uscourts.gov/post-conviction-supervision>.

Defendant's Signature _____

Date _____

DEFENDANT: ALISON LEE GENDREAU
CASE NUMBER: CR 21-22-BU-DLC-1

SPECIAL CONDITIONS OF SUPERVISION

1. All employment must be approved in advance in writing by the probation officer. You must consent to third-party disclosure to any employer or potential employer.
2. You must apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other financial gains to outstanding court-ordered financial obligations.
3. You must provide the probation officer with any requested financial information. You must not incur new lines of credit without prior approval of the probation officer. You must notify the probation officer of any material changes in your economic circumstances that might affect your ability to pay court-ordered financial obligations.
4. You must pay restitution in the amount of \$306,419.72. You are to make payments at a rate of \$300.00 per month, or as otherwise directed by United States Probation. Payment shall be made to the Clerk, United States District Court, P.O. Box 8537, Missoula, MT 59801, and distributed as noted.
5. You must participate in a program for mental health treatment as approved by the probation officer. You must remain in the program until you are released by the probation officer in consultation with the treatment provider. You must pay part or all of the costs of this treatment as directed by the probation officer.
6. You must abstain from the consumption of alcohol and are prohibited from entering establishments where alcohol is the primary item of sale.
7. You must participate in substance abuse testing to include not more than 365 urinalysis tests, not more than 365 breathalyzer tests, and not more than 36 sweat patch applications annually during the period of supervision. You must pay part or all of the costs of testing as directed by the probation officer.
8. You must participate in and successfully complete a program of substance abuse treatment as approved by the probation officer. You must remain in the program until you are released by the probation officer in consultation with the treatment provider. You must pay part or all of the costs of this treatment as directed by the probation officer.

DEFENDANT: ALISON LEE GENDREAU
CASE NUMBER: CR 21-22-BU-DLC-1

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>JVTA</u> <u>Assessment**</u>	<u>AVAA</u> <u>Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$500.00	\$ 0.00	\$ 0.00	\$0.00	\$306,419.72

The determination of restitution is deferred until *An Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

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

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution of \$306,419.722 to:

SENTRY INSURANCE COMPANY
\$110,000.00

YELLOWSTONE HARLEY DAVIDSON
\$196,419.72

- Restitution amount ordered pursuant to plea agreement \$
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution
 - the interest requirement for the fine restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ALISON LEE GENDREAU
CASE NUMBER: CR 21-22-BU-DLC-1

SCHEDULE OF PAYMENTS

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

- A Lump sum payments of \$ 500 due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal 20 (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:
Criminal monetary penalty payments are due during imprisonment at the rate of not less than \$25.00 per quarter, and payment shall be through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk, United States District Court, P.O. Box 8537, Missoula, MT 59807 or online at <https://www.pay.gov/public/form/start/790999918>. Please see www.mtd.uscourts.gov/criminal-debt for more information on how to pay online.

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

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

- Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
 - Defendant shall receive credit on her restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
 - The defendant shall pay the cost of prosecution.
 - The defendant shall pay the following court cost(s):
 - The defendant shall forfeit the defendant's interest in the following property to the United States:

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

1 JoAnn Jett Corson
Registered Diplomate Reporter
2 Certified Realtime Reporter
P. O. Box 8006
3 Missoula, Montana 59807-8006
406/829-7123 office
4 joann_corson@mtd.uscourts.gov
5 United States Court Reporter
6
7
8

9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF MONTANA**
BUTTE DIVISION

11 UNITED STATES OF AMERICA,)
Plaintiff,) No. CR 21-22-BU-DLC
12 vs.)
13 ALISON LEE GENDREAU,) **TRANSCRIPT OF SENTENCING**
Defendant.)
14 _____)

15
16 **BEFORE THE HONORABLE DANA L. CHRISTENSEN**
UNITED STATES DISTRICT COURT JUDGE
17 **FOR THE DISTRICT OF MONTANA**

18
19 Russell Smith United States Courthouse
201 East Broadway
Missoula, Montana 59802
20 Wednesday, August 10, 2022
15:03:19 to 18:07:15
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24 Proceedings recorded by machine shorthand
25 Transcript produced by computer-assisted transcription

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APPEARANCES

For the Plaintiff: MR. RYAN G. WELDON
Assistant U.S. Attorney
P.O. Box 8329
Missoula, Montana 59807

For the Defendant: MR. MICHAEL DONAHOE
Attorney at Law
Federal Defenders of Montana
50 West 14th Street, Suite 300
Helena, Montana 59624

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REPORTER'S NOTE: "Uh-huh" and "Um-hmm" indicate affirmative responses. "Huh-uh" and "Hm-umm" indicate negative responses.

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1 PROCEEDINGS

2 (Open court.)

3 (Defendant present.)

4 THE COURT: Good afternoon. Please be seated.

5 Amanda, would you please call the final matter on
6 the Court's calendar this afternoon?

7 THE CLERK: This is the time set for sentencing in
8 Case No. CR 21-22-BU-DLC, *United States of America v. Alison*
9 *Lee Gendreau*.

10 THE COURT: Mr. Weldon, I assume you have read the
11 presentence investigation report as it relates to defendant
12 Ms. Gendreau?

13 MR. WELDON: I have, Your Honor.

14 THE COURT: And does the United States have any
15 objections to the presentence investigation report?

16 MR. WELDON: We have no objections, Your Honor.

17 THE COURT: It appears that the United States is
18 recommending a 2-level decrease from the adjusted offense
19 level for acceptance of responsibility and an additional
20 1-level decrease for timely notification of plea; is that
21 correct?

22 MR. WELDON: That is correct, Your Honor.

23 THE COURT: That motion is granted.

24 Mr. Donahoe, good afternoon.

25 MR. DONAHOE: Good afternoon, Your Honor.

1 THE COURT: Same assumption? You've read the
2 presentence investigation report?

3 MR. DONAHOE: Yes.

4 THE COURT: And, Ms. Gendreau, have you read the
5 presentence investigation report in this case?

6 THE DEFENDANT: Yes.

7 THE COURT: Was that a yes?

8 THE DEFENDANT: Yes.

9 THE COURT: Okay.

10 And have you had adequate opportunity to discuss it
11 with your attorney, Mr. Donahoe?

12 THE DEFENDANT: Yes, I have.

13 THE COURT: Okay.

14 Mr. Donahoe, I believe we have some objections we
15 need to address, correct?

16 MR. DONAHOE: We do.

17 THE COURT: One of those objections, I believe,
18 relates to the amount of restitution; is that right?

19 MR. DONAHOE: Yes.

20 THE COURT: And is that the only objection? I'm
21 trying to remember.

22 MR. DONAHOE: Special skill, 2 points.

23 THE COURT: Oh, yeah, the 2-level enhancement for
24 special skills, or 2-level addition.

25 Okay. Well, let's get the objections resolved

1 before we proceed much further. This matter, obviously, has
2 been briefed. It's covered in the addendum to the presentence
3 investigation report.

4 We've got basically three issues as it relates to
5 the restitution, as I understand it. Mr. Donahoe, correct me
6 if I've got this wrong.

7 First of all, that the calculated loss amount is
8 inaccurate, and, Mr. Weldon, you'll have to prove up
9 restitution.

10 Second, that any loss amount over the \$13,095.56
11 listed in the indictment is improper because it involves
12 conduct never submitted to the grand jury.

13 And, three, court-imposed restitution -- I'm
14 summarizing -- court-imposed restitution violates the Sixth
15 Amendment.

16 MR. DONAHOE: Correct.

17 THE COURT: Does that cover it?

18 MR. DONAHOE: It did. The first objection, I can
19 make a modification. We've worked the numbers again. The
20 credit card number has come down. The other number has gone
21 up.

22 THE COURT: Which means you and Mr. Weldon have
23 agreed to the amount of restitution?

24 MR. DONAHOE: Well, we're pretty close. The only
25 thing in dispute right now as a matter of number is the cash.

1 THE COURT: Okay. All right. So let's --
2 Mr. Weldon.

3 MR. WELDON: Your Honor, I'm happy to answer any
4 questions that the Court might have.

5 THE COURT: Let's look at Government's Exhibit --
6 I've got some government exhibits up here that I have not seen
7 before. I assume, Mr. Donahoe, you have these exhibits?

8 MR. DONAHOE: I think they're my exhibits.

9 THE COURT: It says "Total Loss"?

10 MR. DONAHOE: Yes.

11 Or is that you?

12 MR. WELDON: That's mine.

13 MR. DONAHOE: That's Mr. Weldon.

14 THE COURT: Right. I have your exhibits here.

15 MR. DONAHOE: Right. That's me.

16 THE COURT: Okay. Now let's work from Mr. Weldon's
17 exhibit, if we could. Let's take -- let's look at the amounts
18 there, and so tell me which of these four items we have an
19 agreement on.

20 MR. DONAHOE: All right. The payroll fraud of, that
21 number, of \$80,589.23?

22 THE COURT: Yes.

23 MR. DONAHOE: That's agreed to.

24 THE COURT: Okay. So that one is okay. All right.

25 What next?

1 MR. DONAHOE: All right.

2 THE COURT: Cash skimming, \$223,061.24.

3 MR. DONAHOE: That's still in dispute.

4 THE COURT: Okay. Credit card fraud, \$2,769.25.

5 MR. DONAHOE: The only thing we admit of credit card
6 fraud is about \$109.

7 THE COURT: So that's in dispute.

8 MR. DONAHOE: Yes.

9 THE COURT: Accounting firm and Talon, \$43,000.

10 MR. DONAHOE: And we dispute that.

11 THE COURT: Okay.

12 Mr. Weldon, I'm gonna let you put on some proof.

13 MR. WELDON: Thank you, Your Honor.

14 And may I walk the Court through a couple things,
15 just to give you a preview?

16 THE COURT: Of course.

17 MR. WELDON: How we arrived at these, and I wanted
18 the Court just to understand how those exhibits work together,
19 is you'll see in the total loss amount, the payroll fraud,
20 which is now agreed to, that's the Exhibit 1 --

21 THE COURT: Yeah.

22 MR. WELDON: -- in the documents, and we don't have
23 any dispute with that anymore.

24 What I wanted the Court to know about is you'll see
25 there's a cash skimming exhibit as well, Your Honor, and

1 that's 106.

2 THE COURT: Yes.

3 MR. WELDON: And I wanted to just walk the Court
4 briefly through that. You can see that that amount is
5 \$223,061.24.

6 And what we did, Your Honor, and what I expect
7 you'll hear testimony about is Exhibit 100 is an exhibit that
8 outlines the amount of cash deposits as it relates to the
9 point-of-sale system which is in the amount of \$54,730.90.

10 And then Exhibit 101 is a day-to-day analysis that
11 Harley-Davidson did based on their point-of-sale system as
12 well as the cash deposits, and that's how we ultimately
13 arrived at the \$190,564.28.

14 And I will tell the Court Mr. Donahoe and I have
15 been working hard on this, and some of the invoices he had
16 provided us that there may have been a double counting, and
17 you can see, then, there's a reduction for invoices provided
18 by the defense. Those invoices are identified, and then we've
19 reduced that amount by \$22,233.94.

20 THE COURT: And do those invoices, reduction for
21 invoices provided by defense, do those relate in any way,
22 shape, or form, Mr. Donahoe, to your Exhibit 500?

23 MR. DONAHOE: Yes.

24 THE COURT: They do.

25 MR. DONAHOE: Yes.

1 THE COURT: Okay.

2 All right. You have some witnesses?

3 MR. WELDON: I do, Your Honor.

4 And I will tell the Court the payroll was the most
5 significantly disputed area of this case, and so I think -- I
6 hope, for the Court's benefit, it will slim some of the issues
7 that you have to decide.

8 THE COURT: Okay.

9 MR. WELDON: All right. Thank you, Your Honor.

10 THE COURT: Yeah.

11 MR. WELDON: All right.

12 At this point, the United States calls Dan Fry.

13 THE COURT: Mr. Fry, if you would come forward, the
14 clerk will administer an oath.

15 (Oath administered to the witness.)

16 THE COURT: Mr. Fry, if you would make yourself
17 comfortable there in the witness stand? And speak directly
18 into the microphone, if you would, please.

19 THE WITNESS: (Complied with request.)

20 THE COURT: You may proceed, Mr. Weldon.

21 MR. WELDON: Thank you, Your Honor.

22 WHEREUPON,

23 MR. DAN FRY,

24 called for examination by counsel for plaintiff, after having
25 been first duly sworn to testify the truth, the whole truth,

DAN FRY DIRECT EXAMINATION BY WELDON

1 and nothing but the truth, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. WELDON:

4 Q Sir, would you please introduce yourself to the Court and
5 spell your last name for the record?

6 A Yeah. Dan Fry, F-r-y.

7 Q And what do you do for a living, sir?

8 A I am a part owner in Harley-Davidson of -- Yellowstone
9 Harley-Davidson, Belgrade, Montana.

10 Q Okay. Can you explain to the Court -- do you remember
11 May 9 of 2019?

12 A I do.

13 Q Can you explain to the Court why that date is significant
14 and what happened on that day, sir?

15 A Well, that day, we were meeting with a group of
16 accountants from Wipfli, who were doing our outside review for
17 Yellowstone Harley-Davidson, and that's the day that Alison
18 admitted that she had taken from us.

19 Q And did it take a while to get to that point, sir?

20 A Yes, it did. A long time.

21 Q Could you explain that to the Court, please?

22 A Well, you know, we, we were in the rental business. We
23 would buy Harley-Davidsons one year and sell them, you know,
24 sell the next year. So we would have to take them from
25 inventory to equipment, appreciate- -- do the depreciation,

DAN FRY DIRECT EXAMINATION BY WELDON

1 and then, when we'd sell them, have to move them back into
2 inventory and then sell them. And for the longest time, we
3 were struggling with that booking entry of how much it should
4 be and recapturing that depreciation and all of the things
5 that go with that.

6 Q Now did it take you a while to ultimately find out that
7 Ms. Gendreau was the source of loss for Harley-Davidson?

8 A Oh, it did, yeah. Months. Months, yes.

9 Q Could you explain that to the Court and what led up to
10 that, sir?

11 A Well, going back in time, so in the fall of 2017, our
12 bank, First Interstate Bank in Belgrade -- in Bozeman, there,
13 had approached my son and I about the lack of profitability in
14 the business. And we owned the buildings underneath another
15 business name, Fry Enterprises, and it had appreciated
16 significantly, and so they said that we should do something
17 about refinancing that and kind of recapture some of that
18 appreciation and then look at -- looking at ways to reduce the
19 operating costs.

20 So we went through and had the building reappraised and
21 indebted ourselves to about another million dollars and used
22 the proceeds of that to pay for all of our new inventory.
23 Instead of having it on the floor plan with Yellow-, with
24 Yellowstone -- oh, excuse me, Harley-Davidson financing
25 services, we paid off that inventory. A much lower

DAN FRY DIRECT EXAMINATION BY WELDON

1 interest -- you know, obviously we had cash at that point,
2 but, you know, a lot lower interest than we were paying and
3 significantly improved our cash flow position and making the
4 company appear to be profitable.

5 Q Mr. Fry, just to make sure we tie that loop for the
6 Court, fair to say, then, that after you refinanced, you owned
7 all of the motorcycles?

8 A We did.

9 Q So any money that came in after would be cash that would
10 go to Harley-Davidson?

11 A This is true.

12 Q Okay. Did that ultimately change and relatively soon?

13 A Yes, it did.

14 Q Could you explain that to the Court, please?

15 A Well, even with that, you know, drastic measure we took,
16 we couldn't seem to, you know, at least report an operating
17 profit. And so we were very frustrated and confused by that
18 and, you know, put a lot of energy into trying to figure out
19 why.

20 Q Okay. Now, then, did there come a time on May 9, 2019
21 where Ms. Gendreau admitted to what she did with
22 Harley-Davidson?

23 A Yes, she did.

24 Q Could you explain that to the Court and the circumstances
25 behind it, please, sir?

DAN FRY DIRECT EXAMINATION BY WELDON

1 A So we were in the conference room, myself and four
2 attorneys and -- excuse me, four accountants. And they were
3 very, you know, forensic type of people and looking at
4 different things and trying to, you know, connect the dots and
5 such.

6 And for the longest time, you know, we were really
7 struggling. We were there, you know, first thing in the
8 morning and midafternoon, maybe to late afternoon, you know.
9 And we'd ask Alison to come in and asked her some questions
10 and things.

11 But finally, you know, it got down to the way that we
12 were reporting the purchase of motorcycles. What would be
13 common is that we would get a discount, you know, for an
14 incentive, and it would be tied to different prices or
15 different percentages of the value based upon the type of
16 motorcycle. And it would be recorded, and then, once the
17 inventory was paid for, we would then get a credit for that
18 amount of money.

19 And we never could seem to get those things to match.
20 You know, the -- they called it factory incentive account.
21 Never seemed -- it was very static. It wasn't moving. As you
22 would think, if we're buying and selling motorcycles all the
23 time, that it would be in and out; there'd be a lot of dynamic
24 changes in that, and we didn't see them.

25 So we looked at that specifically and asked Alison to

DAN FRY DIRECT EXAMINATION BY WELDON

1 show us how she got that entered into the books, the amount
2 owed, versus how she would receive that. And it was very
3 obvious at that moment that the things that she claimed she
4 was doing weren't there. There was money that we were
5 receiving actually in the bank, but it wasn't showing up in
6 the books.

7 And it was just as crazy as could be that, you know, we
8 would be showing one balance in the bank and one balance in
9 the books. And after several hours of conversation, she
10 admitted that she had been stealing money.

11 Q Did she admit to you the method; in other words, how she
12 was stealing money through Harley-Davidson?

13 A She mentioned that payroll and merchandise, as I recall.

14 Q Okay. And did you ever ask her about the skimming of
15 cash?

16 A Never did, no.

17 Q Okay. Were you aware of whether or not the investigator
18 involved did, sir?

19 A No. No knowledge.

20 Q Okay. Did you ever listen to a recording associated with
21 the investigation of this case?

22 A No, I have not.

23 Q Okay. Do you remember Government's Exhibit 165?

24 A Oh, yes. Yes, okay. Yeah. I thought you were talking
25 about at that time.

DAN FRY DIRECT EXAMINATION BY WELDON

1 Q Oh, I see.

2 A Yeah.

3 Q So, in other words, just to make sure we clarify for the
4 Court, you didn't have a recorder when the admission by
5 Ms. Gendreau occurred?

6 A No.

7 Q The investigation ultimately took place, though, and
8 there was a recording that was generated as a result of that?

9 A Right. Correct.

10 MR. WELDON: All right. Let's show the Court
11 Government's Exhibit 100, please.

12 (Discussion off the record re: court display.)

13 MS. KIRSCHTEN: (Complied with request.)

14 BY MR. WELDON:

15 Q Do you recognize Government's Exhibit 100?

16 A I do.

17 Q What is it, sir?

18 A So this is our attempt to try to put the -- a number on
19 the damage that had been done by -- it looks at the
20 point-of-sales numbers versus the deposit in any given month,
21 and then they're grouped by year.

22 MR. WELDON: Your Honor, I move for the admission of
23 Government's Exhibit 100.

24 THE COURT: Any objection, Mr. Donahoe?

25 MR. DONAHOE: No, Your Honor.

DAN FRY DIRECT EXAMINATION BY WELDON

1 THE COURT: Government's Exhibit 100 is admitted.

2 (Exhibit 100 was received in evidence.)

3 BY MR. WELDON:

4 Q All right. Now that this is admitted, Mr. Fry, will you
5 explain to the Court the columns of deposits and years and
6 explain how this chart was ultimately generated?

7 A Sure. We went into -- actually, at the end of each day,
8 we would print, you know, the point of sales, the cash
9 register closeout, basically, and it would show the amount of
10 cash that we received each day and the amount of checks. And
11 so that became the cash that we should have deposited in the
12 bank. So that became the point of sales each month. And then
13 the deposits are from the bank statements of actually what was
14 recorded in each given month.

15 Q Now at this point in time, were you involved in the
16 generation of this report, sir?

17 A This exact report I was not involved with specifically.
18 This was done by a group of family members that were all there
19 huddled up trying to -- actually we were looking at this piece
20 by piece; you know, just files after files after files.

21 Q All hands on deck?

22 A All hands on deck.

23 Q Now, then, explain why it was relevant, the deposits
24 versus the point-of-sale system.

25 A I don't know if I understand that. What's relevant about

DAN FRY DIRECT EXAMINATION BY WELDON

1 it is that, I mean, we should be depositing -- you know, we're
2 open 9 to 6, five, six, and seven days a week, depending on
3 the time of year. So obviously business that was done on
4 Tuesday would not necessarily be -- it wouldn't be deposited
5 on Tuesday. It would be on Wednesday. And quite frankly,
6 sometimes Wednesday turned into Thursday and Thursday into
7 Friday and Friday into the following Monday. So we looked at
8 the deposits as the bank recorded them in that month and
9 against what the point-of-sale software was and just took that
10 raw data as deposits versus point-of-sales amounts that we
11 took over the counter.

12 Q Should the point-of-sale numbers match the deposits?

13 A Yes, they should.

14 Q Why is that so, sir?

15 A Well, because that's the, you know, that's the amount of
16 cash we get in. It's not the number of transactions, not the
17 type of customers or anything. It really gets down to what
18 form of payment did you use? Cash? Check? Credit card?
19 Debit card? Gift card? Any of that stuff.

20 So what we were focused on is what did we actually take
21 in that was, you know, cash, currency, money that should end
22 up in the bank? We wouldn't necessarily -- well, we wouldn't
23 see, physically, the bank change with the credit card. That
24 would depend on how fast the processing company did it and
25 things like that, but we were focused on the amount of cash

DAN FRY DIRECT EXAMINATION BY WELDON

1 that we had received in any given day.

2 Q And then these numbers should all equal the same?

3 A They should be exactly the same.

4 Q Now, then, you see the number of \$146,675.81?

5 A I do.

6 Q Could you explain that to the Court, please?

7 A Well, that's the difference between the deposits during
8 that period, that -- what's that, one, two, three, four --
9 four and a half years, or whatever it is, time frame, the
10 deposits versus the point of sale.

11 Q Now, then, when you use the term "point of sale," could
12 you explain that to the Court and the systems that
13 Harley-Davidson was using, please?

14 A Sure. So when, when you come into, you know, like our
15 place of business and you go to pay for that, immediately when
16 they scan that barcode into their computer, it actually makes
17 that imprinted onto the software as a point of sale, giving
18 the type of transaction, the customer's name, you know, cash
19 or check or how it might be. And so at the end of the day, we
20 get a summary sheet that basically shows all the checks, you
21 know, all the cash and all the other types of transactions.

22 Q Can you explain Lightspeed and Talon to the Court,
23 please?

24 A Well, Lightspeed is a software that we used prior to May
25 of 2017, as I recall. And it was the -- Talon is actually a

DAN FRY DIRECT EXAMINATION BY WELDON

1 Harley-Davidson-branded software. They really put a lot of
2 pressure on us to switch from Lightspeed to Talon, and those
3 are the only two approved softwares for motorcycle business,
4 at least as far as Harley is concerned.

5 And Talon would give you a lot more in-depth visibility
6 to what's going on. I mean, each month we would have to put
7 out what they called a dashboard, like what type of motorcycle
8 you're selling, what type of general merchandise. And they
9 would use that to do a lot of analytical work against our
10 company as far as margins and the type of stuff we're selling
11 and looking at what the trends might be that help them
12 forecast where they should put their energy for new products
13 and things like that.

14 Q Were you able to be more detailed in the cash analysis
15 once Talon was the point-of-sale system?

16 A Absolutely. With Talon, which we still use -- I mean, I
17 had access to do a deep dive on every one of those -- we still
18 at that time operated -- we didn't operate but we maintained
19 the licensing of Lightspeed for a couple of years after
20 because we needed -- there are some records that didn't switch
21 over exactly seamlessly from the new software -- from the old
22 software to the new. So if someone brought in a motorcycle
23 and we couldn't identify it and we'd done some work back in
24 2014, we would go to Lightspeed, put in their name or the VIN
25 number, and up would come, you know, the history of that

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1 motorcycle.

2 Q I'm gonna show you Government's Exhibit 105.

3 THE COURT: Before you do --

4 MR. WELDON: Yes, Your Honor.

5 THE COURT: -- Anita, could we have that exhibit
6 back up, please, Exhibit 100?

7 MS. KIRSCHTEN: (Complied with request.)

8 THE COURT: Mr. Fry, I noticed in 2015 and in 2019
9 for the five months that there is a minus number, which would
10 suggest to me, in looking at this, that the amount of deposit
11 exceeded the point of sale. How did that happen?

12 THE WITNESS: Well, because of timing. So as I
13 said, sometimes we're open seven days a week, and depending on
14 when the day of the month would occur -- and the deposits
15 didn't always take place every day. I mean, we would see big
16 gaps where there would be like ten days of deposits that --
17 for May, for example, that didn't get deposited until June.

18 So instead of trying to calculate that, I just kept
19 a running total, plus or minus. And in this particular case
20 in 2015, it appears that we actually deposited more than we
21 recorded in sales. If you look -- I believe if you look at
22 14, and we didn't go that deep, but at some point, you know,
23 the numbers -- you know, it's like a water meter. We were
24 just trying to do the analysis of how deep the cut was.

25 THE COURT: Okay. So that I understand, so

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1 arguably, then, if we look at 2015 where you've got a minus
2 \$10,000, there may have been point-of-sale receipts in late
3 2014 that didn't get deposited until 2015?

4 THE WITNESS: Correct.

5 THE COURT: And maybe -- okay. All right. And
6 same, same with 20- --

7 THE WITNESS: '19.

8 THE COURT: -- -19, that there may have been some
9 deposits in December or whatever that didn't -- or some
10 receipts in December that didn't get captured --

11 THE WITNESS: Sure.

12 THE COURT: -- until you got into 20- --

13 THE WITNESS: Yeah. Probably had greater sales in
14 December of 2017 -- of 2018 --

15 THE COURT: 2018.

16 THE WITNESS: -- that didn't get deposited. And
17 actually, you know, that's exactly -- we saw evidence of that,
18 you know, that there was a gap. Sometimes three days, four
19 days, five days, you know, just depended on circumstantial,
20 whether we were -- you know, Alison was at work that day or
21 not at work or didn't have time to get the deposit made.

22 THE COURT: And would, would the Christmas season to
23 January 1 be typically a heightened sales time for your
24 business?

25 THE WITNESS: It can be, you know, obviously.

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1 Depending, it can be a great time. You know, it depends on
2 how good a boy you've been.

3 THE COURT: Okay. All right.

4 Go ahead, Mr. Weldon.

5 THE WITNESS: We're selling motorcycles. You know
6 what I mean?

7 THE COURT: Right. I understand.

8 BY MR. WELDON:

9 Q And, of course, August would be a particularly fruitful
10 time?

11 A Oh, absolutely. I mean, Sturgis and -- you know, yeah.
12 It's unbelievable.

13 Q All right. And one thing, just to make sure to follow up
14 a little bit on the Court's questions, when you were tracking
15 the money in the bank and the point-of-sale system, was that
16 ultimately to find out at the end how much you were short in
17 cash?

18 A Yes. I mean, that was the angle, right, is that. What
19 was the total damage done?

20 Q Now, then, when we look at Government's Exhibit 100, is
21 that more at a macro level compared to what we're gonna show
22 the Court once you had Talon in place?

23 A Yeah. I would say this is a 10,000-foot view, easy,
24 yeah.

25 MR. WELDON: Now, then, let's show the witness

DAN FRY DIRECT EXAMINATION BY WELDON

1 Government's Exhibit 105, please.

2 MS. KIRSCHTEN: (Complied with request.)

3 BY MR. WELDON:

4 Q What is this, sir?

5 A So this goes one step deeper. It's actually taking each
6 day and showing how much cash and how much checks and then the
7 total versus the deposit.

8 You know, on Exhibit 100, it was simply what the point of
9 sales were, what the Talon -- what the deposit was. This is
10 just getting a little deeper dive to see what was cash, what
11 was checks. Gave us a total of those two and then looked at
12 the same thing. The deposits, there again, are just the
13 deposits that came in that particular month. You know, when
14 we get the bank -- I looked at all the bank statements, and if
15 it didn't record it on that May, and this happens to be, yeah,
16 May of 2017, I didn't, I didn't go any further. I would just
17 put in the next month or whatever it might be.

18 Q Now just to orient the Court on time frame, your analysis
19 begins May of 2017, but Government's Exhibit 100 begins in
20 2015. Why the difference, sir?

21 A Well, the first one had Lightspeed included with it, and
22 this is just Talon. But to show an example of that, if you
23 notice there on May 31, we had a total received of 39,499.26,
24 and it didn't get deposited until June, even though it shows
25 the point of sales in May. So that kind of speaks to the, you

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1 know, the differences between the timing of when that water
2 meter may have been read, so to speak.

3 Q Now, then, you have the "Variance" column. Can you
4 explain that to the Court, please?

5 A That's simply the difference between the total that point
6 of sales showed that we received versus what deposits show we
7 received. So in May, you know, we would have shown the sales,
8 cash and check sales of 128,171.75, and the deposits that were
9 received that month, per the bank statements, were 110,917.69.

10 Q So you were short, then, \$17,254.06?

11 A Correct.

12 Q Now, then, to your point, though, you continued with the
13 analysis to make sure that you were not somehow mixing months
14 when deposits occurred?

15 A Correct. You know, there was no -- there's no way that I
16 knew how to, with the information I had available, try to
17 figure out what you're looking at. I was looking at
18 electronic copies of the bank statements, and when you look at
19 those deposits slips, they're really a copy of a handwritten
20 note.

21 And as I reflected on it, what I could have done, because
22 I found no evidence of where she -- where Alison ever tried to
23 cash a check, endorse a check made out to Yellowstone Harley,
24 and so what I could have done is try to find, you know, the
25 details of the checks. You know, like if you look at May 31,

DAN FRY DIRECT EXAMINATION BY WELDON

1 the 38,705.74, that may have been one check or may have been
2 five checks. I could have unclicked the summary and got the
3 individual check numbers. I could have then looked at the
4 bank -- the deposit slip and tried to read the writing, you
5 know, kind of faint, and try to find any of those checks on
6 that day and then see what the cash amount was deposited
7 correspondingly to see what day the theft occurred. But it
8 got to be -- you know, the juice wasn't worth the squeeze,
9 from my point of view, so it just didn't get done.

10 Q Because you had the overall numbers, which is what you're
11 focused on?

12 A Right. I, I didn't think I needed that much detail,
13 right.

14 Q Now when you say that you could have unclicked something,
15 you're talking about in Talon to see each specific
16 transaction?

17 A Yeah. The reporting inside of Talon, yes.

18 MR. WELDON: Let's show you, then, page 2 of that
19 exhibit. The next page, please.

20 MS. KIRSCHTEN: (Complied with request.)

21 THE COURT: Mr. Weldon, do I have copies of these
22 exhibits?

23 MR. WELDON: You do.

24 (Discussion off the record re: exhibits.)

25 MR. WELDON: And, Your Honor, I move admission of

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1 Government's Exhibit 105.

2 THE COURT: Any objection?

3 MR. DONAHOE: No objection.

4 THE COURT: 105 is admitted.

5 (Exhibit 105 was received in evidence.)

6 BY MR. WELDON:

7 Q Now, then, to your point, Mr. Fry, on page 2 of 105, what
8 is identified there as the variance amount for the deposits
9 versus the point-of-sale system?

10 A That would indicate that we deposited \$22,888.38 more
11 than the point of sales recorded.

12 MR. WELDON: Okay. Now, then, if we could go to
13 page 7 of that exhibit, please?

14 MS. KIRSCHTEN: (Complied with request.)

15 BY MR. WELDON:

16 Q Now you've identified for the Court, then, that you're
17 keeping a running total per month. Did you do that per year,
18 Mr. Fry?

19 A I did. That's what that \$12,001.73 shows, is that column
20 of the variances.

21 Q Okay. So, then, in 2017, Harley-Davidson lost
22 \$12,001.73?

23 A Correct.

24 Q How did you arrive at that number, sir?

25 A There again, that was the difference between the cash and

DAN FRY DIRECT EXAMINATION BY WELDON

1 checks from the point of sale that we took in over the counter
2 at all three locations, being general merchandise, parts and
3 accessories, and service, and the difference between what
4 ended up in the bank.

5 MR. WELDON: Now, then, let's show you page 17 of
6 that exhibit.

7 MS. KIRSCHTEN: (Complied with request.)

8 BY MR. WELDON:

9 Q How much cash went missing from Harley-Davidson in 2018
10 based on your analysis?

11 A In 2018, it shows a negative, you know, 32,901.35.

12 Q Now that's for the month of December of 2018, correct?

13 A That is, that is correct.

14 Q Now for the total year, then, of 2018, how much had been
15 taken from Harley-Davidson?

16 A \$161,384.10.

17 MR. WELDON: And then we'll show you page 19 based
18 on your analysis.

19 MS. KIRSCHTEN: (Complied with request.)

20 MR. WELDON: And how much -- oh, if we could go one
21 more page, please? One more.

22 MS. KIRSCHTEN: (Complied with request.)

23 BY MR. WELDON:

24 Q How much cash was taken from Harley-Davidson from January
25 of 2019 until May 9 of 2019?

DAN FRY DIRECT EXAMINATION BY WELDON

1 A That is \$1,151.07.

2 Q And that would have been for May of 2019?

3 A Yes.

4 Q Then what about for that five-month time period, the
5 total amount taken?

6 A Oh. 17,178.45.

7 Q Now your analysis stopped on May 9 of 2019. Why is that
8 so?

9 A That's the day that Alison admitted that -- and left the
10 building permanently.

11 MR. WELDON: Now, then, just to tie that number
12 together for the Court, if we could show the witness, please,
13 Government's Exhibit 106? And if we could blow that up,
14 please?

15 MS. KIRSCHTEN: (Complied with request.)

16 BY MR. WELDON:

17 Q This is the analysis in 100 and 101 that we walked the
18 Court through; is that right, sir?

19 A Yes.

20 Q Okay. And so, then, we have for Government's
21 Exhibit 100, the \$54,730.90, and that is added in to the
22 \$190,564.28 we just walked the Court through.

23 A Correct.

24 Q Now, then --

25 THE COURT: Mr. Weldon, can I stop you there?

DAN FRY DIRECT EXAMINATION BY WELDON

1 MR. WELDON: Yes, sir.

2 THE COURT: I believe that on this summary chart
3 that we have in front of us here, where it says "Exhibit 101,"
4 that should be "105."

5 MR. WELDON: It should be, Your Honor, yes.

6 THE COURT: All right. So I just want the record to
7 reflect that, because 105 is the Talon summary sheets.

8 MR. WELDON: Thank you, Your Honor.

9 THE COURT: Okay.

10 BY MR. WELDON:

11 Q Now, then, after we've added those together, there is a
12 portion here for reduction for invoices provided by the
13 defense. Can you explain that to the Court, please?

14 A Yeah. This -- as I said, the -- all that stuff is done
15 with a summary sheet, basically, not detailing what it was,
16 but these all are showing invoices that were recorded as cash
17 but were not cash.

18 Q And why, then, the reduction, sir?

19 A Well, according to -- well, the reduction is because the
20 only thing we were looking at was cash and checks. And so in
21 this particular case, several of these were electronic
22 transfers that came in, were recorded by Alison as cash.

23 Q And so you wanted to make sure that there wasn't a double
24 counting?

25 A Absolutely.

DAN FRY DIRECT EXAMINATION BY WELDON

1 MR. WELDON: Let's show, then, the Court -- we've
2 talked about this concept of Lightspeed and Talon. If we
3 could show the witness, please, Government's Exhibit 101?

4 MS. KIRSCHTEN: (Complied with request.)

5 BY MR. WELDON:

6 Q What do you recognize here, sir?

7 A Well, this is a -- let me just get my wits about me.
8 Just a second here.

9 This is actually Lightspeed's reconciliation of a, you
10 know, cash register closeout. It shows the amount of cash
11 received, the checks received. There again, it goes into,
12 quite detailed, credit cards and such. And then down --
13 basically the bank deposit reconciliation. And you can see
14 that the bank reconcilia- -- the bank deposit is equal to the
15 amount of cash received, the checks received, and such.

16 Q And so it's a way to, then, cross-reference to determine
17 where there might be a leak?

18 A Right.

19 Q All right. Was that, then, used in your analysis?

20 A This particular wasn't. I used Talon. This is the
21 handwritten copies of Lightspeed, which the Talon stuff is
22 electronic. We still use that software. So I actually used
23 the -- I didn't use the handwritten sheets but the Talon
24 software.

25 MR. WELDON: Okay. Now, then, I'll move for the

DAN FRY DIRECT EXAMINATION BY WELDON

1 admission of Government's Exhibit 101, Your Honor.

2 THE COURT: Any objection?

3 MR. DONAHOE: No objection.

4 THE COURT: 101 is admitted. And did you want to
5 offer 106?

6 MR. WELDON: Yes, please, Your Honor. I'll move to
7 admit that as well.

8 THE COURT: Any objection to 106?

9 MR. DONAHOE: No, Your Honor.

10 THE COURT: 101 is admitted, and 106 is admitted.

11 (Exhibits 101 and 106 were received in evidence.)

12 MR. WELDON: And now, Mr. Fry, let's talk about --
13 if we could show the witness Government's Exhibit 103?

14 MS. KIRSCHTEN: (Complied with request.)

15 BY MR. WELDON:

16 Q You had mentioned Talon. What are we looking at here,
17 sir?

18 A So if you look at the top, this is the point of sales
19 cash register closeout, and this particular one is for
20 December -- excuse me, June 30 of 2017, showing, at the top
21 there, you know, these are cash transactions. So listed
22 there: invoice number, the employee that received the money,
23 the customer name, be it cash or something else, and then the
24 invoice amount, and then the cash total.

25 MR. WELDON: Your Honor, I move for the admission of

DAN FRY DIRECT EXAMINATION BY WELDON

1 Government's Exhibit 103.

2 THE COURT: Any objection?

3 MR. DONAHOE: No objection.

4 THE COURT: 103 is admitted.

5 (Exhibit 103 was received in evidence.)

6 BY MR. WELDON:

7 Q And, Mr. Fry, can you explain the difference here between
8 a cash transaction and the "CASH" that is used in the column
9 of "Customer Name"?

10 A Sure. People come in and -- as I said, these are all
11 cash transactions and regardless of who the customer was. A
12 lot of times, because we use a lot of our software for
13 advertising and marketing -- you know, we build a big mailing
14 list and names and addresses and such. So a lot of times, we
15 will put "CASH" if we know they're just passing through the
16 dealership or we've only seen them once. If they're a repeat
17 customer, then we'll put down their name and -- so that we can
18 track their business with us and, if we've got things that
19 affect them, can identify them with marketing and things like
20 that.

21 Q Does the fact that somebody is identified as "CASH" in a
22 customer name impact the point of sale in terms of the amount
23 of cash incoming into the business?

24 A It doesn't affect whether it's cash, check, or -- I mean,
25 you'll see, if you look at enough transactions, that the

DAN FRY DIRECT EXAMINATION BY WELDON

1 customer name "CASH" is used for credit cards, debit cards,
2 gift cards, just about -- checks. You know, all of that.

3 Q And why is that, sir?

4 A Well, just, there again, there's no reason to take the
5 time to enter that stuff, particularly if they're new, if
6 they're just passing through. You know, we're right on the
7 corridor to Sturgis right there on I-90. We get a lot of
8 people, one and done. I don't think that they care that we've
9 got a sale on T-shirts on Tuesday night.

10 MR. WELDON: All right. And if we could go to the
11 next page, please?

12 MS. KIRSCHTEN: (Complied with request.)

13 BY MR. WELDON:

14 Q Then there's also "Check Transaction" and "Credit
15 Transaction." Could you explain that to the Court, please?

16 A Same thing. You know, this is a detailed listing of the
17 point of sale cash register closeout. At the top, there's the
18 checks, and you -- that's the check transactions. You can see
19 that we had, you know, one customer that gave us a \$100 check
20 as a customer named "CASH," and then the next one is the guy's
21 name, you know, that gave us \$2,400. Still call them one
22 "CASH," one -- a customer named "CASH" and check, but still a
23 check transaction.

24 If you go down to the next step, you'll see the next
25 group is credit card transactions. There, again, you can see

DAN FRY DIRECT EXAMINATION BY WELDON

1 that we use both their real names and "CASH" names just, you
2 know, either way, based upon if they're a customer we know or
3 whether we don't want to look up their number or whatever,
4 just get their money and move on to the next one.

5 Q I'm gonna show you Government's Exhibit 107. Do you
6 recognize Government's Exhibit 107, sir?

7 A I do.

8 Q What is it?

9 A Yeah, well, it's the cash register -- it's the point of
10 sale cash register closeout for August 18 of 2017.

11 MR. WELDON: I move for the admission of
12 Government's Exhibit 107, Your Honor.

13 THE COURT: Any objection?

14 MR. DONAHOE: No objection.

15 THE COURT: 107 is admitted.

16 (Exhibit 107 was received in evidence.)

17 BY MR. WELDON:

18 Q Can you explain to the Court why this was relevant for
19 your analysis, Mr. Fry?

20 A Well, as you can see there, the highlighted check
21 transactions, we're showing a Justin Johnson gave us a check
22 for \$42,000. In fact, that was a bag of cash.

23 Q And do you recall that specifically, sir?

24 A I do.

25 Q All right. And what did you notice about the check

DAN FRY DIRECT EXAMINATION BY WELDON

1 number that caught your attention?

2 A Yeah, it was, it was a falsified number, for certain.

3 Q Now there's a column there for "Emp."

4 A That would be the employee.

5 Q And what do you see as the initials there, sir?

6 A ALG, Alison Gendreau.

7 Q Okay. Now, then, let's talk about your analysis and how
8 that relates to Government's Exhibit 105, page 3.

9 A You can see there, on August 18 of 2017, we recorded
10 \$1,216.88 in cash and \$42,000 in a check, for a total of
11 43,216.88.

12 Q And did the 42,000 ultimately ever get deposited into the
13 bank?

14 A Nowhere that it became visible, no.

15 Q Now, then, are you aware of the -- and have heard the
16 recording from Ms. Gendreau related to the skimming of cash?

17 A I have.

18 MR. WELDON: Could we please put up Government's
19 Exhibit 150A?

20 BY MR. WELDON:

21 Q And is that a true and accurate depiction of
22 Ms. Gendreau, sir, the recording?

23 A Oh. Yes, it is.

24 MR. WELDON: Your Honor, I move for the admission of
25 Government's Exhibit 165A.

DAN FRY DIRECT EXAMINATION BY WELDON

1 THE COURT: Any objection?

2 MR. DONAHOE: No, Your Honor.

3 THE COURT: 165A is admitted.

4 (Exhibit 165A was received in evidence.)

5 MR. WELDON: May we publish for the Court,

6 Your Honor? This --

7 THE COURT: You may.

8 MR. WELDON: Thank you.

9 (Exhibit 165A, audio recording, started:)

10 ALLMENDINGER: *Hi.*

11 GENDREAU: *Hi.*

12 ALLMENDINGER: *I'm Deputy Allmendinger with*
13 *the sheriff's office.*

14 *I think you probably know why I'm here; is*
15 *that right? Can you tell me why I'm here?*

16 GENDREAU: *(Inaudible) -- from the business.*

17 ALLMENDINGER: *Okay. When did this start?*

18 GENDREAU: *About two years ago.*

19 ALLMENDINGER: *Okay. How much do you think*
20 *you took?*

21 GENDREAU: *I'm guessing in the \$30,000 range.*
22 *They think it's much more because there's some*
23 *inventory stuff, but I never took inventory. It*
24 *was always cash.*

25 ALLMENDINGER: *And how, how did you get the*

DAN FRY DIRECT EXAMINATION BY WELDON

1 extra money?

2 GENDREAU: Payroll, usually.

3 ALLMENDINGER: Okay. And what did you do for
4 that?

5 GENDREAU: What do you mean?

6 Sorry. My eyes are dry.

7 Just through direct deposits.

8 ALLMENDINGER: Okay.

9 GENDREAU: Yeah. Sometimes I'd skim cash,
10 but I never, like I said, I never took inventory.
11 I never took -- you know, like they -- you know,
12 the accountant asked like if I took the money to
13 pay for the bike. No, I never took the money to
14 pay for the bike. I had, you know, a little
15 inheritance when that happened. They asked if I
16 took the money and paid for land. No, I had
17 inheritance for that, and I have bank records that
18 show all that.

19 ALLMENDINGER: Okay.

20 GENDREAU: But I didn't, I didn't take a lot.
21 I stole, yes.

22 ALLMENDINGER: How long have you been --

23 (Exhibit 165A, audio recording, stopped.)

24 BY MR. WELDON:

25 Q And, Mr. Fry, is that a shorter portion of a larger

DAN FRY DIRECT EXAMINATION BY WELDON

1 recording?

2 A Yes, it is.

3 Q And that larger recording is Government's Exhibit 165?

4 A Yes, it is.

5 MR. WELDON: Your Honor, I move for the admission of
6 Government's Exhibit 165 as well.

7 THE COURT: Any objection?

8 MR. DONAHOE: No, Your Honor.

9 THE COURT: 165 is admitted.

10 (Exhibit 165 was received in evidence.)

11 BY MR. WELDON:

12 Q Now, Mr. Fry, there was a reference by Ms. Gendreau to
13 not taking any inventory. Did you hear that, sir?

14 A I did.

15 Q Did you ever find, through your analysis, Ms. Gendreau
16 taking any inventory without paying for it?

17 A Most certainly did.

18 MR. WELDON: Let's show the witness Government's
19 Exhibit 96.

20 MS. KIRSCHTEN: (Complied with request.)

21 BY MR. WELDON:

22 Q What is the Court looking at here, Mr. Fry?

23 A This is a copy of an invoice for some clothing sold to
24 Alison.

25 Q All right. And you can see the customer name; is that

DAN FRY DIRECT EXAMINATION BY WELDON

1 right, sir?

2 A I can.

3 Q And who was that?

4 A Alison L. Gendreau.

5 Q Then is there a place where the check is identified on
6 that exhibit, sir?

7 A Yes, there is.

8 I need it blown up a little bit for my eyes. Sorry.

9 MR. WELDON: Could we blow up the bottom portion,
10 please?

11 MS. KIRSCHTEN: (Complied with request.)

12 THE WITNESS: Check No. 9172.

13 BY MR. WELDON:

14 Q And 9172, was that important, then, for your analysis?

15 A Absolutely was.

16 Q What did you ultimately find, sir?

17 A Well, I found that there was no Check 9172. It was
18 recorded, but it was never deposited.

19 MR. WELDON: Okay. We'll show the witness the next
20 page, please.

21 MS. KIRSCHTEN: (Complied with request.)

22 BY MR. WELDON:

23 Q What is the Court seeing in page 2 of Government's
24 Exhibit 96?

25 A This is a copy of the invoice that was printed off at the

DAN FRY DIRECT EXAMINATION BY WELDON

1 point-of-sale software when Alison gave the check to run it.

2 Q Now how did you find this particular transaction,

3 Mr. Fry?

4 A This is just dumb luck. I stumbled onto it.

5 Q While you were conducting your analysis?

6 A I was, yes.

7 MR. WELDON: Now, then, we'll show the witness the
8 final page.

9 MS. KIRSCHTEN: (Complied with request.)

10 BY MR. WELDON:

11 Q What do you see there, sir?

12 A I see that the bank claims that they have no record of
13 Check No. 9172.

14 Q Why did that matter for your analysis?

15 A Well, because it was obvious to me that she went
16 downstairs, gave the check to Brenna, you know, basically
17 verified that she had paid for it, and then that night or the
18 next day when she was reconciling -- you know, was doing the
19 cash register closeout, she made sure the check disappeared.
20 Threw it away.

21 Q Now we'll get to this in a minute from your son, sir, but
22 could you just generally describe the control that
23 Ms. Gendreau had over the money at Harley-Davidson?

24 A Sure. Because we worked, as I said, sometimes seven days
25 a week and, you know, and didn't expect anyone to work seven

DAN FRY DIRECT EXAMINATION BY WELDON

1 days a week, we had cash bags that had \$300 in cash in it of
2 various denominations and such so they -- you know, we would,
3 we would have a clean -- we would call those a clean bag. So
4 Alison's job was, at the end of the day -- although I should
5 back up just a second.

6 At the end of the day, each manager of each department
7 would count the money in the bag and sign that sheet that says
8 the amount of money received and sign off their name on it,
9 what was in the bag. They would then slide that into a locked
10 door in her office where she would then, next morning, come
11 in, issue clean bags with the exact numbers that they needed,
12 the \$300 and such in each bag, and then count and reconcile
13 what they said was in the bag was in the bag, and then make
14 out the deposit slips and then make the deposits.

15 Q Now, then, have you done this analysis since Ms. Gendreau
16 left Harley-Davidson?

17 A Virtually every day.

18 Q And so for the cash, can you and have you been able to
19 track it?

20 A Yeah. I've, I've probably had six times when there's
21 been a discrepancy where someone has done something, you know,
22 not exactly right but it was easily explained. But the cash
23 received equals the amount of checks and cash received at the
24 point of sales for the last three and a half years.

25 Q And those numbers have matched?

DAN FRY CROSS-EXAMINATION BY DONAHOE

1 A Matched.

2 Q What's the only difference since those numbers have
3 matched?

4 A The only difference is Alison hasn't been there.

5 MR. WELDON: Your Honor, I have no further questions
6 at this time. Thank you.

7 THE COURT: All right.

8 Mr. Donahoe?

9 MR. DONAHOE: Just a couple.

10 CROSS-EXAMINATION

11 BY MR. DONAHOE:

12 Q Sir, were you in the process of doing this kind of
13 analysis day to day in real time? Do you understand my
14 question?

15 A Was I in the process of doing that previous to Alison
16 leaving?

17 Q Right.

18 A No.

19 Q Right. So what you just described, just that little
20 piece, that last piece, you've been doing that since, and you
21 said you had six occasions where you had some kind of
22 discrepancy and it was easily explainable.

23 A Correct.

24 Q You were not doing that when Alison was the bookkeeper.

25 A Correct.

DAN FRY CROSS-EXAMINATION BY DONAHOE

1 Q Okay. Can you tell me what level of involvement you had
2 in the business during the time that Alison was the
3 bookkeeper?

4 A Very little.

5 Q Were you there day to day?

6 A No, I was not.

7 Q Okay. Did you know exactly instructions that your son
8 may have been giving to her?

9 A No, I do not.

10 MR. DONAHOE: Okay. I don't have anything else.
11 Thanks.

12 THE COURT: Any redirect, Mr. Weldon?

13 MR. WELDON: No, Your Honor.

14 One administrative matter: I move for the admission
15 of Government's Exhibit 96.

16 THE COURT: Any objection?

17 MR. DONAHOE: No, Your Honor.

18 THE COURT: Exhibit 96 is admitted.

19 (Exhibit 96 was received in evidence.)

20 THE COURT: May Mr. Fry be excused?

21 MR. WELDON: Yes, please, Your Honor.

22 THE COURT: Any objection, Mr. Donahoe?

23 MR. DONAHOE: No.

24 THE COURT: You're excused.

25 Mr. Weldon.

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 MR. WELDON: Thank you, Your Honor.

2 The United States calls Josh Fry.

3 (Oath administered to the witness.)

4 THE COURT: Mr. Fry, if you would sit in the same
5 place as your father?

6 THE WITNESS: (Complied with request.)

7 THE COURT: And speak directly into the microphone,
8 please.

9 WHEREUPON,

10 MR. JOSHUA FRY,
11 called for examination by counsel for plaintiff, after having
12 been first duly sworn to testify the truth, the whole truth,
13 and nothing but the truth, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WELDON:

16 Q Sir, would you please introduce yourself to the Court and
17 spell your last name for the record?

18 A Joshua Fry, F-r-y.

19 Q What do you do for a living, sir?

20 A I work at Yellowstone Harley. One of the owners there.

21 Q And can you explain to the Court why May 9 of 2019 is a
22 significant day at Harley-Davidson?

23 A Yeah. I mean, it's significant in the fact that, yeah,
24 kind of the world came crumbling down on us pretty hard. It
25 was the last day that -- it was the day that Alison admitted

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 to the theft and kind of had to start picking up the pieces.
2 It kind of got much more involved and, you know, very scary
3 after that, just trying to kind of keep the wheels on the bus.

4 Q Can you explain to the Court what led up to the ultimate
5 admission of Ms. Gendreau to the Harley-Davidson team?

6 A Yeah. Kind of, you know, as my father already went
7 through, various things kind of started alluding to that, you
8 know, there was something going on. Kyle, our -- that worked
9 at our -- at the accounting firm, he was the one that
10 ultimately found a large discrepancy and, you know, the books
11 were not working out for us to proceed with closing our books
12 for that year for accounting purposes.

13 I still remember vividly I defended her kind of to a
14 fault. I, I could not believe that someone that close to us
15 could be doing something like that, and I, I fought against
16 it, you know, pretty, pretty, pretty hard until the end there.
17 Once she admitted to it on the 9th, it was, it was -- you
18 know, with having the forensic accountants there, it got
19 pretty tense there, and then she did admit to it, so.

20 Q What did she admit to you?

21 A Just like the recording we heard there, she admitted to,
22 you know, the different -- the various forms of theft. As we
23 dug into it, it -- it's kind of all forms. It was not just,
24 you know, one, as we've seen. It was payroll. It was cash.
25 It was credit card. Merchandise that we found at the end

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 there. And to be honest with you, I think that if it was --
2 if we dove in very, very hard, it could be even much worse
3 than what it really is, what we're showing.

4 Q Now, then, before we get into some of the job duties of
5 Ms. Gendreau, was there anything -- a collateral consequence
6 that Harley-Davidson had as a result of Ms. Gendreau failing
7 to pay the IRS?

8 A Yeah. The theft is a -- obviously very serious and a
9 very large number. Quite a bit worse than that was as we dove
10 into the theft, we found that we had -- she had not been
11 paying any of our federal withholding taxes against our
12 employees, their pay. So that number was quite astronomical.
13 We found out within a week of her leaving that we owed almost
14 \$800,000 to the federal government for payroll taxes.

15 That was --

16 THE COURT: Let me, let me stop you there, Mr. Fry.

17 THE WITNESS: Yes, sir.

18 THE COURT: She was -- on the employees' paychecks,
19 withholding was being made, but she was not then paying it to
20 the Internal Revenue Service?

21 THE WITNESS: Yes, sir.

22 THE COURT: Okay.

23 THE WITNESS: Yep.

24 THE COURT: Thank you.

25 THE WITNESS: So as we found out, we found that that

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 number was roughly \$8,000 -- \$800,000, excuse me. We
2 started -- as we approached the federal government, the
3 penalties and fees, you pretty much -- you typically use a
4 multiplier of about 3, so we were upwards of \$2.4 million into
5 the federal government.

6 So from there, it got very, very scary very quick.
7 It -- we had to hire a number of different people to try to
8 help us. We are still -- some of that stuff is still
9 overhanging our head right now.

10 As we were fighting that, COVID then hit, so we have
11 not been excused of any of the penalties and fees of all of
12 it. We paid the \$800,000.

13 We, as my father alluded to earlier, we -- as we
14 financed our motorcycles, as we paid for them, so the next
15 day, what I did is I re-floored all those bikes. Got the
16 money back from Harley. We maxed out our line of credit for a
17 total of \$800,000, so I was totally up against the red line
18 there. Paid off the federal government immediately because we
19 wanted to make sure that our employees were safe. That was,
20 that was very concerning. We had to square that up no matter
21 what. So that was a very large consequence that we did have
22 to deal with immediately.

23 BY MR. WELDON:

24 Q Now, Mr. Fry, the failure to pay payroll tax, was that in
25 part used to cover up the loss that was occurring from the

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 theft?

2 A It was, because, you know, we did -- our books
3 essentially represented that we were, we were clean on all
4 that. So as we dug into this, we found, at the bottom of a
5 file cabinet, we found a warning that, you know, we were not
6 paying it. And so we found that in a box that she had been
7 warned. And I don't know if the rest of them were destroyed
8 or what, but that went on for, you know, almost five years
9 there.

10 Q And when you say "she," you're referring to Ms. Gendreau?

11 A Yes, sir.

12 Q Did you ever receive those notices during that time
13 period?

14 A I did not.

15 Q If you had received them, would you have paid the taxes?

16 A Yes. I would have had a heart attack and -- yeah, we
17 would have paid them immediately, like we did.

18 Q Let's talk -- I think that's a good segue into the role
19 of Ms. Gendreau at Harley-Davidson.

20 Could you outline some of her duties that she had while
21 she was working there?

22 A Yeah. Some of her duties were -- pretty much everything.
23 We are a, we're a very small shop. It's a family-owned
24 business. I've been doing it for 23 years now. And I had all
25 my faith in her. She essentially was -- she did have control

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 over everything. There's been a lot of procedures put into
2 place now that this will never happen again, I hope, but, yes,
3 she -- you know, we're a small shop. We all were pretty much
4 family. Everybody stuck together through the good times and
5 bad.

6 She had control over -- you know, she signed on the
7 accounts with myself. The payroll account only needed one
8 signature at the time, and so it was either herself, myself,
9 or my father. And so the other checks did require two
10 signatures, so that was an issue there. I was not picking the
11 mail up back then, so if there were any type of -- you know,
12 anything come in the mail, I never would see that if it was
13 destroyed, so.

14 MR. WELDON: Your Honor, may I approach the witness
15 briefly, please?

16 THE COURT: Yes.

17 MR. WELDON: Thank you. (Handing water.)

18 THE WITNESS: Thank you.

19 MR. WELDON: Absolutely.

20 BY MR. WELDON:

21 Q You mentioned dual signatures versus one signature and as
22 it relates to the payroll. Could you explain why that's
23 significant to Harley-Davidson?

24 A Well, just in the fact that, you know, a dual signature
25 requires both of us to see that check, and then I could

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 question what was going in and out of the, of the building.
2 That payroll account, as she admits to on, you know, that
3 video -- that audio file only required one signature. So that
4 was a very easy place to, you know, to siphon money out of the
5 business, both, you know, wirely -- you know, wire fraud and
6 writing checks, which we, we have.

7 Q Okay. Did you ever review the documents that
8 Ms. Gendreau was doing as it relates to payroll or any of the
9 accounting information?

10 A I did not. You know, as you look back on it, I, I
11 definitely see my errors in a lot of this, and I'll take full
12 responsibility for that.

13 This, the business, once again I would say, you know, it
14 was small at the time, but it's, it's up -- at the same time,
15 it's, it's large. We would do -- we were probably doing
16 anywhere from 7 to \$8 million worth of business a year, and
17 for me to handle absolutely everything, it's a -- it was a
18 large ask. So I do; I put a lot of faith in my employees.

19 I am not the type of owner that is not there. I am there
20 absolutely almost every hour we are open of every day. Like I
21 stated, I've done it for 23 years. It's an incredible passion
22 of mine. I absolutely love the business and the product and
23 the people that go with it. And so I do; I, I still put faith
24 in people to this day, that they are good, and it, it takes a
25 number of us to run an operation that big.

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 Q Did Ms. Gendreau have the ability to pay bills as she saw
2 fit, Mr. Fry?

3 A She did.

4 Q Can you explain that to the Court, please?

5 A Okay. So as the bills come in, you know, daily, Alison
6 would typically wait until around the 15th. She would then
7 collect the bills. She would process all the checks on a
8 standard bill. She would bring those to me. She would sign
9 it, and I would sign it. The bills would go out, and they
10 would be paid, so.

11 Q Now one question I asked you is whether or not you were
12 reviewing it. Did anybody else review Ms. Gendreau's work
13 while she was at Harley-Davidson?

14 A No. She did not. No. We would review reports at the
15 end of the month, but not, not daily transactions by any
16 means. Nope.

17 Q What about the transfer of money? Could Ms. Gendreau
18 transfer money for Harley-Davidson?

19 A She could, yes, because we had, especially at the time --
20 once again, we've changed a number of things, but at the time
21 we had various accounts set up, and she could -- she pretty
22 much had free rein to move the money around as she needed, you
23 know, as she saw fit.

24 Q Now let's talk -- you mentioned that this is a close,
25 family-run business. Could you explain the relationship that

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 you had with your employees at that time, as well as with
2 Ms. Gendreau, and how close she was to the Harley-Davidson
3 family?

4 A Yeah. I mean, it is. Especially back then, a lot of us
5 had worked together for many years, and it just -- you know,
6 it's -- the motorcycle culture, it truly is a family. Even
7 when I say "family," I look at -- the majority of our
8 customers are, are tied to us, so a lot of us are very close.
9 A lot of the employees would hang out together.

10 Alison had a number of friends that worked there, you
11 know, and they would, they would hang out after work, you
12 know, certain times, whether it be birthdays or certain
13 parties. So, yeah, it's very much. We all looked out for
14 each other, and it was, it was a family, family operation.
15 Still is to this day.

16 Q You've heard -- you've used some terms before, and your
17 father did as well, of cash analysis versus a cash
18 transaction. Can you explain that to the Court and how it
19 works in practice at Harley-Davidson?

20 A Yes. So, yeah, I deal with it every day. Still to this
21 day, I work at the tills, cash regis- -- you know, cashing
22 people out.

23 So a prime example is right now this is the middle of
24 Sturgis bike week in Sturgis, South Dakota, so we have, you
25 know, hundreds of people that come through the dealership. On

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 average, we do about 150 transactions a day right now. And
2 when those folks come in, like my father stated, if it's a
3 local guy that we know, we will put their name in there, and
4 that transaction will be tied to that customer for the history
5 of their business with us.

6 If it's a, if it's a standard customer passing through,
7 they do -- it is both a Talon and a Lightspeed function that a
8 very generic name for a customer is Cash. It just happens to
9 be that. It's just a -- and like he stated, it has nothing to
10 do with how they pay for the products they're buying from us.
11 It's just that is the name that is given to a generic customer
12 that comes in the dealership.

13 MR. WELDON: Let's show the Court, then,
14 Government's Exhibit 150, please.

15 MS. KIRSCHTEN: (Complied with request.)

16 BY MR. WELDON:

17 Q Did Ms. Gendreau have a credit card while working for
18 Harley-Davidson, Mr. Fry?

19 A She did.

20 Q And have you had an opportunity to review these
21 transactions and what occurred with Ms. Gendreau's credit
22 card?

23 A I have, yes.

24 Q And these identified on Government's Exhibit 150 would be
25 the unauthorized transactions?

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 A They are. They're the ones that, without a doubt, we, we
2 have no question. There was a number of them, but these are
3 the ones that we feel are without a doubt.

4 Q Let's talk, then, about the Open Range Restaurant of \$394
5 on September 14 of 2016. Could you just generally describe
6 whether or not that was authorized, for the Court?

7 A It was not authorized, no, sir.

8 Q And what was your understanding of what the purpose
9 behind that \$394 was?

10 A I've been told that it was for a 40th birthday party for
11 one of our employees.

12 Q Did you pay for it?

13 A I obviously did, but I did not personally, no. It came
14 out of our bank credit card.

15 Q And would you have authorized that, sir?

16 A If I would have been there, yes, I would have. If I
17 would have been the one at the party, for sure. I did not
18 authorize that credit card purchase.

19 Q Then what about the Hertz rental car, the 10/16 of 2016?

20 A I did not.

21 Q And then the remaining flights and hotel rooms and rental
22 cars?

23 A I did not.

24 Q What about the Wendy's Belgrade? It's \$12.68, but that
25 one in particular, Mr. Fry, seems to bother you. Can you

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 explain that to the Court, please?

2 A Well, we thought it was just -- it was interesting. As
3 we were going through all this, as we were investigating the
4 possible theft, she used the credit card, you know, to buy a
5 personal meal that morning or that day. And it was -- to me,
6 it just felt like it was a slap in the face. I know that
7 she's -- you know, I believe she told us that it was an
8 accident. She grabbed the wrong card. But, yeah, that one
9 was pretty interesting.

10 Q Still bothers you?

11 A Yeah. It's a little -- yeah. It's ridiculous.

12 Q All right. Now, then, one thing I do want to show you is
13 on, for example, January 28 of 2019, the Hotels.com purchase.
14 Do you see that there, sir?

15 A I do.

16 Q All right. And you've already identified that you did
17 not authorize that particular transaction?

18 A I did not.

19 Q Now one thing the Court should be aware of is that
20 Harley-Davidson would send individuals for training; is that
21 right, sir?

22 A We do, yep. We send, we send a lot of our employees out
23 for training. Mainly the mechanics would be the majority of
24 them. They go out for training, but there are other managers
25 that will go as well.

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 MR. WELDON: And then if we show the next page to
2 the Court, please?

3 MS. KIRSCHTEN: (Complied with request.)

4 BY MR. WELDON:

5 Q That is a rather small chart but of the authorized
6 trainings that occurred for Harley-Davidson?

7 A Yes. These are all the corporate. So we got all the
8 corporate records of when we sent people for training.

9 Q All right. And do any of those match up, then, with
10 Government's Exhibit 150, sir?

11 A They do not.

12 Q Now I'm gonna show you, then -- we mentioned that
13 January 28, 2019 day. I'm gonna show you Government's
14 Exhibit 82, page 6.

15 THE CLERK: Did we admit 150?

16 MR. WELDON: We have not.

17 Your Honor, I move for the admission of Government's
18 Exhibit 150.

19 THE COURT: Any objection?

20 MR. DONAHOE: No.

21 THE COURT: 150 is admitted.

22 (Exhibit 150 was received in evidence.)

23 BY MR. WELDON:

24 Q Now do you see any transactions that are occurring in
25 Arizona during February of 2019, sir?

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 A Yes, I do. Yep.

2 Q And what do you see, specifically?

3 If we could blow that up for the witness, please? Down a
4 little more. Yep.

5 MS. KIRSCHTEN: (Complied with request.)

6 THE WITNESS: Yeah. So in February, it looks like,
7 the Bisbee Breakfast in Tucson, Arizona.

8 BY MR. WELDON:

9 Q And that would have been the same time period as the
10 transaction on Ms. Gendreau's card?

11 A Yes.

12 THE COURT: Did she have both a company credit card
13 and debit card?

14 THE WITNESS: No, sir. We will only have a credit
15 card.

16 THE COURT: A credit card.

17 THE WITNESS: Yes, sir.

18 THE COURT: Okay. And she had a company credit
19 card.

20 THE WITNESS: She had a company credit card, yes.

21 BY MR. WELDON:

22 Q Did your business almost fail as a result of this,
23 Mr. Fry?

24 A It did, yes. As I was stating, the theft was one thing,
25 and it was, it was bad, but the fact that we had to come up

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 with that \$800,000 overnight was, was gigantic. And then
2 still to this day that looms over us is the 2.4 million that
3 is essentially a -- the penalties and liabilities -- the
4 penalties that we have from the federal government for not
5 paying those taxes.

6 So that, you know, we maxed out everything we had. If,
7 if we couldn't have done anything, we were up against it. I
8 mean, it would have, it would have been, you know, trying to
9 sell the building at that point and, you know, just try to,
10 try to get square with the government at that point.

11 Q Were you worried about your employees at all and any
12 impacts as a result of the payroll tax, for example?

13 A Well, 100 percent. We had -- we have a number of people.
14 We had two different folks that were getting ready to retire,
15 and that, that affected them. I mean, we found that we didn't
16 have retirement funds that were being funded. We had, we had
17 all kinds of stuff where, you know, it affected, it affected
18 our employees. And once again, this was a family.

19 What's really hard is, you know, these people were very
20 close to Alison. One of the, one of the women that was
21 retiring was a dear friend of hers. And all this was
22 affected, and we had to square up on everything immediately.
23 And we did. It was, it was countless hours for countless
24 weeks with more friends and family and people to come to our
25 aid to just help us dig through this.

JOSHUA FRY DIRECT EXAMINATION BY WELDON

1 It was. It was, it was very difficult.

2 Q Let's talk about the \$42,000 in cash that you received
3 for a Harley. Do you remember that transaction, sir?

4 A I do, vividly. Yep.

5 MR. WELDON: Could we show the witness, please,
6 Government's Exhibit 107?

7 MS. KIRSCHTEN: (Complied with request.)

8 BY MR. WELDON:

9 Q Can you tell the Court what you recall about this
10 particular cash transaction?

11 A I do. So Justin Johnson was a customer. He lived in
12 Denver, Colorado, and he had come through the dealership a
13 number of weeks before and had saw some of the bikes we were
14 building, and he was very interested in us having a -- having
15 us build one for him.

16 So we kind of structured a deal on a bike we were
17 building. And he happened -- my wife happened to be racing
18 down in, in Denver right around that time. So we finished the
19 bike. I fully expected he was gonna pay with a check. I --
20 his -- I know that his -- the only guys I've ever been around,
21 his two friends, that's how they always paid. It's rare that
22 a guy will pay for an entire bike in cash. It's, it's not
23 rare in the fact that it never happens, because it has
24 happened, for sure.

25 But when I, when I got there, he paid in cash. I did not

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1 have him fill out a form. That is, you know, an error on my
2 part. It was over the \$10,000.

3 And so I do remember bringing that bag of cash back.
4 Alison, at that point, was gonna put it into the bank. And
5 even, even though we don't see that there's a large \$42,000,
6 you know, deposit in the bank, if she was slowly bringing it
7 into the bank, it still -- none of it ever squared up.

8 So that was the, the issue with that \$42,000, is none of
9 it ever made it to the bank.

10 Q Was there a check number associated with that \$42,000 in
11 cash?

12 A No, there was not, because it was cash.

13 Q And then the employee, who's identified as the employee
14 that put that into the point-of-sale system?

15 A It was Alison. I, I gave her the, the bag of cash.

16 Q Mr. Fry, did you -- did Ms. Gendreau, on May 9 of 2019,
17 ever tell you that she would repay you the money back?

18 A She, she stated, and I don't know if it was ever on
19 record. She stated -- I remember vividly she, as she was
20 walking out, she says, "We'll get you paid back."

21 Q Okay.

22 A At that time, I think she has no clue what the number
23 was, but she did say that, yes, sir.

24 Q Did she tell you that she had \$40,000 in her bank account
25 that she could pay you?

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1 A No, sir.

2 Q Have you ever received any money from her after May 9 or
3 anytime as a result of this?

4 A No, sir.

5 MR. WELDON: Your Honor, I don't want to deviate too
6 much, but Mr. Fry was gonna make a victim impact statement to
7 the Court as well. We can either do that after, or I can have
8 him provide his general comments to the Court.

9 THE COURT: I think this -- we might as well do it
10 now while he's on the stand --

11 MR. WELDON: Thank you, Your Honor.

12 THE COURT: -- so he doesn't have to do it again.

13 MR. WELDON: Thank you, Your Honor.

14 Mr. Fry.

15 THE WITNESS: Yeah. I just wanted to say thank you
16 for your time. It's nice that after three and a half years
17 we're finally to this point.

18 It is -- this is all I've ever wanted to do. I've
19 been very fortunate in life that I kind of had a, I had a
20 passion for a product. I don't know why. I didn't grow up
21 around Harley-Davidson, but I always loved them. And so I was
22 fortunate enough, at 19 years old, to start at this dealership
23 as a wash boy. There was -- I was their fourth employee. We
24 were very little at the time. And I've just -- I loved
25 everything about it. We -- I kind of worked through, I worked

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1 through the whole dealership. I went from a wash boy to
2 mechanicking, to working in parts, to working in sales,
3 vehicle sales. And so just -- I've been very blessed.

4 When I was 26 years old, we purchased the dealership
5 from the previous owner. It took, it took -- there were six
6 of us. There was five other investors and myself. I didn't
7 have a dime, so there were five men that really believed in
8 me, and I feel very blessed and honored that they would, they
9 would do that for me. So -- with my father being one of them
10 and my father-in-law being another one of my partners. So,
11 once again, it is still this family affair.

12 We pushed hard for about ten years before I was able
13 to buy out the remaining partners. My father and I then
14 became sole owners of Yellowstone Harley, both 51 percent and
15 49 percent. Like I told you earlier, I'm actively involved in
16 absolutely every aspect of the business.

17 I put a lot of faith in people. I will not let
18 this, you know, break that faith. I do not want to be a
19 grumpy old man and not trusting people the rest of my life.
20 So no matter what the verdict is, I, you know, I'm gonna keep
21 forging on.

22 It was, it was very scary there. It still is to
23 this day. We're not -- I know we're not past -- we're not out
24 of the woods completely when it comes to the, when it comes to
25 the tax issue, the tax liability that we may possibly be

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1 facing. And so we're gonna keep, you know, we're gonna keep
2 fighting, fighting the fight. Like we -- we talk about it a
3 lot: She may have taken -- she took the egg, but she didn't
4 take the goose. So we'll, we'll keep striving to do the best
5 we can, and we learned a lot from it.

6 BY MR. WELDON:

7 Q Mr. Fry, just to make sure the Court understands as well,
8 you mentioned you have a passion for Harley-Davidson and that
9 you, in your mid-20s, you purchased Harley-Davidson with other
10 individuals. When you discovered the fraud, what did you
11 think you were ultimately gonna have to do?

12 A Well, I mean, it was -- to protect the employees, the
13 biggest -- you know, what I, what I was gonna do, my father,
14 who -- you know, my father came from nothing. And, you know,
15 he's, he's fought a hard fight, and he was getting to the end
16 of his career. He was just retiring. And the last thing I
17 would do would be to ask him to bail me out of this, this
18 problem.

19 And so we would -- you know, if I needed to, you know, we
20 would have sold the building, and we would have done what I've
21 taken. You know, I'm, I'm about as a by-the-book kind of guy
22 as it comes. This, this \$42,000 with no form filling it out,
23 that's probably about the worst mistake I've made in my career
24 so far, and I can see it's biting me right now. But, you
25 know, we -- you know, we'll, we'll do what it takes. You

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1 know, we fought hard for it, and we'll keep fighting hard for
2 it.

3 Q How has this impacted your dad, who is your business
4 partner?

5 A Well, I mean, it's, it's, it's very hard. He's been --
6 you know, he supposedly retired a couple years ago, but he
7 still -- he works every day. He works very hard. I wouldn't
8 be here without him.

9 MR. WELDON: I have no further questions,
10 Your Honor. Thank you.

11 THE COURT: I'd like to follow up on some of your
12 testimony. I want to go back to the payroll deductions and
13 the nonpayment of payroll taxes. And I think I understood
14 your testimony, but why do you believe that the payroll taxes
15 were not being paid to the IRS?

16 THE WITNESS: Well, they weren't, bec- -- I mean,
17 they, they weren't, so --

18 THE COURT: We know they weren't. That's for sure.

19 THE WITNESS: We -- yes, sir.

20 THE COURT: Yeah.

21 THE WITNESS: So we found, as we dug through years
22 and years of files, we found this warning. And when we
23 started calling, we were behind both on the Montana, the
24 Montana taxes and the federal, which was the very scary one,
25 all five years.

1 THE COURT: Okay. And so maybe my question wasn't
2 clear. You suggested in your testimony, and then Mr. Weldon
3 asked you another question, that by not paying the payroll
4 taxes, that made the profitability or the income of the
5 business greater.

6 THE WITNESS: Well, it would show, yes, it would
7 show more money in the bank.

8 THE COURT: More money in the bank.

9 THE WITNESS: Um-hmm.

10 THE COURT: And who was responsible for paying the
11 payroll taxes?

12 THE WITNESS: Alison.

13 THE COURT: Okay.

14 THE WITNESS: Yeah.

15 THE COURT: Does that trigger any further questions,
16 Mr. Weldon?

17 MR. WELDON: No, Your Honor. Thank you.

18 THE COURT: All right.

19 Mr. Donahoe, cross? Do you wish to cross-examine?

20 MR. DONAHOE: I do not.

21 THE COURT: You may proceed.

22 MR. DONAHOE: Thank you. No, I do not.

23 THE COURT: Oh, you do not.

24 MR. DONAHOE: I have no questions.

25 THE COURT: Okay.

1 All right, Mr. Fry. You are excused. You can
2 return to the gallery.

3 Mr. Weldon, any additional testimony?

4 MR. WELDON: Your Honor, this concludes the United
5 States' presentation.

6 THE COURT: What's the final item there, "Accounting
7 Firm and Talon"? Is that expenses that were incurred in
8 relation to discovering this fraud?

9 MR. WELDON: That is correct, Your Honor, and they
10 provided an affidavit with the Court with the PSR for the
11 Court's --

12 THE COURT: Right. And are those recoverable? Do
13 you have any legal authority that that's a recoverable item of
14 restitution?

15 MR. WELDON: Your Honor, I can look at the statute.
16 Generally speaking, investigative costs would not be
17 covered --

18 THE COURT: Right.

19 MR. WELDON: -- but, but if -- this one is different
20 in that it was associated with private transactions for the
21 business. So, in other words, this is an investigative cost
22 of the United States associated with the investigation. These
23 are private costs that are associated with their CPAs to
24 investigate and uncover what occurred.

25 THE COURT: Okay. I understand that. What's the

1 Talon part of this? And I apologize; let me look, let me look
2 back at the affidavit. That would probably help me.

3 MR. DONAHOE: Judge, I do have -- Ms. Gendreau does
4 want to testify.

5 THE COURT: Oh, I know.

6 MR. DONAHOE: Oh, okay.

7 THE COURT: Let me, let me look at that.

8 Okay. I'm looking at the affidavit signed by -- I
9 can't tell which of the Frys -- Josh Fry. And in that
10 affidavit, it says, "We spent \$35,000 with our accounting firm
11 to help with the theft as well as \$8,000 with Talon to help
12 clean up our point of sale software."

13 Okay. Do you have any legal authority that that is
14 a recoverable cost?

15 MR. WELDON: Your Honor, the only legal authority --
16 and I will tell the Court, if you would prefer not to go down
17 that road, then I would completely understand that. The legal
18 authority, though, would be 3663A.

19 THE COURT: Hold on.

20 (Pause.)

21 THE COURT: Okay. I've got it.

22 MR. WELDON: And Subsection (b).

23 THE COURT: Yeah.

24 MR. WELDON: Subsection (4).

25 THE COURT: "[I]n any case, reimburse the victim for

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1 lost income and necessary child care, transportation, and
2 other expenses incurred during participation in the
3 investigation or prosecution of the offense or attendance at
4 proceedings related to the offense."

5 (Pause.)

6 THE COURT: Okay.

7 MR. WELDON: Thank you, Your Honor.

8 THE COURT: Mr. Donahoe.

9 MR. DONAHOE: Ms. Gendreau.

10 THE COURT: If you would come forward? And please
11 be sworn.

12 (Oath administered to the defendant.)

13 WHEREUPON,

14 MS. ALISON LEE GENDREAU,
15 called for examination by counsel for defendant, after having
16 been first duly sworn to testify the truth, the whole truth,
17 and nothing but the truth, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. DONAHOE:

20 Q Ms. Gendreau, in preparation for sentencing, do you
21 recall that a series of documents were sent to you so that you
22 could review them?

23 A I do.

24 Q All right. And some of them were in summary form. They
25 were charts, things like we've been looking at today, correct?

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 A That's correct.

2 Q All right. And there were certain totals associated with
3 various categories, right?

4 A Yes.

5 Q And they were credit card?

6 A Yes.

7 Q Cash?

8 A Yes.

9 Q And what was the third category?

10 A Payroll?

11 Q Payroll.

12 A Yes.

13 Q Now when you discussed with the sheriff or the deputy on
14 the tape that the Court heard, you were talking about the
15 payroll?

16 A Yes.

17 Q And so it's your testimony pretty much that the money
18 that you took was associated with the payroll?

19 A Yes.

20 Q And you have pled guilty to all five counts of this
21 indictment without a plea agreement?

22 A I have.

23 Q And we added up the totals in the boxes. Do you remember
24 the indictment and the numbers that were associated with those
25 boxes?

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1 A Yes.

2 Q And it was somewhere around 13, \$14,000, right?

3 A Yes.

4 Q All right. Now since that time, just insofar as the
5 payroll is concerned, you've been able to look at the
6 government's proffer, and you've disputed some of those things
7 and agreed with some of those things, right?

8 A Yes.

9 Q All right. Are you prepared today to agree to the
10 \$82,000 figure that's in the chart that discusses the payroll?

11 A I will.

12 Q Okay. Do you think it's high?

13 A Yes.

14 Q But, nevertheless --

15 A Yes.

16 Q -- you admit that?

17 A I have admitted that, and I have always admitted that.

18 Q All right. Now insofar as the credit card account is
19 concerned --

20 THE COURT: Mr. Donahoe, I don't mean to be overly
21 precise here, but the number is not 82,000. It's \$80,589.23.

22 MR. DONAHOE: Okay. Thank you.

23 THE COURT: Is that what she's admitting to?

24 MR. DONAHOE: That's what she's admitting to --

25 THE COURT: All right.

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1 MR. DONAHOE: -- to that number.

2 THE COURT: Okay.

3 BY MR. DONAHOE:

4 Q All right. Now the credit card fraud, you had the
5 breakdown of that as well?

6 A Yes.

7 Q Do you remember, just talking in round numbers, what that
8 started out to be?

9 A I believe it started out at 15,000-ish.

10 Q And you reviewed it, and we went -- you looked at the
11 documents that you had requested and that had been sent to
12 you. And we went back and forth with the government --

13 A Yes.

14 Q -- and the number came down.

15 A Yes.

16 Q And today, we're in the \$2,000 area; is that correct?

17 A Yes.

18 Q All right. Now insofar as the cash is concerned, I just
19 want to talk to you about your duties at the Yellowstone
20 dealership. Can you tell me: What was your position?

21 A I was the accounting manager.

22 Q You were the accounting --

23 A Manager.

24 Q All right. And when did you start your employment there?

25 A I believe I started in 2014.

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 Q Okay. And who was your day-to-day boss?

2 A Initially my -- well, it was always Josh, and initially I
3 worked underneath another accounting manager.

4 Q And who was that person?

5 A That -- her name was Robin.

6 Q All right. And over time, did you assume more duties day
7 to day?

8 A Yes, and then she left the company to work elsewhere.

9 MR. DONAHOE: All right. Now can I see
10 Government's 106?

11 MS. KIRSCHTEN: (Complied with request.)

12 BY MR. DONAHOE:

13 Q Now can you see there in the cash statement, the lower
14 box that has all those numbers on the left there?

15 A (No response.)

16 Q "Reduction for Invoices"?

17 A Yes.

18 Q All right. Now when we talk about these invoices, who
19 reviewed those invoices?

20 A When we were going through the --

21 Q Did you conduct the review on these invoices?

22 A I did.

23 Q All right.

24 A Yes.

25 Q So the stack of documents that we had requested and were

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 turned over, you methodically went through --

2 A Yes.

3 Q -- and came up with this figure?

4 A Yes.

5 Q And that represents something that's being deducted here,
6 correct?

7 A Yes.

8 Q Now what do these numbers -- what does this number
9 represent, this minus \$22,233.94?

10 A Those were, those were accounts receivable that I
11 cashiered as cash instead of expensing to the departments.

12 Q All right. So explain that to me. What does that mean,
13 exactly?

14 A So we had internal charge accounts like for the different
15 departments to charge their expenses to, and we put it into
16 basically an accounts receivable account. And then at the end
17 of the month, I would expense it out to charge -- to be able
18 to charge and track the various expenses for the departments.

19 Q So it's cash that wasn't cash?

20 A Correct.

21 Q So accounts receivable were recorded as cash.

22 A Correct.

23 Q And that's basically what your complaint was there, and
24 you identified these invoices that added up to this total?

25 A Yes.

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 Q Now is it your position that there are more of these?

2 A Yes.

3 Q Why would you do an accounting system like this?

4 A Why would, why would I have --

5 Q -- done this this way? Why would you count accounts
6 receivable as cash?

7 A I would have done that to clear out the accounts
8 receivable for the month.

9 Q All right. Well, why would you do it? Is it an accepted
10 accounting practice to do something like that?

11 A No.

12 Q Did you have someone tell you to do that?

13 A No. I just did it.

14 Q All right. So tell me why the cash number is not
15 correct.

16 A Because there were other things, other transactions that
17 I created and generated in order to, in order to actually hide
18 things from Harley, and most of them had to do with the
19 performance upgrades.

20 MR. DONAHOE: Okay. Madam Clerk, could I see
21 Defense Exhibit 500, the last page, page 4?

22 THE CLERK: (Complied with request.)

23 MR. DONAHOE: Your Honor, I move the admission of
24 Exhibit 500.

25 THE COURT: Any objection?

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 MR. WELDON: No objection, Your Honor.

2 THE COURT: Exhibit 500 is admitted.

3 (Exhibit 500 was received in evidence.)

4 BY MR. DONAHOE:

5 Q Now you see that last page there, Alison --

6 A Yes.

7 Q -- and the total figure of \$21,339.45?

8 A Yes.

9 Q All right. It's basically the same set of questions.

10 Are these performance upgrades of a different stripe but sort
11 of the same as the accounts receivable?

12 A Well, they were for customers, and so they wouldn't have
13 been put on account. But I would have created a transaction
14 to basically cash out the invoice for the work done.

15 Q All right. And why would you do this?

16 A I did that because, at the time, when we were doing
17 performance upgrades, the Talon software was able to upload
18 our service records, and our service records would have in
19 there that we did performance upgrades that would have voided
20 powertrain warranties on the motorcycles.

21 Q All right. So -- but my question is: Are these of a
22 similar nature, that they would be recorded as cash?

23 A Yes.

24 Q All right. And you didn't receive any credit in the
25 government's calculation for these, correct?

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 A Correct. Those were all transferred from a service
2 invoice to an over-the-counter invoice so that they would not
3 be attached to the motorcycles, and then I cashiered them as
4 cash.

5 Q And why would you want to do that?

6 A Why would I not want to attach them to the motorcycles?

7 Q No. Why would you want to do this?

8 A It was --

9 Q What do the performance upgrades have to do with
10 cashiering them as cash?

11 A They needed to be cashed out of the system, and we
12 couldn't cashier them through service. Some of these units
13 had already been paid for. They had been financed or
14 purchased with a check or purchased with cash, and so there
15 was no other way that I could account for completing the
16 transaction in Talon unless I created a second transaction and
17 cashiered it as cash.

18 Q So by your lights, these figures here inflate the cash
19 going through the business, but there's really no cash?

20 A Correct, yes.

21 Q All right. And did anybody tell you to do this this way?

22 A I was told to do it this way.

23 Q And why were you told to do it that way?

24 A I was told to do it this way so it wouldn't report back
25 to Talon or Harley or be attached to the motorcycles.

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 Q All right. So they wanted to sell the performance
2 upgrade but maintain the warranty?

3 A Yes.

4 Q That was the goal?

5 A Yes.

6 Q And these figures here would suggest that more cash was
7 taken in than actually received.

8 A Yes.

9 Q Okay. Is it your position that there are more of these
10 in the system?

11 A Yes.

12 Q And insofar as Government's Exhibit 106 is concerned --
13 can I see that again?

14 MS. KIRSCHTEN: (Complied with request.)

15 BY MR. DONAHOE:

16 Q Was there any way, up on the top there, Alison,
17 Exhibit 100, looking across, that you could check the
18 invoices?

19 A No.

20 Q Why?

21 A Because it was a different accounting software, and it
22 was Lightspeed. It wasn't Talon. And there were no long- --
23 there was no longer a detail amount for those transactions.

24 Q So there's no way to go back and source that to the point
25 of origin?

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 A No.

2 Q All right. Is there a way to go back and source to the
3 point of origin what would now be Exhibit 105 on that page?

4 A It would, it would need -- there would need to be a lot
5 more detail.

6 Q All right. Is that possible?

7 A I don't know, because I don't know -- I would, I would
8 need to -- it would need to be like on an individual
9 transaction level.

10 Q All right. So if we talked about an individual
11 transaction level, what documentation would there be to make
12 that more clear?

13 A There would need to be itemized sales deals. We'd need
14 to look in the original sales deal jackets for all of the
15 orig- -- or the folders for all of the original sales deal
16 receipts to be able to see if it was actually cash that was
17 received, a check that was received, or funds from the bank.

18 Q All right. So the documents that we requested and
19 reviewed didn't show those things.

20 A Correct.

21 Q All right. Lastly, let's talk about the \$42,000.

22 A Yes.

23 Q You heard the testimony?

24 A I did.

25 Q And you saw on the screen that there was a check number

GENDREAU DIRECT EXAMINATION BY DONAHOE

1 associated with that?

2 A Yes.

3 Q All right. Did anybody tell you to handle that
4 transaction that way?

5 A Yes.

6 Q Who?

7 A Josh.

8 Q And what was told to you to do?

9 A I was told to go ahead and receive it as a check because
10 we didn't have the IRS form to fill out, and he did not want
11 to deal with having to explain it to the woman that was
12 working in F&I at the time. "F&I" is finance and insurance.
13 So I did take that money. I put it in a locked location and
14 funneled it through the deposits slowly.

15 Q All right. What does that exactly mean, you "funneled it
16 through"?

17 A Rather than doing one large deposit that would be very
18 obvious, I did a series of smaller deposits over time.

19 Q Okay. Did you take \$223,000 in cash from
20 Harley-Davidson?

21 A No, I did not.

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

23 THE COURT: Mr. Weldon.

24 MR. WELDON: Thank you, Your Honor.

25 ///

GENDREAU CROSS-EXAMINATION BY WELDON

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CROSS-EXAMINATION

BY MR. WELDON:

Q Ms. Gendreau, you were -- on May 19, 2019, you told Harley-Davidson that you took approximately \$30,000; is that right, ma'am?

A I -- that's what I heard in the recording. I don't actually remember that conversation specifically.

Q Okay. But, but the recording would be accurate?

A Yes.

Q All right. And now at that point in time, did you have \$30,000 available to repay Harley-Davidson?

A No, I did not.

Q Okay. I'm gonna show you Government's Exhibit 95, page 3. Do you recognize this bank statement, ma'am?

A I do. That's our bank statement.

Q It is. And on May 3 of 2019, there is a deposit of \$40,000, approximately.

A Yes.

Q And prior to that, you had \$500.74?

A Yes.

Q And then if we go to page 10, approximately 25 days later --

A Um-hmm.

Q -- you spent the entirety of that money.

A Yes.

GENDREAU CROSS-EXAMINATION BY WELDON

1 Q And that was in your bank account on May 9 of 2019.

2 A It was in my bank account on May 2 or 3, and we spent it
3 to pay off some large bills that we had.

4 Q But none of that money went to Harley-Davidson?

5 A No, it did not.

6 Q Now, then, let's talk about money that went to -- that
7 you used for Mexico.

8 A Okay.

9 Q Do you remember going to Mexico?

10 A I do.

11 Q And do you remember taking additional money from
12 Harley-Davidson in order to cover going to vacation to Mexico?

13 A I do.

14 Q Okay. And that was you taking money by way of payroll
15 deductions, for example?

16 A Correct. I paid myself more than once.

17 Q Okay. And if we show you, in fact, it was approximately
18 during that time period, \$14,000 or so?

19 A I, I don't recall.

20 Q Okay.

21 A And I don't -- I'd have to look at it.

22 Q Okay. So you don't recall the exact number, then?

23 A Correct.

24 Q Let's talk about the payroll taxes. Was it your job to
25 pay payroll taxes for Harley-Davidson?

GENDREAU CROSS-EXAMINATION BY WELDON

1 A Yes.

2 Q Did you fail to pay those taxes?

3 A I did.

4 Q Why was that, ma'am?

5 A I wasn't paying a lot of things that I should have paid
6 at that time.

7 Q And you don't dispute the number, that it was
8 approximately \$800,000 that you failed to pay?

9 A I didn't see it, so I guess I don't dispute it.

10 Q Okay.

11 A If that's what was at the end of it all when the
12 accountants did everything, I wouldn't have any reason to
13 disagree.

14 Q And in part, was that used to make the business look more
15 profitable, to cover the money that you were taking from
16 Harley-Davidson?

17 A No. I just wasn't doing it. And it's not because I was
18 trying to hide anything. I was -- I honestly know, during
19 that time, I was trying to just get by and get my job done.

20 Q And your job was to pay the payroll taxes?

21 A It was, yes.

22 Q And you, you had received notices?

23 A I don't recall. I don't remember a lot.

24 Q Now you inflated checks that were issued to you?

25 A Yes.

GENDREAU CROSS-EXAMINATION BY WELDON

1 Q Okay. You issued direct deposits and checks at the same
2 time?

3 A Yes.

4 Q You wrote checks to Cash?

5 A You know what? I didn't recall doing that until I saw
6 it, and I still don't know why that was done.

7 Q I'll show you Government's Exhibit 14, page 1.

8 If we could blow that up for the witness, please?

9 MS. KIRSCHTEN: (Complied with request.)

10 THE DEFENDANT: I can see that.

11 BY MR. WELDON:

12 Q Do you recognize this, ma'am?

13 A Yes, but I don't know why I wrote that check in
14 particular to Cash for that amount. I don't know what it
15 would have been used for.

16 Q That's your signature?

17 A It is my signature.

18 Q Did you go to the bank and cash that check?

19 A Yes.

20 MR. WELDON: And then we'll show you Government's
21 Exhibit 17, page 1. If we could blow that up, please?

22 MS. KIRSCHTEN: (Complied with request.)

23 BY MR. WELDON:

24 Q January 4 of 2016, there's another check for Cash in the
25 amount of \$3,301.44?

GENDREAU CROSS-EXAMINATION BY WELDON

1 A Yes.

2 Q And that's your signature?

3 A Yes.

4 Q And you were in possession of that cash?

5 A I must have been, yes.

6 Q Now you gave yourself other additional amounts that you
7 claimed were, quote-unquote, bonuses.

8 A Yes.

9 Q Okay. And you did not pay payroll taxes on those,
10 either, did you, ma'am?

11 A I believe they would have gone into my end-of-year, so at
12 some point, taxes -- I would have paid taxes on them.

13 Q I'll show you Government's Exhibit 15, page 1. Now this
14 is an amount that was unauthorized as well; isn't that right,
15 ma'am?

16 A I mean, it looks -- it was at the end of the year, so I
17 was -- it looks like it would have been a bonus.

18 Q Okay. But you agree that this was unauthorized in the
19 payroll?

20 A Yes.

21 Q Now when you say that it was an authorized bonus, there
22 would have been payroll taxes that would have been taken out
23 of that as well; isn't that right?

24 A I don't believe that any of the bonuses had payroll taxes
25 taken out, given to anybody.

GENDREAU CROSS-EXAMINATION BY WELDON

1 Q And whose job was it to pay the payroll taxes?

2 A It was mine.

3 Q Okay. Now, then, you've done that with other bonuses as
4 well, is that right, for yourself, that were unauthorized?

5 A Yes.

6 Q What about you at times needed money in your bank
7 accounts, and then you would use direct deposits that you
8 would just outright take from Harley-Davidson.

9 A Yes.

10 Q Okay. Now there were multiple times where you would
11 double-deposit electronic transfers into your bank account; is
12 that right, Ms. Gendreau?

13 A Yes.

14 Q Now you also paid money to your daughter, Hannah Waldear,
15 when she was at Boise; isn't that right?

16 A Yes.

17 Q Now there were also times where you would inflate your
18 payroll by the amount of \$150?

19 A I don't believe that was inflated.

20 MR. WELDON: Okay. Let's show you Government's
21 Exhibit 64.

22 MS. KIRSCHTEN: (Complied with request.)

23 BY MR. WELDON:

24 Q Do you see this direct deposit form from Harley-Davidson?

25 A I do.

GENDREAU CROSS-EXAMINATION BY WELDON

1 Q And do you see the \$150 amount?

2 A Yes.

3 Q Do you see the amount above that, ma'am?

4 A Yes.

5 Q What is that amount?

6 A \$1,449.86.

7 Q Okay. So there are two transactions that go into your
8 bank account?

9 A Yes.

10 MR. WELDON: Let's go down to the next page, please.

11 And if we could blow up the left-hand corner?

12 MS. KIRSCHTEN: (Complied with request.)

13 BY MR. WELDON:

14 Q How much is authorized to go into your bank account based
15 on QuickBooks?

16 A It's pretty blurry, but it does look like the 1,400.

17 Q The 150 is inflated, right, ma'am?

18 A And it is inflated, yes.

19 Q Okay. And that was consistently done while you were
20 paying yourself through direct deposit?

21 A I would need to see each one, each transaction. Are they
22 available?

23 Q They are. And, in fact, did you agree to those for the
24 payroll for Government's Exhibit 1?

25 A Did I agree to those?

GENDREAU CROSS-EXAMINATION BY WELDON

1 Q That those were fraudulent?

2 A Then yes.

3 Q Okay. Now you issued yourself a, quote-unquote, meal
4 plan or an amount for \$3,800. Do you remember that,
5 Ms. Gendreau?

6 A It wasn't -- it was, it was part of something we paid
7 into.

8 Q Okay. I'll show you Government's Exhibit 23, page 1. Do
9 you recognize this transaction, ma'am?

10 A Yes.

11 Q And this is where you issued \$500 but then a \$3,800 wire
12 transfer into your account?

13 A Yes.

14 Q And that was unauthorized as well?

15 A I don't remember, because we had that cafeteria plan, and
16 I don't remember. That number just jumps out as part of the
17 cafeteria plan.

18 Q But you've already agreed that that was inappropriate and
19 not to be given to you?

20 A Is that part of the 80,000? Because we had a discrepancy
21 in that, and I never re-added -- I didn't add everything else
22 up again.

23 Q I'll show you Government's Exhibit 1.

24 And if we could go to -- could we go to the fourth page,
25 please?

GENDREAU CROSS-EXAMINATION BY WELDON

1 MS. KIRSCHTEN: (Complied with request.)

2 BY MR. WELDON:

3 Q Do you see the portion there that says "Cafeteria Plan"?

4 A Yes.

5 Q Twenty-three, \$3,800?

6 A Yes.

7 MR. WELDON: Let's go, then, to page 1.

8 MS. KIRSCHTEN: (Complied with request.)

9 BY MR. WELDON:

10 Q And you've agreed, then, that that was unauthorized?

11 A Oh. I thought that was part of what we took off.

12 Q So are you disputing that now, then, ma'am?

13 A No.

14 Q Okay. Now you would agree with me that there were
15 collateral consequences to Harley-Davidson as a result of the
16 theft; is that right, ma'am?

17 A Yes.

18 Q And that included the payroll tax?

19 A Yes.

20 Q That included for the employees as well, because they
21 weren't making contributions to Social Security?

22 A Yes.

23 Q And you knew that when you were taking the money?

24 A I didn't think about that while I was taking the money.

25 Q Now one thing we focused on here is this is the payroll.

GENDREAU CROSS-EXAMINATION BY WELDON

1 A Right.

2 Q And these are all the different means in which you took
3 money from Harley-Davidson. Is that fair to say?

4 A Yes.

5 Q But your testimony today is that you would never take
6 cash.

7 A Correct.

8 MR. WELDON: I have no further questions,
9 Your Honor. Thank you.

10 THE COURT: All right.

11 Mr. Donahoe, any redirect?

12 MR. DONAHOE: No, thanks.

13 THE COURT: Ms. Gendreau, you may return to counsel
14 table. Thank you.

15 Mr. Donahoe, any additional evidence?

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

17 THE COURT: Okay.

18 Mr. Donahoe, do you wish to be heard further on your
19 Sixth Amendment argument or on your grand jury argument?

20 MR. DONAHOE: Your Honor, I can leave that to the
21 papers.

22 THE COURT: Okay.

23 And, Mr. Weldon, do you wish to be heard on those
24 two issues before I issue my ruling?

25 MR. WELDON: Not unless the Court has any questions,

1 Your Honor.

2 THE COURT: I don't.

3 MR. WELDON: Thank you.

4 THE COURT: Okay. So we've got three issues here as
5 it relates to restitution. We have the exact amount of
6 restitution that I think should be awarded in this case. We
7 have the objection as it relates to the fact that Ms. Gendreau
8 was charged in the indictment with five counts of wire fraud
9 and that the amount of restitution should be limited to those
10 five counts which totals \$13,095.56. And then we have an
11 objection as it relates to -- again, on the restitution issue
12 under the Sixth Amendment. Let's save -- and then, finally,
13 we've got the objection as it relates to the 2-level
14 Section 3B1.3 enhancement which is paragraph 32 of the
15 presentence investigation report, part of the guideline
16 calculation.

17 In terms of the restitution amount, what we're
18 talking about here is paragraphs 22, 30, and 93 of the
19 presentence investigation report, and I'm going to save until
20 the end the issue of what the actual restitution amount should
21 be.

22 On July -- so let's start with the indictment, the
23 argument relating to the indictment and the argument that the
24 amount of restitution should be limited to the \$13,095.56. As
25 we all know, on July 28, 2022, Ms. Gendreau was charged by

1 indictment with five counts of wire fraud in violation of 18
2 United States Code Section 1343.

3 The indictment alleges that from December 2014 to
4 May 2019, Ms. Gendreau "stole money by various means" from
5 Yellowstone Harley-Davidson, "including diverting payroll,
6 inflating her own compensation, using a business credit card
7 for personal expenses, skimming cash deposits, and paying
8 family members as if they were employees for Yellowstone
9 Harley-Davidson" when, in fact, they were not.

10 And the indictment contains a chart of alleged
11 interstate wire communications, Count 1 being for \$1,100;
12 Count 2, \$5,200; Count 3, \$1,420.56; Count 4, \$3,875, and,
13 Count 5, \$1,500. Those five amounts associated with those
14 five counts total \$13,095.56.

15 The presentence investigation report calculates a
16 loss amount of \$376,625.84, including \$268,849 in skimmed
17 cash, \$101,619.40 in payroll fraud, and \$6,157.44 in improper
18 credit card usage.

19 Now we know these numbers have changed as a result
20 of agreement between counsel and amendments and revisions that
21 have been made to these numbers which form the basis of the
22 testimony that we've heard. But in any event, based on the
23 calculation within the presentence investigation report,
24 Officer Tierney, the author of the presentence investigation
25 report, assigned a base level of 7, which I'll get to here

1 shortly when I calculate the guidelines, pursuant to
2 Section 2B1.1(a) (1) and then added 12 levels pursuant to
3 Section 2B1.1(b) (1) (G) because the calculated loss amount is
4 more than \$250,000 but less than \$550,000. This is
5 paragraphs 29 and 30 of the presentence investigation report.

6 Ms. Gendreau objects, arguing that the calculated
7 loss amount is inaccurate, No. 1.; No. 2, any loss amount over
8 the \$13,095.56 listed in the indictment is improper because it
9 involves conduct never submitted to the grand jury; and,
10 No. 3, court-imposed restitution violates the Sixth Amendment.

11 If Ms. Gendreau is correct that her loss amount
12 should be \$13,095.56, then her base offense level would become
13 9 -- 7 plus 2 -- pursuant to Section 2B1.1(a) (1) and
14 (b) (1) (B), resulting in a recommended custodial sentence of
15 four to ten months.

16 So Ms. Gendreau is arguing, first, that the United
17 States is improperly broadening the scheme alleged in the
18 indictment by contending the loss amount exceeds the
19 \$13,095.56 listed in the five counts in the indictment,
20 relying predominantly on *United States v. Miller*, a United
21 States Supreme Court case from 1985, 471 U.S. 130.

22 In *Miller*, the defendant was tried under an
23 indictment that alleged a certain fraudulent scheme but was
24 convicted based on trial proof that supported only a
25 significantly narrower and more limited, though included,

1 fraudulent scheme. The Supreme Court rejected Mr. Miller's
2 claim that this violated the Fifth Amendment's grand jury
3 clause, holding, "As long as the crime and the elements
4 thereof that sustain the conviction are fully and clearly set
5 out in the indictment, the right to a grand jury is not
6 normally violated by the fact that the indictment alleges more
7 crimes or other means of committing the same crime."

8 In other words, the indictment was not
9 unconstitutionally broad because the variance complained of
10 added nothing new to the grand jury's indictment.

11 Ms. Gendreau relies on *Miller* to argue that because
12 the indictment sets forth a total loss of \$13,095.56, the
13 United States' attempt to establish a \$350,000-plus loss in
14 restitution amount unconstitutionally broadens the indictment.

15 It's my conclusion that this argument misunderstands
16 the holding in *Miller* regarding broadening of an indictment.
17 *Miller* prevents the United States from broadening the theory
18 of criminal liability from that contained in the indictment.
19 Here, the indictment specifically relies on a fraudulent
20 scheme theory of liability and describes such scheme as
21 involving diverting payroll, inflating compensation,
22 improperly using business credit card, skimming cash, and
23 paying family members as if they were employees when they were
24 not.

25 The indictment's reference to specific interstate

1 wire communications as an aside, in my opinion, is
2 unnecessary. And the indictment's specific reference to
3 interstate wire communications in the amount of \$13,095.56 is
4 not presented as an articulation of the total loss amount in
5 this case. In fact, the indictment does not list the loss
6 amount at all, nor need it do so.

7 And, here, I'm relying on *United States v. Schiek*,
8 806 F.2d 943, a 1986 Ninth Circuit case, where it was held
9 that, "Requiring the indictment to state the precise amount of
10 loss to the victims . . . would merely impose a pleading
11 technicality without promotion of fairness or reliability."

12 So whereas here the loss amount is not set forth in
13 the indictment or a plea agreement, it's my responsibility to
14 determine it at sentencing after the United States puts on its
15 evidence. *United States v. Jenkins*, 844 F.2d 433, a 1989
16 Ninth Circuit case. Also see *United States v. Pomazi*, 851
17 F.2d 244, a Ninth Circuit 1988 case.

18 So based on this authority, I am rejecting the
19 argument that the loss amount or restitution award cannot
20 exceed the \$13,095.56 in interstate wires listed in the
21 indictment.

22 Regarding the Sixth Amendment argument, Ms. Gendreau
23 argues the Sixth Amendment requires the restitution amount in
24 the case to be decided by a jury, citing to the dissent of
25 Justices Gorsuch and Sotomayor in *Hester v. United States*,

1 139 S. Ct. 509, 2019.

2 There are two flaws with this argument. First,
3 under binding Ninth Circuit authority, a restitution award
4 does not fall within the purview of the Sixth Amendment's jury
5 clause. That's *United States v. Stanfill El*, 714 F.3d 1150
6 (9th Cir. 2013).

7 Second, even assuming any restitution award fell
8 within Ms. Gendreau's Sixth Amendment right to a jury, she
9 waived that right at the change of plea hearing when she
10 elected to plead guilty to five counts of wire fraud. So I'm
11 rejecting, as well, the Sixth Amendment argument as it relates
12 to the restitution award.

13 So that leaves the actual amount of restitution
14 which I must resolve after hearing evidence at the sentencing
15 hearing.

16 As we know, the United States needs to prove the
17 loss in restitution amounts by a preponderance of the
18 evidence. Importantly, when calculating loss amounts, I am to
19 consider all relevant conduct that is part of the same course
20 of conduct or common scheme or plan as the offense of
21 conviction. This means I can include charged, uncharged, and
22 even acquitted conduct in the determination of loss, assuming,
23 of course, it is part of the same course of conduct or common
24 scheme or plan as the offense of conviction. And that is
25 based on *United States v. Thomsen*, 830 F.3d 1049 (9th Cir.

1 2016).

2 So what is, then, the amount of restitution that in
3 my opinion has been established by a preponderance of the
4 evidence?

5 We start with the payroll fraud in the amount of
6 \$80,589.23. This has been agreed to by the parties.

7 The credit card fraud of \$2,769.25 has implicitly
8 been agreed to because, as I understand the testimony of
9 Ms. Gendreau, that number started out at about \$15,000 and it
10 has been reduced to \$2,769.25, and I am satisfied, based on
11 the testimony of Mr. Josh Fry, that that number has been
12 established clearly by a preponderance of the evidence.

13 We now get into the cash skimming. I have, on the
14 one hand, the meticulous accounting that was performed by
15 Mr. Fry and all of the exhibits associated with that in his
16 sworn testimony showing point of sale, showing deposits month
17 by month by month, year after year after year, with some
18 testimony countering that by Ms. Gendreau that, well, perhaps
19 there were some amounts that actually weren't skimmed in cash
20 that have been misinterpreted, but with no testimony, no proof
21 as to what those amounts were because, as Ms. Gendreau
22 testified, she wouldn't really be able to sort that out based
23 upon the records that we have. So I have that testimony
24 compared to the testimony of Mr. Fry.

25 And then we have the \$42,000 in cash for the

1 Harley-Davidson that was purchased which, according to
2 Mr. Josh Fry, never found its way into the books, looking at
3 exhibits. And then we have the testimony of Ms. Gendreau
4 that, in fact, that amount trickled into the books slowly but
5 surely, but nobody has pointed out to me where those amounts
6 were actually deposited.

7 So it's my conclusion, based upon the testimony that
8 I have heard, that the most reliable testimony is that of
9 Mr. Fry and the supporting exhibits, and so I find by a
10 preponderance of the evidence that the cash skimming of
11 \$223,061.24 will also be awarded as restitution in this case.

12 Leaving the accounting firm and Talon, I have an
13 affidavit from Mr. Josh Fry indicating that there was \$35,000
14 incurred in accounting fees, and I heard testimony about an
15 army of accountants assisting the Fry family in sorting all of
16 this out. That, according to the affidavit, which is attached
17 to the presentence investigation report, those accounting fees
18 were \$35,000.

19 As to the \$8,000 additional in connection with Talon
20 and the books, I heard no testimony on that, so I'm only going
21 to award the \$35,000 of payments made to the accounting firm.
22 I'm doing so under Section 18 United States Code
23 Section 3663A(b)(4) and *United States v. Gordon*, 393 F.3d
24 1044, a Ninth Circuit 2004 case which upholds an award of
25 private investigation costs incurred in uncovering and sorting

1 out embezzlement by an employee under the previously mentioned
2 statutory provision in Section 3663A.

3 So adding those amounts up, I am going to order
4 restitution in the total amount of \$341,419.72. That, I
5 believe, has been established by a preponderance of the
6 evidence.

7 And with that, we will take a brief recess.

8 Oh. Before we do so, one other objection.
9 Mr. Donahoe has objected to the application of the 2-level
10 enhancement under Section 3B1.3. This enhancement is included
11 in the presentence investigation report at paragraph 32. It
12 applies when "the defendant abused a position of public or
13 private trust, or used a special skill, in a manner that
14 significantly facilitated the commission or concealment of the
15 offense."

16 The presentence investigation report justifies this
17 enhancement by concluding that Ms. Gendreau had full
18 discretion to manage Yellowstone Harley-Davidson's finances
19 with little oversight and used this access and lack of
20 oversight to cover up her fraudulent acts.

21 Ms. Gendreau objects, arguing she did not exercise
22 special skills because it was simply computer software. That
23 argument vanished in the face of the testimony of Josh Fry.
24 It is very clear to me that Ms. Gendreau was the only person
25 within that organization during the period of time in question

1 responsible for the management of the financial affairs of
2 this company. A lot of trust was placed in her, a tremendous
3 amount of trust. And, of course, that trust was violated
4 here.

5 So it's being applied here in this particular case
6 because she abused a position of private trust, "here" being
7 Yellowstone Harley-Davidson's controller, with unfettered
8 access to the business's finances. An abuse of private trust
9 is an adequate and independent basis to apply Section 3B1.3.
10 She doesn't need to use special skills, but it certainly
11 applies in the breach of trust as I've described it. And, in
12 fact, there hasn't been any objection regarding the conclusion
13 that she abused a position of private trust. So that
14 objection is overruled as well.

15 We'll take a ten-minute recess.

16 (Recess taken from 17:15:22 to 17:33:09.)

17 (Open court.)

18 (Defendant present.)

19 THE COURT: Please be seated.

20 Over the course of the recess, it was brought to my
21 attention that I was perhaps in error in awarding the \$35,000
22 in the accounting fees incurred by the victims in this case.
23 I was cited to *Lagos v. United States*, 138 S. Ct. 1684, a 2018
24 case, which holds in sum and substance that expenses incurred
25 through private investigations can only be awarded under

1 Section 3663A if done at the behest of the United States.

2 That does not appear to have been what occurred here.

3 MR. WELDON: (Nodded head affirmatively.)

4 THE COURT: Thus, I am going to revise the amount of
5 restitution and delete -- deduct the \$35,000. So the amount
6 of restitution, instead of being \$341,419.72, will be
7 \$306,419.72.

8 Now \$110,000 of this was paid by insurance, correct?

9 MR. WELDON: That's correct, Your Honor.

10 THE COURT: So when we get to the amount to be paid
11 to certain victims, \$110,000 will be paid to the insurance
12 company. I'll give that information specifically. And
13 \$196,419.72 will be paid to Yellowstone Harley-Davidson.

14 Mr. Weldon.

15 MR. WELDON: Your Honor, I just wanted to apologize
16 to the Court. It actually wasn't the Court's fault; it was my
17 fault for giving you the subsection, and I wanted to make sure
18 you had that Supreme Court case that Ms. Clark was able to get
19 for us, and I apologize for that, Your Honor.

20 THE COURT: No need to apologize. I'm trying to get
21 it right.

22 Okay. Back to square one.

23 As we all know, Ms. Gendreau has pled guilty to five
24 counts without the benefit of a plea agreement, but I will
25 rely on the presentence investigation report for purposes of

1 calculating the advisory guidelines on the counts of
2 conviction. Those counts are Counts 1 through 5 charging wire
3 fraud under 18 United States Code Section 1343.

4 As counsel are well aware, it is my obligation to
5 summarize the punishments that are available to me in this
6 case, pursuant to not only the United States Sentencing
7 Guidelines but the applicable statutes.

8 So let's start with the guidelines. They are
9 summarized beginning at paragraph 28 of the presentence
10 investigation report.

11 We start here with a -- first of all, we've got
12 multiple counts of conviction, but we count Group 1, wire
13 fraud, the base offense level of which is 7. And based on the
14 loss amount, which is the same as the restitution amount in
15 this case, which falls within \$250,000 to \$550,000, that is
16 the 12-level increase under Section 2B1.1(b)(1)(G). Based on
17 my overruling of the objection relating to Section 3B1.3,
18 2 additional levels are added which results in an adjusted
19 offense level of 21, from which I then subtract 2 levels for
20 acceptance of responsibility, an additional 1 level for timely
21 notification of plea, resulting in a total offense level
22 of 18.

23 Turning our attention to Ms. Gendreau's criminal
24 history for purposes of calculating the guidelines, she has no
25 documented convictions, so her criminal history score is zero

1 which establishes a criminal history category of I.

2 So with a total offense level of 18 -- excuse me. I
3 need to get another sheet of paper here.

4 Total offense level of 18 and a criminal history
5 category of I, that results in a recommended custodial
6 sentence under the guidelines of 27 to 33 months to be
7 followed by supervised release of one to three years for each
8 count. As we know, periods of supervised release for multiple
9 counts run concurrently. Ms. Gendreau is not eligible for
10 probation pursuant to the guidelines. A fine could be
11 assessed in the range of \$10,000 to \$100,000. Restitution
12 will be ordered in the amount of \$306,419.72. And we have a
13 special assessment here of \$500 total, \$100 per count.

14 Pursuant to the applicable statutes for Counts 1
15 through 5, I could sentence Ms. Gendreau to zero to 20 years
16 per count followed by supervised release of zero to three
17 years per count; run, again, concurrently. She is eligible
18 for probation pursuant to statute for a period of one to five
19 years. A fine could be assessed up to \$250,000 per count. We
20 have the same amount of restitution, again, \$306,419.72, and
21 the same special assessment total of \$500.

22 Mr. Weldon, have I accurately summarized the
23 punishments available to me?

24 MR. WELDON: Certainly, Your Honor.

25 THE COURT: Do you agree, Mr. Donahoe?

1 MR. DONAHOE: I do.

2 THE COURT: Okay.

3 Now I have read everything that has been filed,
4 including, Mr. Donahoe, Document 35, your sentencing
5 memorandum. I reviewed the sentencing letters that were
6 filed. There were six of them, one under seal; Document 36,
7 and the document under seal from Ms. Hislop was filed as
8 Document 37.

9 Mr. Weldon, I read your sentencing memorandum which
10 was Document 38. So I think I have read everything.

11 So, Mr. Donahoe, I'll turn this over to you and
12 Ms. Gendreau.

13 MR. DONAHOE: Thank you, Your Honor.

14 I'll be brief. Working with Alison, the only thing
15 I guess I want to stress is that she's been under tremendous
16 stress, and I just ask the Court to take account of her
17 physical condition. It's documented in the presentence
18 report. I don't know what difference it may have made to the
19 testimony today, but she does have longer term, even some
20 short-term memory issues with the condition that she suffers
21 from.

22 She did, I wanted to point out, stop taking a
23 particular medication. She gets headaches, migraine
24 headaches, on a regular basis, but they make her kind of
25 fuzzy, so she just had a brief interlude of not taking the

1 medication so she could be a little sharper.

2 She regrets deeply harming her former employer. I
3 think she's gonna express that, voice that out loud here this
4 evening, this afternoon.

5 I don't know; these are tough cases. People get
6 around money and they get -- things change. They can have
7 terrific impact on relationships.

8 I recognize the Court's analysis with regard to the
9 trust. I agree with it. It was well taken. I just think
10 this is a woman in a difficult position here today, one, I
11 suspect, that she never thought she was gonna be in.

12 Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Donahoe.

14 Ms. Gendreau, you have an absolute right to speak to
15 me this evening before I impose sentence in your case if you
16 would like to do so.

17 THE DEFENDANT: I would.

18 THE COURT: You may proceed.

19 THE DEFENDANT: I deeply regret my actions. I never
20 ever thought I would be a person that committed the crime that
21 I committed. I am so very sorry that I took the money that I
22 took for payroll and inflating payroll and paying my daughter
23 from Yellowstone Harley.

24 I am very sorry that I broke trust. It was a family
25 there, and it felt good to be part of that family, and I am so

1 very sorry to them and to their families. I broke trust all
2 around. I broke trust with them. I broke trust with my
3 coworkers. In my own family, I broke trust. I put my husband
4 in a position he didn't deserve to be in, my children in
5 positions they don't deserve to be in. Likewise, I've
6 affected Josh's family and his children. And it's something
7 I'm very, very sorry for.

8 THE COURT: All right. Thank you. You and
9 Mr. Donahoe may return to counsel table.

10 Mr. Weldon.

11 MR. WELDON: Thank you, Your Honor.

12 The United States is recommending a guideline range
13 sentence which is the 27 to 33 months of imprisonment.

14 And there were a few factors in this case I wanted
15 to focus on, Your Honor, and the first was when the original
16 allegation came out, Ms. Gendreau, and the Court heard this,
17 said it was around \$30,000 or so. And I think it was
18 significant for the Court to know -- No. 1, we know that that
19 was underrepresented, but importantly, on May 3 of 2019,
20 Ms. Gendreau had \$40,000 come into her bank account that she
21 could have at least given a portion of that money to
22 Harley-Davidson, and she did none of that. She used the money
23 for other expenses, other purposes, and it was never used to
24 repay Harley-Davidson in any capacity.

25 I do want to talk a little bit about general

1 deterrence in this case, and the reason I think it's
2 important, Your Honor, is this is a family business. It is a
3 business that almost closed down. And I will tell the Court,
4 because I've had the opportunity to work with the Fry family
5 and Kyle Blessinger, their CPA, and you really have the
6 American dream in their business. You have a 26-year-old kid
7 who thinks, "I want to own my own Harley-Davidson shop," and
8 he does it. He goes out and he gets it. And you can tell,
9 even when you go to their shop, they are working hard
10 constantly, and they never expect anything from anyone, and it
11 truly is the American dream. And the one thing that Mr. Fry
12 said that always stuck with me is that they thought they were
13 gonna have to close it down and walk away entirely from his
14 dream as a result of this theft.

15 And so that leads me to the point that I do think
16 general deterrence is especially important for the community
17 to make sure this doesn't happen to other closely held
18 relationships.

19 But the other thing is I do think there needs to be
20 some specific deterrence associated with this case as well.
21 There was some -- any way that Ms. Gendreau could get her
22 hands on money from Harley-Davidson, whether it's cash, the
23 bank accounts, paying her daughter, paying herself, she took
24 that opportunity, and she did it over the period of years.
25 Not once did she stop and say it was enough. She continued to

1 steal throughout that time period.

2 I also put, Your Honor, and this is the final thing
3 I'll leave the Court with, the sentencing chart that I do put
4 in the sentencing memos that I file with the Court, and there
5 were a couple that I wanted to highlight for you.

6 The first was Natalee Crumley. That was an
7 individual who stole \$425,939, and she received a 38-month
8 sentence of imprisonment. She was a bookkeeper that worked
9 for an accounting firm when she was stealing from the victims,
10 and in that particular case, there was an aggravated identity
11 theft so there is the two-year mandatory consecutive
12 associated with it, but the overall sentence of 38 months was
13 around that \$425,000 range with a bookkeeper who was
14 associated with it. So that's one end of the book.

15 And then the other end of the book that I wanted to
16 cite for the Court is Toni Plummer, and that one was \$246,000,
17 so less than what Ms. Gendreau stole. And she received
18 12 months and a day for her sentence. And one thing -- and I
19 know we've talked about this in other sentencings, and every
20 defendant has the right to dispute and to challenge the
21 government's case, but Ms. Plummer had some disputes with
22 restitution as well.

23 THE COURT: I remember it well.

24 MR. WELDON: And we had -- probably not to the
25 degree of Ms. Plummer, but there is some thread of similarity

1 with this particular case as well, and so I wanted to make
2 sure that I put in those two bookends for the Court.

3 And the reason I think that that matters,
4 Your Honor, is I could see somebody looking from the outside
5 in. Harley-Davidson is a big corporation. What does it
6 matter to them? But in reality, it's a small business that
7 Josh Fry and Dan Fry have tried to build from the ground up,
8 and it's an American dream.

9 And then on top of that, it's essentially stealing
10 from the people who were working there because Ms. Gendreau
11 was using the failure to pay payroll tax to cover the fraud
12 that she was engaged in.

13 So for all of those reasons, we're recommending a
14 guideline sentence in this case, Your Honor.

15 THE COURT: All right. Thank you, Mr. Weldon.

16 MR. WELDON: Thank you, Your Honor.

17 THE COURT: Well, the overriding consideration for
18 me is I am to impose a sentence that is sufficient but not
19 greater than necessary, taking into consideration not only the
20 punishments that are available to me, which we've discussed
21 here on the record this afternoon, but also taking into
22 consideration a number of factors that are found within a
23 United States statute, a statute that the lawyers and I are
24 very familiar with. It's 18 United States Code
25 Section 3553(a). That statute requires me to consider:

1 The nature and circumstances of the offense and the
2 history and characteristics of Ms. Gendreau;

3 The need for my sentence imposed to reflect the
4 seriousness of the offense, to promote respect for the law,
5 provide just punishment for the offense;

6 The need to afford hopefully not only specific but
7 general deterrence to any future criminal conduct; to protect
8 the public from further crimes by Ms. Gendreau; to address any
9 needed educational or vocational training, medical care, or
10 other correctional treatment in the most effective manner;
11 and, finally, to avoid unwarranted sentence disparities
12 amongst defendants with similar records who have been found
13 guilty of similar conduct.

14 I have carefully considered all of these factors as
15 I think about what is a sufficient, but not greater than
16 necessary, sentence in this matter.

17 Let me address these factors, and then I will
18 announce my sentence.

19 Ms. Gendreau is 49 years old. She has pled guilty
20 to five counts of wire fraud. This offense stems from her
21 being employed at Yellowstone Harley-Davidson as a controller,
22 accounting manager. During the period of her employment, she
23 was hired as an accounting clerk and worked her way up to the
24 position of controller. As part of her duties, she handled
25 payroll, deposited checks and cash for the company, and had

1 access to the company credit card.

2 As she continued to work, Ms. Gendreau, you became a
3 trusted employee of Yellowstone Harley-Davidson. And during
4 this time, you embezzled; you stole money from the company in
5 an amount that has been the subject of extensive testimony
6 here this afternoon.

7 This amount includes skimmed cash, payroll theft,
8 improper credit card usage, extended over a considerable
9 period of time, and has had serious ramifications for this
10 family-owned company, not only in terms of the actual loss of
11 income but in terms of consequences with the Internal Revenue
12 Service and failure to make the requisite payroll payments to
13 the IRS, consequences that the company is still dealing with.
14 And you have heard this afternoon the impact that your actions
15 have had on the Fry family, which have been profound.

16 You have no criminal convictions other than the
17 current offense. You have otherwise lived a law-abiding
18 lifestyle. In terms of your personal upbringing, you were
19 raised, it appears, primarily by your father in California,
20 with your grandparents for a period of time. You were very
21 close with your father and had a good relationship with
22 stepmothers. You have one sibling and two half siblings, and,
23 according to the presentence investigation report, you
24 reported that your childhood was really good and you have
25 positive memories from growing up.

1 You are married with three children; two children
2 are from a previous marriage, and your youngest is from your
3 current marriage. You report having a great relationship with
4 your family. You report everyone is close to one another, and
5 your family has been supportive throughout this entire
6 process.

7 You had a vascular malformation in your brain which
8 caused two brain bleeds, in 2019 and 2021. You had a
9 craniotomy. You report that this has caused you to suffer
10 from memory loss and potential future health problems. You
11 also acknowledged and reported anxiety and depression since
12 2000. I understand you're currently in therapy as it relates
13 to those issues.

14 You have struggled with alcoholism during your adult
15 life. You were introduced to alcohol at the age of 19.
16 Progressed to the point of drinking daily. You participated
17 in medical detox, outpatient counseling, which helped you to
18 regain control of your alcohol consumption. At the time you
19 were interviewed in connection with the presentence
20 investigation report, you indicated that your last drink of
21 alcohol was on December 31, 2021.

22 You have a high school diploma. You've taken
23 several college courses but did not obtain a degree. You had
24 a Montessori school early on in your career. You've
25 maintained employment for most of your adult life. And the

1 majority of your employment, of course, of recent was with
2 Yellowstone Harley-Davidson.

3 It was interesting, in reading the presentence
4 investigation report, to see that when your family was asked
5 about the instant offense, they all indicated that they could
6 not understand why you committed this offense, and, in their
7 opinion and according to the character letters I've received,
8 it was out of character for you.

9 Clearly it was perceived out of character by the Fry
10 family, who trusted you, and like so many of these cases, it
11 is a mystery to me why you did what you did in terms of the
12 offense conduct here that we've been talking about. Simply
13 difficult to understand.

14 You have accepted responsibility. You have
15 apologized to the Fry family. I don't know what they would
16 like me to do in this particular case. Obviously I'm bound by
17 the requirement that whatever sentence I impose be sufficient
18 but not greater than necessary.

19 At the end of the day, what we all hope for is that
20 you'll have the ability to pay restitution. That's how the
21 Fry family will be made whole. The question is whether a
22 custodial sentence is warranted in the case and, if so, what
23 length.

24 And I have concluded that a custodial sentence is
25 warranted. I think the guidelines are too high. I think

1 there are reasons to vary downward, so I'm going to impose a
2 custodial sentence here of 16 months followed by supervised
3 release for a term of three years.

4 Ms. Gendreau, if you would please rise, and I will
5 pronounce sentence.

6 THE DEFENDANT: (Complied with request.)

7 THE COURT: Alison Lee Gendreau, pursuant to the
8 authority vested in me by the Constitution of the United
9 States and the laws enacted by the United States Congress as
10 they have been interpreted by the United States Supreme Court
11 and the Ninth Circuit Court of Appeals, it is my obligation to
12 impose sentence on you.

13 I do so having considered all of the material that
14 has been provided to me, the arguments and recommendations of
15 counsel, your own statement to the Court, your testimony in
16 open court, the statements of the Frys in terms of the impact
17 that this has had on their business, and the character letters
18 submitted on your behalf.

19 And having considered all of these matters, the
20 United States Sentencing Guidelines and the factors found
21 within 18 United States Code Section 3553(a), it is the
22 judgment of this Court that you be committed to the custody of
23 the United States Bureau of Prisons for a term of 16 months on
24 each count to run concurrently.

25 Upon release from imprisonment, you shall be placed

1 on supervised release for a term of three years, also on each
2 count to run concurrently.

3 Within 72 hours of release from custody of the
4 Bureau of Prisons, you shall report in person to the probation
5 office in the district to which you are released.

6 While on supervised release, you shall not commit
7 any federal, state, or local crime and shall not possess a
8 controlled substance.

9 You shall be prohibited from owning, using, or being
10 in constructive possession of firearms, ammunition, or other
11 destructive devices while on supervision and anytime after the
12 completion of the period of supervision unless granted relief
13 by the Secretary of the Treasury.

14 You shall cooperate in the collection of DNA as
15 directed by the United States probation officer.

16 You shall comply with the standard conditions of
17 supervision as recommended by the United States Sentencing
18 Commission and which have been approved by this Court.

19 And you shall also comply with the following eight
20 special conditions:

21 Special Condition 1. All employment must be
22 approved in advance, in writing, by the probation officer.
23 You must consent to third-party disclosure to any employer or
24 potential employer.

25 Special Condition 2. You must apply all monies

1 received from income tax refunds, lottery winnings, judgments,
2 and/or any other financial gains to outstanding court-ordered
3 financial obligations.

4 Special Condition 3. You must provide the probation
5 officer with any requested financial information. You must
6 not incur new lines of credit without prior approval of the
7 probation officer. You must notify the probation officer of
8 any material changes in your economic circumstances that might
9 affect your ability to pay court-ordered financial
10 obligations.

11 Special Condition 4. You must pay restitution in
12 the amount of \$306,419.72. You are to make payments at a rate
13 of \$300 per month or as otherwise directed by the United
14 States Probation office. Payment shall be made to the Clerk
15 of Court, United States District Court, P.O. Box 8537,
16 Missoula, Montana 59807, and shall be distributed in the
17 amount of \$110,000 to Sentry Select Insurance Company, and the
18 balance of \$196,419.72 to Yellowstone Harley-Davidson.

19 I'm ordering that interest be waived on
20 this obligation pursuant to 18 United States Code
21 Section 3612(f)(3)(A).

22 Special Condition 5. You must participate in a
23 program for mental health treatment as approved by the
24 probation officer. You must remain in the program until you
25 are released by the probation officer in consultation with

1 your treatment provider. You must pay part or all of the
2 costs of this treatment as directed by the probation officer.

3 Special Condition 6. You must abstain from the
4 consumption of alcohol and are prohibited from entering
5 establishments where alcohol is the primary item of sale.

6 Special Condition 7. You must participate in
7 substance abuse testing to include not more than
8 365 urinalysis tests, not more than 365 Breathalyzer tests,
9 and not more than 36 sweat patch applications annually during
10 the period of supervision. You must pay part or all of the
11 costs of testing as directed by the probation officer.

12 And final, Special Condition 8. You must
13 participate in and successfully complete a program of
14 substance abuse treatment as approved by the probation
15 officer. You must remain in the program until you are
16 released by the probation officer in consultation with the
17 treatment provider, and you must pay part or all of the cost
18 of this treatment as directed by the probation officer.

19 I find that you do not have the ability to pay a
20 fine and waive the obligation to pay a fine in this case.

21 I am ordering, however, that you shall pay to the
22 United States the special assessment of \$500 which shall be
23 due immediately.

24 During your custodial sentence, Ms. Gendreau, you'll
25 be making criminal monetary penalty payments at a rate of not

1 less than \$25 per quarter. Those payments will be made
2 through the Bureau of Prisons Inmate Financial Responsibility
3 Program, and they shall be made to the Clerk of Court, United
4 States District Court, the address of which is P.O. Box 8537,
5 Missoula, Montana 59807.

6 Ms. Gendreau, you have a right of appeal. You'll
7 have 14 days from the date of entry of judgment in which to
8 appeal. Because it's late in the day, judgment will not be
9 entered until tomorrow. So tomorrow that 14-day time clock
10 will begin to run. If you do not appeal within the next
11 14 days, then any appeal would be barred. Do you understand
12 me?

13 THE DEFENDANT: Yes.

14 THE COURT: All right.

15 Mr. Weldon, any legal objections to this sentence?

16 MR. WELDON: No, Your Honor. Thank you.

17 THE COURT: Any legal objections, Mr. Donahoe?

18 MR. DONAHOE: No, Your Honor.

19 THE COURT: Mr. Weldon, does the government have any
20 objection to allowing Ms. Gendreau to self-report?

21 MR. WELDON: No objection at all, Your Honor. Thank
22 you.

23 THE COURT: I assume, Mr. Donahoe, that's your
24 request?

25 MR. DONAHOE: Yes, Your Honor, please.

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THE COURT: Any other requests?

MR. DONAHOE: No, Your Honor.

THE COURT: All right.

Anything further?

MR. WELDON: No, Your Honor. Thank you for your
time.

THE COURT: All right. We'll be in recess. Thank
you.

(Proceedings were concluded at 18:07:15.)

1 REPORTER'S CERTIFICATE

2 I, JoAnn Jett Corson, a Registered Diplomat
3 Reporter and Certified Realtime Reporter, certify that the
4 foregoing transcript is a true and correct record of the
5 proceedings given at the time and place hereinbefore
6 mentioned; that the proceedings were reported by me in machine
7 shorthand and thereafter reduced to typewriting using
8 computer-assisted transcription; that the Exhibit 165A audio
9 recording was transcribed by me to the best of my ability;
10 that after being reduced to typewriting, a certified copy of
11 this transcript will be filed electronically with the Court.

12 I further certify that I am not attorney for, nor
13 employed by, nor related to any of the parties or attorneys to
14 this action, nor financially interested in this action.

15 IN WITNESS WHEREOF, I have set my hand at Missoula,
16 Montana this 7th day of October, 2022.

17
18 /s/ JoAnn Jett Corson

19 _____
20 JoAnn Jett Corson
21 United States Court Reporter
22
23
24
25

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALISON LEE GENDREAU,

Defendant.

CR 21-22-BU-DLC

**DEFENDANT GENDREAU'S
SENTENCING MEMORANDUM**

I. INTRODUCTION

Defendant Alison Lee Gendreau, by and through her counsel, Michael Donahoe and the Federal Defenders of Montana, offer the following memorandum in aid of sentencing currently set down before this Court for August 10, 2022, at 3:00 p.m., in Missoula.

///

II. PRESENTENCE REPORT OBJECTIONS

Ms. Gendreau objects to the loss/restitution amounts. She pled guilty to the indictment, all five (5) counts, without a plea agreement. The total loss as set forth in those counts is \$13,095.56. The government is including loss amounts in this case that were never submitted to the grand jury. This is wrong because by claiming a loss of \$372,819.14 the government essentially broadens the indictment to include amounts neither alleged nor proved, nor admitted beyond a reasonable doubt. *United States v. Miller*, 471 U.S. 130 (1985) (Grand jury right not violated where defendant convicted on proof that supports narrower more limited scheme). Thus, it stands to reason that where, as here, the government seeks to “broaden” a scheme after the defendant has admitted a narrower one, to include an amount thirty (30) times higher as a loss/restitution amount, a grand jury violation has occurred. *Cf. Stirone v. United States*, 361 U.S. 212 (1960) (holding that indictment was unconstitutionally broadened when prosecution offered evidence of two theories of liability, but grand jury only indicted on first theory); *also see McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (sentencing enhancement should not be the “tail which wags the dog of the substantive offense”). That is what is happening here, the government alleged and Ms. Gendreau admitted \$13,095.56, but it demands \$330,000.00 (rounding up) with no proof.

///

Moreover, there is also the matter of Ms. Gendreau's right to a jury trial on the issue of restitution. In *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2352 (2012) the Court held that the rule from *Apprendi v. New Jersey* (cite omitted) applies to cases where significant criminal fines are imposed. Furthermore, the Ninth Circuit has recognized that allowing judges, rather than juries, to decide facts necessary to support restitution orders is not consistent with the Supreme Court's Sixth Amendment decisions. See *United States v. Green*, 722 F.3d 1146, 1151 (2013). Also see *United States v. Leahy*, 438 F.3d 328, 343-344 (3rd Cir. 2006) (*en banc*) McKee, J. concurring and dissenting, in part); *United States v. Carruth*, 418 F.3d 900, 905-906 (8th Cir. 2005), Judge Bye dissenting. And in 2019, Justice Gorsuch joined by Justice Sotomayor dissented from denial of certiorari in *Hester v. United States*, 139 S. Ct. 509 (2019) where the petitioner claimed a right to jury trial on the issue of restitution. At page 511, Justice Gorsuch opines:

If the government's arguments appear less than convincing, maybe it's because they're difficult to reconcile with the Constitution's original meaning. The Sixth Amendment was understood as preserving the “historical role of the jury at common law.” *Southern Union*, 567 U.S., at 353, 132 S.Ct. 2344. And as long ago as the time of Henry VIII, an English statute entitling victims to the restitution of stolen goods allowed courts to order the return only of those goods mentioned in the indictment and found stolen by a jury. 1 J. Chitty, *Criminal Law* 817–820 (2d ed. 1816); 1 M. Hale, *Pleas of the Crown* 545 (1736). In America, too, courts held that in prosecutions for larceny, the jury usually had to find the value of the stolen property before restitution to the victim could be ordered. See, e.g., *Schoonover v. State*, 17 Ohio St. 294 (1867); *Jones v. State*, 13 Ala. 153 (1848); *State v. Somerville*, 21

Me. 20 (1842); *Commonwealth v. Smith*, 1 Mass. 245 (1804). *See also* Barta, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 Am. Crim. L. Rev. 463, 472–476 (2014). And it's hard to see why the right to a jury trial should mean less to the people today than it did to those at the time of the Sixth and Seventh Amendments' adoption. Respectfully, I would grant the petition for review.

139 S. Ct. at 511.

Furthermore, M.s Gendreau's Notice of Intent to Plead Guilty to the Indictment (ECF No. 17) expressly states that she took *payroll* funds and paid them over to herself and her daughter without entitlement.

III. 18 U.S.C. §3353(a) FACTORS

The relevant sentencing factors are set forth in 18 U.S.C. §3553(a)(2), which we address briefly:

(1) *Nature and Circumstances of the Offense*

Ms. Gendreau stands before this Court convicted of five (5) counts of wire fraud, in violation of 18 USC §1343 for claiming payroll funds by wire to which she was not entitled.

(2) *History and Characteristics of the Defendant*

Ms. Gendreau has significant medical issues (PSR at ¶s 55-59).

(3) *Seriousness of the Offense*

Ms. Gendreau acknowledges that her conviction is serious and takes full responsibility for her actions.

(4) ***Deterrence and Protection of the Public***

Both general and specific deterrence would be promoted by a sentence of probation.

(5) ***Promotion of Respect for the Law***

Ms. Gendreau has gained a respect for the law through this federal prosecution.

(6) ***Need to Provide Defendant with Education, Training, Medical Care or Other Correctional Treatment***

The need to provide Ms. Gendreau with education, training, medical care, or other treatment does not appear relevant and, in fact, such needs would be better served in a community context with current providers.

(7) ***The Applicable Guidelines***

Ms. Gendreau recognizes that she faces a statutory sentence of up to 20 years per count. However, Ms. Gendreau contends a sentence of probation is sufficient but not greater than necessary in this case given consideration all 18 USC §3553(a) factors, to include a loss/restitution amount of \$13,095.56.

IV. CONCLUSION

WHEREFORE, Ms. Gendreau prays this Court will consider this memorandum in aid of sentencing.

///

RESPECTFULLY SUBMITTED this 1st day of August, 2022.

/s/ Michael Donahoe

MICHAEL DONAHOE
Deputy Federal Defender
Counsel for Defendant

CERTIFICATE OF SERVICE
L.R. 5.2(b)

I hereby certify that on August 1, 2022, a copy of the foregoing document was served on the following persons by the following means:

1 CM-ECF

2 Mail

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Defendant

/s/ Michael Donahoe
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6
7 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
8 MISSOULA DIVISION

9 UNITED STATES OF AMERICA,)
)
10)
VS.) CASE NO: CR 21-22-BU-DLC
11) CHANGE OF PLEA HEARING
ALISON LEE GENDREAU,)
12)
Defendant.)
13

14
15 BEFORE THE HONORABLE KATHLEEN L. DESOTO
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
16 FOR THE DISTRICT OF MONTANA

17 Russell Smith Federal Courthouse
201 East Broadway
18 Missoula, Montana 59802

19 Tuesday, December 21, 2021
20 1:33:37 p.m. to 2:36:54 p.m.

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24 Proceedings recorded by digital audio recording
25 Transcript produced by computer-aided transcription

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1 AFTERNOON SESSION, TUESDAY, DECEMBER 21, 2021

2 (Whereupon, the court convened at 1:33:37 p.m., with
3 Defendant present via Zoom connection, and the following
4 proceedings were had:)

5 THE COURT: All right. This is the time and place
6 set for a hearing on Defendant's motion to change plea in
7 United States of America vs. Alison Lee Gendreau. It's
8 CR 21-22-BU-DLC.

9 Ms. Gendreau?

10 THE DEFENDANT: Yes.

11 THE COURT: Can you hear and see me okay?

12 THE DEFENDANT: Yes, I can.

13 THE COURT: Okay. All right. I will tell you that
14 your counsel is here present in the court, Mr. Donahoe. I
15 don't know -- I don't know what actually you see other than
16 maybe the bench and then the Assistant United States --

17 THE DEFENDANT: I see the bench and I see a screen
18 with a seal on it.

19 THE COURT: Oh, okay.

20 THE DEFENDANT: The United States --

21 THE COURT: Okay. That sounds good. So Mr. Donahoe
22 is here as well. The Assistant United States Attorney
23 Jennifer Clark is here.

24 All right. So I am going to have you raise your
25 right hand and Sara, our clerk, will place you under oath.

1 (Defendant was sworn by the clerk.)

2 THE COURT: All right. Ms. Gendreau, this case has
3 been referred to me by Judge Christensen. He is the Article
4 III Judge or the District Court Judge who is in jurisdiction
5 in your case. And what that means is, that he is ultimately
6 the person who will decide whether to accept your guilty plea
7 and sentence you in this matter.

8 And you have the right to have him conduct this
9 hearing but you also have the ability to waive that right. In
10 other words, what you can do is consent to proceeding before
11 me. And if you do so, what will happen is, at the conclusion
12 of this hearing I will make a findings and recommendation to
13 Judge Christensen regarding whether he should accept your
14 guilty plea and sentence you in this matter.

15 So what I have here -- oh, I should also mention
16 that you obviously have the right to be here in person, but by
17 the fact that you moved to conduct this hearing by Zoom, I
18 presume that you are amenable to proceeding by video; is that
19 correct?

20 THE DEFENDANT: Yes, that's correct.

21 THE COURT: Okay. So what I have here is a consent
22 to Rule 11 plea in a felony case. I'm going to read it to
23 you, and then I will ask if your attorney has your authority
24 to sign on your behalf.

25 So it states as follows: I hereby declare my

1 intention to enter a plea of guilty in this case. I have been
2 advised by my attorney and by United States Magistrate Judge
3 Kathleen L. DeSoto of my right to enter a change of plea
4 before a United States District Judge. I request and consent
5 to the acceptance of my guilty plea by a United States
6 Magistrate Judge of a Rule 11 of the Federal Rules of Criminal
7 Procedure.

8 I understand that if the United States Magistrate
9 Judge recommends acceptance of my guilty plea and orders the
10 preparation of a presentence investigation report, a signed
11 United States District Judge will then decide whether to
12 accept or reject my plea of guilty and the plea agreement I
13 may have with the United States -- although, I know that
14 that's not an issue in this case -- and will adjudicate guilt
15 and will impose sentence.

16 Though it is dated the 21st day of December, there's
17 a signature line for you, there's a signature line for
18 Mr. Donahoe, as well as for the Assistant United States
19 Attorney. So let me ask you, Ms. Gendreau, having heard this,
20 do you consent to Mr. Donahoe signing this form on your
21 behalf?

22 THE DEFENDANT: Yes, I consent.

23 THE COURT: All right. Okay. Thank you. Do you
24 want to hand this down.

25 (Pause.)

1 All right. So, Ms. Gendreau, you are now under
2 oath, and I'm going to be asking you a series of questions
3 that you must answer truthfully. Do you understand that if
4 you were to be untruthful to me, in other words if you were to
5 lie or to make a material misrepresentation or omission, that
6 the fact that you were untruthful, could be used against you
7 in a completely separate and standalone prosecution for
8 perjury or making a false statement?

9 THE DEFENDANT: I understand that.

10 THE COURT: So the purpose, of course, of what we're
11 doing here today is for me to decide whether I can recommend
12 to Judge Christensen that he accept your guilty plea. And in
13 order for me to be able to do that, I must be convinced that
14 your decision to change your plea is both voluntary and
15 informed.

16 And for me to believe that both of those conditions
17 exists, I must be convinced that you understand the nature of
18 the charges against you, the potential consequences that you
19 will face by pleading guilty here today, the maximum penalties
20 that you will face by pleading guilty here today, as well as
21 the constitutional rights that you are going to waive by
22 pleading guilty here today.

23 I also must be convinced that the government could
24 prove its case against you and the burden of proof or the
25 level of proof it would have to satisfy is beyond a reasonable

1 doubt. So those are all of the subject matters and topics
2 that we're going to be discussing here today.

3 Do you have any question about the scope of what
4 we're going to do here?

5 THE DEFENDANT: No, I have no questions.

6 THE COURT: All right. Well, Ms. Gendreau, let me
7 begin by asking you some background questions. And the point
8 of me asking these questions is not to pry unnecessarily into
9 your private life, but it's so that I have some sense of
10 context in which to place that analysis of whether your
11 decision to change your plea is both voluntary and informed.

12 So let me start with how old you are.

13 THE DEFENDANT: Um, I'm 49.

14 THE COURT: Okay. Are you married?

15 THE DEFENDANT: Yes.

16 THE COURT: Do you have children?

17 THE DEFENDANT: Yes.

18 THE COURT: And do your children -- are they in the
19 home still or are they grown up?

20 THE DEFENDANT: I have two that are still minors and
21 in the home.

22 THE COURT: Okay. And what is the highest level of
23 education that you have?

24 THE DEFENDANT: College, um, I -- college.

25 THE COURT: Okay. So did you graduate from college?

1 THE DEFENDANT: No.

2 THE COURT: Okay. So -- but you graduated from high
3 school; is that correct?

4 THE DEFENDANT: Yes.

5 THE COURT: And when you went to college afterwards;
6 well, how long were you in college?

7 THE DEFENDANT: I was in college for four years.

8 THE COURT: And then what were you studying when you
9 were there?

10 THE DEFENDANT: Elementary education.

11 THE COURT: And after you left college, if you had
12 to kind of generalize, what type of work did you do over the
13 years?

14 THE DEFENDANT: I did -- I taught, and I did receive
15 a Montessori credential and taught Montessori school, and I
16 actually was able to teach that at the elementary level due to
17 my background. All I -- I just waived my student teaching and
18 then never applied to graduate, which is why I didn't ever
19 receive that.

20 THE COURT: Okay.

21 THE DEFENDANT: So I taught and then I did
22 construction project management and bookkeeping.

23 THE COURT: Okay. And are you currently employed?

24 THE DEFENDANT: Yes.

25 THE COURT: And what are you doing right now?

1 THE DEFENDANT: Currently, I work at the local
2 Amazon fulfillment center in their packaging and processing
3 department.

4 THE COURT: And that's in the Boise area?

5 THE DEFENDANT: Yes, its near Nampa.

6 THE COURT: Okay. Have you ever been treated for
7 mental illness?

8 THE DEFENDANT: Aside from depression and anxiety,
9 no.

10 THE COURT: So let me ask you a couple --

11 THE DEFENDANT: (Indiscernible.)

12 THE COURT: Okay. That's okay. It's sometimes hard
13 with the video to, you know, know when to start and stop, but
14 let me ask you a little follow-up about the depression and
15 anxiety. Are you currently treated for depression and
16 anxiety?

17 THE DEFENDANT: Yes.

18 THE COURT: Are you currently taking any medications
19 for those conditions?

20 THE DEFENDANT: No.

21 THE COURT: Okay. So you're just seeing a counselor
22 or a therapist?

23 THE DEFENDANT: I see a therapist once a week on
24 Mondays. She is treating me for depression and anxiety as
25 well as addiction issues.

1 THE COURT: Okay. And, actually, that was going to
2 be my next question. Have you ever treated for addiction to
3 alcohol or drugs?

4 THE DEFENDANT: Yes; addiction to alcohol.

5 THE COURT: Okay. And did you go to inpatient or
6 outpatient type of treatment for that or simply meet with your
7 therapist?

8 THE DEFENDANT: I did therapy, but I did do an
9 outpatient medically supervised detox.

10 THE COURT: Okay. How long?

11 THE DEFENDANT: May of 2019 I did that.

12 THE COURT: Okay. Are you currently under the
13 care -- other than your therapist, are you currently under the
14 care of any medical providers?

15 THE DEFENDANT: Yes, I am under the care of Dr. Doug
16 (indiscernible). He is a neurosurgeon. I had a craniotomy in
17 July.

18 THE COURT: All right.

19 THE DEFENDANT: I have had a cavernous malformation
20 removed which is a vascular tumor in my right frontal lobe, so
21 I am under his care currently.

22 THE COURT: Okay. Are you taking any medications
23 for that condition or for any follow-up from the surgery?

24 THE DEFENDANT: No. No medications.

25 THE COURT: Okay.

1 THE DEFENDANT: The only medications I was on post
2 surgery was just to manage pain.

3 THE COURT: Um-hum.

4 THE DEFENDANT: And that was while I was in the
5 hospital and then just one prescription post -- post surgery.

6 THE COURT: Okay. Are you currently under the
7 influence of any alcohol or drugs?

8 THE DEFENDANT: No.

9 THE COURT: Okay. And is there anything about you
10 -- I'm not intending to pry into your medical history too
11 much, but is there anything about the condition that resulted
12 in the craniotomy that affects your ability to understand and
13 fully comprehend what we're doing here today?

14 THE DEFENDANT: No. It does not affect my ability
15 to understand and comprehend.

16 THE COURT: Okay. So you feel comfortable going
17 forward?

18 THE DEFENDANT: Yes.

19 THE COURT: Okay. Do you have -- I'm sorry -- do
20 you have a copy of the Indictment there with you,
21 Ms. Gendreau?

22 THE DEFENDANT: I do. Yes.

23 THE COURT: So the Indictment charges you with five
24 counts of wire fraud. That's a violation of 18, United States
25 Code, Section 1343. It's my understanding of what your intent

1 to do here today is -- there is no plea agreement with the
2 United States, and it's your intent to enter into an open plea
3 of guilty to all five counts charged in the Indictment. Am I
4 correct?

5 THE DEFENDANT: Yes, that is correct.

6 THE COURT: And you realize, of course, that as you
7 sit here right now at this stage in the proceedings, you are
8 still presumed innocent, and you would have the right to
9 require the government to prove its case against you at trial.

10 But if we go forward with the remainder of this
11 hearing, there won't be a trial, and you will simply be
12 pleading guilty without requiring the governments to --
13 government to prove its case at a trial. Do you understand
14 that?

15 THE DEFENDANT: I do.

16 THE COURT: Okay. And is it still your wish to go
17 forward with this hearing?

18 THE DEFENDANT: Yes. It is my wish to move forward
19 with this hearing.

20 THE COURT: All right. Well, have you had the
21 chance to discuss this case in general with Mr. Donahoe?

22 THE DEFENDANT: Yes. Mr. Donahoe and I have
23 discussed this case in general and at length.

24 THE COURT: Okay. And part of what I'm getting at,
25 there is -- you know, were you able to discuss with him, you

1 know, the evidence the government has or doesn't have and what
2 exactly it would have to prove in order to get convictions on
3 these five counts?

4 THE DEFENDANT: Yes. I have discussed that evidence
5 with Mr. Donahoe.

6 THE COURT: Have you had sufficient time to meet
7 with Mr. Donahoe to discuss all of the options that you have
8 in your case?

9 THE DEFENDANT: Yes, I've had sufficient time.

10 THE COURT: So, normally speaking, what happens in a
11 case, Ms. Gendreau, is that after somebody makes an initial
12 appearance, the government turns over its discovery. And
13 discovery is just the evidence the government has that it
14 believes proves its case against you.

15 And it can be a lot of different things. It's
16 usually reports from agents who investigate. There are often
17 witness statements, victim statements, documentation of
18 transactions, sometimes there are photographs or audio or
19 video recordings, things like that.

20 But all of that information is really the basis of
21 the government's case against you, and they are required by
22 law to turn it over to you and to your attorney during the
23 pretrial stage of your case so that you can review it and
24 discuss it and evaluate it, and then, you know, make decisions
25 based on the evidence that they have.

1 So let me ask you, Ms. Gendreau, did you have the
2 ability to either review that discovery yourself or review
3 summaries of it and -- excuse me -- and discuss it with
4 Mr. Donahoe?

5 THE DEFENDANT: I did review the discovery myself.

6 THE COURT: Um-hum.

7 THE DEFENDANT: And I did discuss it with
8 Mr. Donahoe.

9 THE COURT: And if you had any questions either
10 about something that was in the discovery itself or any legal
11 aspect of your case, were you able to ask Mr. Donahoe those
12 questions?

13 THE DEFENDANT: Yes. I was able to ask those
14 questions.

15 THE COURT: And did he answer them to your
16 satisfaction?

17 THE DEFENDANT: Yes. He answered them to my
18 satisfaction.

19 THE COURT: Okay. And are you satisfied with the
20 advice that he has given you?

21 THE DEFENDANT: I am very satisfied with the advice.

22 THE COURT: Are you satisfied with the
23 representation he has provided you?

24 THE DEFENDANT: I am satisfied with the
25 representation he has provided.

1 THE COURT: Okay. As you sit here right now,
2 Ms. Gendreau, it's a little awkward because you're not
3 physically present in the courtroom, but as you sit here now,
4 do you feel that you need any additional time to speak with
5 Mr. Donahoe about anything related to your case, before we go
6 on with the remainder of this hearing?

7 THE DEFENDANT: No. I don't feel like we need to
8 discuss anything else.

9 THE COURT: Okay. Turning back to the Indictment,
10 the maximum penalty that can be imposed for wire fraud is up
11 to 20 years imprisonment, a \$250,000 fine, and three years of
12 supervised release. There's also a \$100 special assessment
13 that is due and owing at the time of sentencing.

14 And those are the maximum penalties that can be
15 imposed against you. And I do understand there is also a
16 request for restitution; is that correct?

17 MR. DONAHOE: From the government?

18 THE COURT: Yes.

19 MR. DONAHOE: Yeah.

20 THE COURT: Okay.

21 MR. DONAHOE: And I, actually, am going to have a
22 lot to say about that because --

23 THE COURT: Oh, I have -- I actually have a couple
24 questions about that.

25 MR. DONAHOE: Okay.

1 THE COURT: And maybe this would be the appropriate
2 time to handle it, actually.

3 So my review of -- I guess I'm getting this from
4 reviewing both the Indictment and the offer of proof -- is
5 that there are five charges alleged in the Indictment, Counts
6 I through V. The offer of proof sets out specifically the
7 date of the wire, the account deposited and transferred, and
8 then the amount of the wire.

9 And there are very specific numbers: 1100 for Count
10 I, 5200 for Count II, 1420.56 for Count III, 3875 for Count
11 IV, and 1500 for Count V. And, I mean, just roughly, that's
12 under \$20,000. And then in the offer of proof -- I'm sorry,
13 that's from the Indictment, not the offer of proof.

14 And then the offer of proof there is a statement
15 that says the defendant is also responsible for restitution
16 which the United States estimates is approximately
17 \$377,468.40.

18 And I've certainly had situations before where there
19 are dismissed counts and there's a written plea agreement.
20 And part of the provision of the plea agreement is that the
21 defendant understands and agrees that they are -- or she is or
22 he is responsible for restitution even for dismissed counts.
23 Here, there's an open plea to all five counts.

24 The total transferred aggregate -- and this is
25 obviously ballpark, I don't have a complete figure, but it's

1 under \$20,000. But the restitution is exponentially greater
2 than that, and I guess I'm a little confused. And I wondered
3 if anybody could fill me in on what's going on there -- and I
4 put that --

5 MR. DONAHOE: (Indiscernible.)

6 THE COURT: -- to Michael and Jenn, I'm not sure
7 who --

8 MR. DONAHOE: I can speak to it. All right. The
9 first thing I want to say is that this plea is being offered
10 by design. I think she has a right to plead guilty to the
11 charges that are pending. The charges are very specific.

12 In the past ten years I've had this ongoing battle
13 with the government about this restitution statute. And I
14 understand what it is, and I understand a case in particular
15 called *United States v. Miller*. It's at 471 U.S. 130, it's a
16 1985 decision. That's a fraud case -- I think it's a mail
17 fraud case.

18 And the essence of it is, is that there was a broad
19 scheme alleged in the case. And then what happened at trial
20 was a much smaller scheme was actually proved to the jury.
21 And the case went to the Ninth Circuit on appeal. And the
22 defendant argued, that's not the scheme that you alleged; the
23 scheme that you proved was much smaller. There was a variance
24 or, you know, some --

25 THE COURT: Um-hum.

1 MR. DONAHOE: -- kind of defect in the proof. And
2 he wins; but he goes up to the Supreme Court, and the Supreme
3 Court says, hold up. As long as the complaint scheme was
4 alleged, if a narrower scheme were proved, we're good to go --
5 (indiscernible) not responsible count wise.

6 THE COURT: Okay.

7 MR. DONAHOE: And what I think is happening of late
8 is we're doing it backwards. We're alleging small schemes and
9 then coming in with restitution requests for bigger schemes.
10 I want to make it clear, so I don't take up the Court's time,
11 we're here to plead guilty to the Indictment. Nothing else.

12 And this game that Mr. Weldon (phonetic) thinks
13 justifies the \$373,000 is far away different and larger than
14 anything alleged in this charging document. So we would pray
15 that the Court would listen to her allocution, take the plea
16 after the elements are discussed, and we leave it there.

17 If the government wants to argue that her allocution
18 is an insufficient factual basis for the plea, I guess we can
19 have that fight. I'm not looking for a fight. All I want to
20 do is plead guilty to the indictment.

21 THE COURT: Okay. And I think -- and maybe,
22 Ms. Clark, maybe that's sufficient. I guess I just wanted it
23 to be on the record what exactly was happening because there
24 was such a disparity between the five counts alleged and the
25 five counts which she intends to plead guilty to.

1 And a mention of restitution in the offer of
2 proof -- I agree that's not an issue for today, certainly, in
3 terms of -- that's not an issue that I have any authority or
4 jurisdiction to make a determination of. And if there's, I
5 guess, an issue with the allocution, we can handle it at that
6 time.

7 Does that seem satisfactory to the government as
8 well?

9 MS. CLARK: Yes, Judge. And I don't think that the
10 amount of restitution is an element that needs to be proven.

11 THE COURT: It's not. Yeah.

12 MS. CLARK: So as far as her pleading guilty today,
13 I agree.

14 THE COURT: Okay.

15 MS. CLARK: It should --

16 MR. DONAHOE: I just would -- (indiscernible) to add
17 on, I don't want any misunderstanding. At some point, if
18 we're going to talk about this as a sentencing issue or
19 whatever kind of issue -- however you want to label it -- I'm
20 going to argue --

21 THE COURT: Right.

22 MR. DONAHOE: -- that you are talking about charges
23 that are completely different than what we pled guilty to.
24 And I'm going to try and draw in the grand jury clause, and
25 the due process clause, and those sorts of arguments. I just

1 don't want them -- it would seem to me that the government
2 today would have to justify, somehow, a connection of the
3 scheme that's on the Indictment to that number. And I just
4 don't see that there is any proof of that.

5 THE COURT: And I think I understand and follow what
6 you're saying, Mr. Donahoe. But I do agree that it's really
7 an issue at the time of sentencing because I don't think that
8 I need to get -- I don't think I need to get anything beyond
9 the elements as to each count, and that's all I need.

10 MR. DONAHOE: Okay.

11 THE COURT: And so I don't anticipate having to go
12 into anything more than that. But I thought it was important
13 to talk about on the record because it was unclear to me what
14 was going on and to the extent that you want to make sure
15 that -- well -- and I certainly want to make sure that
16 Ms. Gendreau knows exactly what she is pleading guilty here to
17 today, and so I thought it was important to talk about it.
18 But I don't think that it is a -- I don't think it is a deal
19 breaker for us today, going forward, in terms of having her
20 plead guilty to Counts I through V.

21 MR. DONAHOE: I appreciate that very much, Your
22 Honor.

23 THE COURT: Okay. Do you agree, Ms. Clark?

24 MS. CLARK: I do agree. And it is the understanding
25 of the United States that she is not agreeing to that

1 restitution --

2 THE COURT: Yes.

3 MS. CLARK: -- number.

4 THE COURT: Okay. All right.

5 Sorry for that -- that little sidetrack,
6 Ms. Gendreau. Were you able to hear and follow along with
7 everything that we're saying?

8 THE DEFENDANT: I did hear and follow along.

9 THE COURT: Okay.

10 MR. DONAHOE: And I would point out that we've had
11 that discussion --

12 THE COURT: Okay.

13 MR. DONAHOE: -- and that she is completely aware of
14 what we're talking about here.

15 THE COURT: Okay. All right. Okay. Well, so I
16 think we've covered, then, what the maximum penalties in terms
17 of the actual penalties. Restitution is a fight that will
18 occur on another day. And I think we've run that to ground in
19 terms of what we need to do for here today.

20 But let me ask you, Ms. Gendreau, just kind of
21 talking about sentencing at an early point in this hearing, do
22 you understand that there is no parole in the federal system?

23 THE DEFENDANT: I don't know what that means, sorry.

24 THE COURT: Okay. No, that's fine. So in the state
25 system, and I don't know if you have any criminal history or

1 any criminal background whatsoever, but, generally speaking,
2 if somebody is incarcerated in the state judicial system, they
3 might have the possibility of parole.

4 And what that really is, is the potential or the
5 possibility of being released from prison earlier than they
6 normally would be. So they are released early for -- under
7 certain situations.

8 We don't have that in the federal system. So if
9 there is a period of incarceration that is a sentence in this
10 case, you have to presume that whatever period of
11 incarceration that is, is truly the sentence that you will
12 serve.

13 So in other words, if you are sentenced to prison
14 time and you go to the Bureau of Prisons, you will go there,
15 you will serve whatever sentence the judge gives you. You can
16 get good time accrued under certain circumstances, and those
17 days get taken off your sentence.

18 But other than that, if you receive a period of
19 incarceration as a sentence, that is the sentence that you
20 will serve. So it's just a slight distinction between the
21 state and the federal system, and I just wanted to make sure
22 you understand that.

23 THE DEFENDANT: I understand that. Thank you for
24 explaining it.

25 THE COURT: No problem. Do you understand what

1 supervised release is?

2 THE DEFENDANT: No, I don't know what that is.

3 THE COURT: Okay. Well, supervised release is --
4 it's something very similar to probation, but the distinction
5 between the two is this: If you are sentenced to probation,
6 it means that you don't go to prison. So probation is a
7 sentence that you get in lieu of prison time.

8 Supervised release, on the other hand, is the time
9 period after you have gone to prison and are released from
10 prison. It is the time period directly following that. And
11 the reason I say that they are similar is that in both
12 situations what happens is you are released subject to a
13 number of conditions.

14 There are standard conditions that apply in every
15 case. There are additional conditions that may or may not
16 apply in your case; everybody is a little bit different. But
17 the upshot of it is this, whether it's on supervised release
18 or probation, whichever -- whichever type of release we're
19 talking about, you have to comply with all of those
20 conditions.

21 And if you don't comply with those conditions, what
22 happens is, your probation officer will file a petition to
23 revoke either your probation or your supervised release. And
24 everybody comes back to court, and the judge holds a hearing.
25 And if he determines that you did, in fact, violate your

1 conditions, he can revoke your probation or revoke your
2 supervised release, and then you can be sentenced to prison
3 time.

4 So even if you have already been to prison and are
5 out on supervised release, if you violate those conditions,
6 you could be sent back to prison again. So the conditions are
7 there to help you, but they have significant consequences.

8 And, obviously, that consequence is that if you are
9 in violation, you can be sent to prison. So I just want to
10 make sure you understand that. Any question about that at
11 all?

12 THE DEFENDANT: I -- I understand that. I have no
13 questions.

14 THE COURT: All right. So let's talk about the
15 waiver of your constitutional rights that will occur if you
16 plead guilty here today. You have the right to have a trial
17 in this matter. You can have a trial one of two ways. You
18 can either have a jury trial or you can have a judge trial.
19 We call that a bench trial.

20 And the main distinction between the two is this:
21 If you have a jury trial, the folks that are selected as
22 jurors, they listen to all the witness testimony, they review
23 all the evidence, and they make factual findings based on what
24 they hear and see.

25 The judge determines what law applies in the case

1 and it gives the law to the jury, and what they do during
2 deliberation is they apply the law to the facts, and then they
3 determine whether to acquit you or convict you of these
4 charges. That's how a jury trial works.

5 A bench trial is different in this sense: If you
6 have a bench trial, the judge is still the person who
7 determines the law that applies in your case, but in a bench
8 trial, the judge is also the person who listens to all the
9 testimony and reviews all the evidence, and he makes factual
10 findings based on what he hears and sees.

11 He applies the law to those facts, and he is the
12 person who would determine whether to acquit you or convict
13 you. So that's really the main distinction between a jury
14 trial and a bench trial. If you want to have a bench trial,
15 you can do that.

16 The Court would have to agree to it, and you would
17 have to agree to it, and the United States would have to agree
18 to it as well. But if all three of you did, then you could
19 have a bench trial.

20 On the other hand, if you wanted to have a jury
21 trial, it's your absolute right to have a jury trial. And
22 this is a Butte division case, so what would happen is the
23 Court would summon potential jurors from the counties that
24 make up the Butte division.

25 They would be randomly selected people from licensed

1 drivers and registered voters. They'd be summonsed into
2 court, and then we would go through the jury selection
3 process.

4 And it really -- there's really two main components
5 to jury selection: The first is voir dire, and the second is
6 the actual selection process itself. So voir dire is just --
7 it's a phrase that we use. It means to speak the truth.

8 But what really happens during jury voir dire is the
9 potential jurors are asked questions, because what we're
10 looking for are people who can be fair and impartial, who can
11 simply apply the law to the facts. And we need to have those
12 people be fair and impartial. And the only way we can know if
13 they are fair and impartial is if we know a little bit about
14 them.

15 So in the federal system the judge goes first, and
16 he would ask the majority of the questions, and they would be
17 background questions, you know, who you are, who you know,
18 what you do, any involvement with this case. Do you know
19 anybody involved in the case?

20 Do you have any opinions or thoughts about the
21 judicial system -- questions like that, all in an effort to
22 learn more about these folks. And after the judge is done
23 questioning them, the lawyers get to go. And they would ask
24 whatever follow-up questions they would like to ask.

25 And when all the questioning is done, then we

1 transition to the second part of the jury selection process,
2 and that is truly where the jury is actually selected, because
3 what happens when -- when you bring in folks for a jury trial,
4 you bring in a larger number, and then what you have to do is
5 get down to the smaller number that's actually the trial jury.

6 And that's done by way of challenging. So there are
7 two types of challenges that we use in court; they are a
8 challenge for cause, and a peremptory challenge. A challenge
9 for cause is when there is some reason that that particular
10 person could not be fair and impartial.

11 So, for example, you used to live in the Belgrade
12 area?

13 THE DEFENDANT: Yes.

14 THE COURT: Okay.

15 THE DEFENDANT: I used to live in Belgrade.

16 THE COURT: Okay. So because -- you know,
17 obviously, Gallatin County is one of the counties that's in
18 the Butte division, so there's a possibility that if we
19 summoned a bunch of people in from Gallatin County or happened
20 to be from Gallatin County, one of them might know you or
21 might know your family or have worked with you or went to
22 school with you or something like that.

23 And if that person was asked, look, could you set
24 aside your friendship with Ms. Gendreau and simply apply the
25 law to the facts, even if doing so would make a bad outcome

1 for Ms. Gendreau, could you do that? Most of the time if
2 people are asked questions like that, they are candid and
3 would say, "No, I couldn't hurt my friend." So that person
4 would most likely be excused for cause because they would have
5 admitted they couldn't just be fair and impartial.

6 The government would be asked the same questions --
7 you know, if there was someone who knew a witness for the
8 government or the agent or the prosecutor -- asked the same
9 questions, if they gave the same type of answers, they would
10 also be excused for cause. So that's one type of challenge
11 for cause.

12 Another type of challenge for cause is when somebody
13 has a very strongly held belief or thought or opinion, either
14 about something in the case or about the judicial system
15 itself, that would make it impossible for them to simply apply
16 the law to the facts.

17 So, you know, people have very strong opinions about
18 the judicial system, about sitting in judgment of people and
19 so forth. And if they were asked, look, could you set that
20 belief aside and simply apply the law to the facts because
21 that's what you're required to do?

22 Again, if they can't, and they said, "No, I just
23 don't think I could do that. It would be inconsistent with my
24 beliefs." They would most likely be excused for cause as
25 well. So those are challenges for cause. They don't come up

1 in every single case, but they do come up, and it's important
2 you understand how they work.

3 The second type of challenge, the peremptory
4 challenge, they do come up in every case because they are
5 really the way that we get from the larger jury folks that are
6 brought in, to the actual trial jury itself.

7 So a peremptory challenge is when you feel that a
8 particular person would not be a good fit for your case. So
9 let's say the judge asked a question or your attorney asked a
10 question, and you listened to the answer and you thought, "I
11 just don't like that answer. I don't like -- I don't like
12 what they said" or "I don't like their body language.
13 Something about that makes me feel uncomfortable like I don't
14 want that person making a decision about me." You can
15 exercise a peremptory challenge, and that person would be
16 excused from jury duty. The United States gets them as well.

17 The only thing that neither the United States nor
18 the defendant can do is exercise peremptory challenges in such
19 a way as to excuse all members of a protected class. So, in
20 other words, you cannot use your peremptory challenges to
21 excuse all the women from the jury or all the men from the
22 jury or based on somebody's race or religion. That's
23 inappropriate and not allowed under the law.

24 But other than that, if you just feel that a
25 particular person wouldn't be a good fit for your jury, you

1 can exercise one of your peremptory challenges, and that
2 person would be excused from jury duty. So after all of the
3 challenges have been exercised, the challenges for cause, if
4 there were any in your case, and the peremptory challenges,
5 what you would be left with is a jury made up of 12 people.
6 We actually seat an alternate, so there would technically be
7 13. Those folks would be the trial jurors for your case.

8 So the way a trial works is this: The United States
9 has the burden of proof, so it goes first. So it would call
10 witnesses. Those witnesses would be sworn. They would
11 testify, and evidence would come in through those witnesses.

12 Mr. Donahoe, on your behalf -- and, of course, you
13 have the right to be represented throughout this entire
14 process -- but Mr. Donahoe on your behalf could question those
15 witnesses, could cross-examine them and challenge their
16 testimony and challenge their evidence.

17 He could also bring witnesses to testify on your
18 behalf to tell your side of the story. And if those folks
19 would not come of their own accord, he could ask the Court to
20 issue a subpoena, which the Court would do, and the U.S.
21 Marshals would go get those folks, and they would come to
22 court and testify for you.

23 You, yourself, have the right to testify at trial.
24 But you have the absolute right to not testify at trial. In
25 other words, you have the right to remain silent throughout

1 the entirety of your trial, if you choose to do so. And if
2 you did that, the Court would instruct the jury that it could
3 not consider your decision to remain silent in any way, shape,
4 or form when it was determining whether to acquit you or to
5 convict you.

6 So, Ms. Gendreau, if you chose to have a jury trial
7 in this case, this is how the jury would be instructed:

8 First, that you are presumed innocent as a matter of
9 law; second, that the charges against you must be proven
10 beyond a reasonable doubt; third, that the burden of proving
11 you guilty beyond a reasonable doubt rests entirely with the
12 government.

13 And fourth, any verdict the jury came to, whether it
14 was to acquit you or convict you, whatever that verdict might
15 be, it would have to be unanimous. So in other words, all 12
16 people of the jury would have to agree as to what that verdict
17 was.

18 And if after all of that occurred, you were found
19 guilty, you would have the right to appeal your conviction and
20 sentence to the Ninth Circuit Court of Appeals. Because you
21 are pleading without a plea agreement, you are retaining your
22 right to appeal your sentence to the Ninth Circuit Court of
23 Appeals.

24 But those other rights, those trial rights that I
25 just discussed there, those rights are very valuable, and you

1 are going to waive them by pleading guilty here today. So let
2 me ask you a couple of questions about that: First of all, do
3 you understand how valuable they are?

4 THE DEFENDANT: I do understand how valuable they
5 are.

6 THE COURT: And do you understand, Ms. Gendreau,
7 that if you go forward and change your plea, you're going to
8 be waiving those rights?

9 THE DEFENDANT: I understand that I will waive those
10 rights, yes.

11 THE COURT: Okay. And do you still wish to go
12 forward with this change of plea hearing?

13 THE DEFENDANT: I still wish to go forward with this
14 change of plea hearing.

15 THE COURT: All right. Well, there are additional
16 collateral rights that you will waive by pleading guilty here
17 today. And the collateral -- not because they are
18 unimportant, but they are not as closely associated with the
19 trial itself.

20 They include the right to vote, the right to hold
21 public office, the right to serve on a jury or a grand jury,
22 the right to possess a firearm and -- let's talk about that
23 for a second.

24 All of these rights, of course, are incredibly
25 important, and the loss of them is a very important and

1 serious matter. But the loss of your Second Amendment right
2 comes with it a potential very significant and severe
3 consequence, and it's this: So once you plead guilty to a
4 federal felony, you are prohibited from possessing a firearm
5 or ammunition. And the only way to get that back is if the
6 federal Department of Treasury restores that right. I
7 literally have never heard of that happening. You have to
8 presume that it's a lifetime ban.

9 And the reason that the consequence is so
10 significant is this: If you are later found to be in
11 possession of a firearm or ammunition, you can be charged with
12 a completely separate standalone charge of being a prohibited
13 person in possession.

14 And so that would be a federal charge and a federal
15 sentence completely separate from anything that might come out
16 of this case, so it's very -- it's very serious. Do you have
17 any question about what that means?

18 THE DEFENDANT: No.

19 THE COURT: Okay.

20 THE DEFENDANT: (Indiscernible.)

21 THE COURT: All right. So let me ask you the same
22 questions about these collateral rights. Do you understand
23 how valuable they are?

24 THE DEFENDANT: I do.

25 THE COURT: And that you will waive them by going

1 forward here today?

2 THE DEFENDANT: I understand that, yes.

3 THE COURT: Okay. And you still wish to go forward?

4 THE DEFENDANT: I still wish to go forward, yes.

5 THE COURT: All right.

6 Let's talk about sentencing: So sentencing, and I
7 know Mr. Donahoe would have discussed this with you, but
8 sentencing in the federal system is governed by statute. It's
9 18, United States Code, Section 3553(a). And that statute
10 requires the Court to sentence you to a sufficient but no
11 greater than necessary sentence.

12 There's a whole list of factors that the Court must
13 consider when determining what is a sufficient but not greater
14 than necessary sentence. It includes your history and
15 background, the nature and circumstances of the crime, the
16 need to promote deterrence and respect for the law, the need
17 to provide restitution. Sometimes there's a need to provide
18 medical or rehabilitative care.

19 There are occasionally policy statements that the
20 Court must consider as well. One of the factors that the
21 Court is required to consider under 3553(a) is the United
22 States Sentencing Guidelines. And have you discussed those
23 with Mr. Donahoe?

24 THE DEFENDANT: I've discussed them a little bit,
25 not -- not a tremendous amount.

1 THE COURT: Okay. Well, the guidelines used to be
2 mandatory; now they are advisory. The Court is required to,
3 first of all, calculate what the accurate guideline range is
4 and then consider the accurate guideline range in -- in coming
5 to that sufficient but no greater than necessary sentence.

6 This is essentially the way it works: There's
7 really two components of determining what your guideline range
8 is. The first is your criminal history category, and the
9 second is your offense level. So the criminal history
10 category is calculated by -- the presentence report writer
11 will run a background check on you and find any contacts that
12 you've had with law enforcement.

13 Some of those score, some of those don't score. The
14 ones that score get added up and you get points for them, and
15 whatever your total number is, is going to fall under a
16 criminal history category. Have you seen the sentencing
17 table?

18 THE DEFENDANT: No.

19 THE COURT: So the sentencing table looks like a
20 grid. And up on top, there are Roman numerals I through VI,
21 and those represent your criminal history categories, I being
22 the lowest, VI being the highest. So whatever your criminal
23 history category is, you're going to get assigned one of those
24 Roman numerals.

25 On the left hand side of this table is another

1 series of numbers, 1 through 43, and those represent your
2 offense level. And the way the offense level is calculated is
3 you start off with the statute that you are accused of
4 violating, and that's going to correspond to a guideline. And
5 that guideline is going to have a base offense level.

6 And then there are factors that can make that
7 offense level go up or down. There are adjustments and
8 enhancements, and in cases like yours, restitution or loss
9 amount often -- it says "loss amount," not restitution -- can
10 make that number go up or down. There are other factors that
11 can make that number go up or down as well.

12 Once all of the adjustments and enhancements have
13 been taken into account, you have your final adjusted offense
14 level, and that's going to be one of those numbers, 1 through
15 43, on the left-hand side.

16 And the way you figure out what your guideline range
17 is -- you take whatever criminal history category you are --
18 so that's up on top, right? And then you take your offense
19 level over here on the left, and you look in that table of
20 columns and wherever those two things meet, there are going to
21 be -- there's going to be a range of numbers.

22 And they vary from a lot of different things, but it
23 will start with a lower-end month to a higher-end month, and
24 that's your guideline range. So it's a little mathematic, and
25 there are a lot of things -- a lot of moving parts that can

1 make that number go up or down, but that's essentially how it
2 works. Okay?

3 THE DEFENDANT: Yes.

4 THE COURT: All right.

5 Mr. Donahoe, have you been able to estimate what you
6 think the guideline range might be in this case? And I know
7 it's a moving target because of the loss amount, I presume.

8 MR. DONAHOE: I have.

9 THE COURT: And have you discussed that with
10 Ms. Gendreau?

11 MR. DONAHOE: I have.

12 THE COURT: Okay.

13 MR. DONAHOE: I gave her estimates highest and then
14 lowest.

15 THE COURT: Okay. Ms. Gendreau, do you feel that
16 you have had sufficient time to discuss the estimates with
17 Mr. Donahoe?

18 THE DEFENDANT: I do. I feel like we've had
19 sufficient time to discuss.

20 THE COURT: Okay.

21 MR. DONAHOE: I don't know if she remembers all of
22 this conversation. I mean, she does have some memory issues
23 with the procedure that she went through.

24 THE COURT: Okay.

25 MR. DONAHOE: She surely doesn't remember everything

1 that we spoke about.

2 THE COURT: Sure.

3 MR. DONAHOE: Yeah.

4 THE DEFENDANT: I don't always remember everything,
5 but I don't -- like I'm not (indiscernible) or I'm not able to
6 ask questions.

7 THE COURT: Okay.

8 THE DEFENDANT: I do have memory loss as a result of
9 both the -- what led up to the procedure and my brain surgery
10 so...

11 THE COURT: Okay. So -- and I understand that. Let
12 me just kind of ask a couple of follow-up questions on that.

13 When we initially -- when we started off this
14 hearing and I was asking you if there was anything about your
15 condition that made it difficult for you to understand, and
16 you said, "No," you were fine. And I do understand that and
17 appreciate that.

18 I think what I'm hearing is that you occasionally
19 have some difficulty with memory; is that right?

20 THE DEFENDANT: Right. But, typically, once I'm
21 reminded it will come back.

22 THE COURT: Okay.

23 THE DEFENDANT: It sometimes -- whether it's right
24 there or not --

25 THE COURT: Um-hum.

1 THE DEFENDANT: -- at that moment.

2 THE COURT: Okay. So let me ask you then,
3 Ms. Gendreau, as you sit here -- and we've kind of maybe
4 refreshed your recollection a little bit -- do you remember
5 talking with Mr. Donahoe about the guidelines and sort of how
6 they work and --

7 THE DEFENDANT: I do remember talking with
8 Mr. Donahoe about the guidelines. I do not remember specific
9 numbers, if that makes sense, like specific --

10 THE COURT: Sure.

11 THE DEFENDANT: -- (indiscernible). I just -- we
12 had that conversation.

13 THE COURT: Okay.

14 THE DEFENDANT: And nothing has changed my position.

15 THE COURT: Okay. Well -- and I will tell you that
16 right now, the most that anyone can do is give an estimate of
17 what they believe the guidelines might be anyway. So there
18 certainly isn't a hard and fast number that has been
19 determined to be the guideline range at all.

20 I just need to make sure that you have a basic
21 understanding of how it works and what types of things can,
22 you know, I guess, affect the ultimate guideline range. And
23 as long as you feel comfortable that you've had sufficient
24 time to discuss all those matters with Mr. Donahoe and he
25 feels the same, I think we're all on the same page.

1 Do you agree with that?

2 THE DEFENDANT: I do. And, again, I do remember
3 having those conversations about the guidelines and what
4 affects them and it being, you know, based on certain factors.

5 THE COURT: Okay.

6 THE DEFENDANT: I do recall -- I recall that and I
7 remember it. I'm aware of that.

8 THE COURT: Okay.

9 THE DEFENDANT: Yes.

10 THE COURT: Okay. Thank you very much.

11 Ms. Clark, would you please explain the legal
12 elements of the offense?

13 MS. CLARK: Yes.

14 The legal elements that the government must prove
15 are first, the defendant knowingly participated in, devised,
16 and intended to devise, a scheme or plan to defraud, or a
17 scheme or plan for obtaining money or property by means of a
18 false or fraudulent pretenses, representations, or promises;

19 Second, the statements made or facts omitted as part
20 of the scheme were material; that is, they had a natural
21 tendency to influence, or were capable of influencing, a
22 person to part with money or property;

23 Third, the defendant acted with the intent to
24 defraud, that is, the intent to deceive and cheat; and

25 Fourth, the defendant used, or caused to be used, a

1 wire communication to carry out or attempt to carry out an
2 essential part of the scheme.

3 THE COURT: Mr. Donahoe, do you agree that those are
4 the essential elements of the offense?

5 MR. DONAHOE: I do.

6 THE COURT: Okay. So, Ms. Gendreau, there has been
7 an offer of proof filed in this case. And an offer of proof
8 is just a document that the government files with the Court,
9 and it sets out a number of things including the elements.

10 But, more importantly, for our purposes today, it
11 also sets out the evidence they believe they could prove if
12 they had to try this case. So let me ask you a couple of
13 questions. First, did you receive a copy of that offer of
14 proof?

15 THE DEFENDANT: I did receive a copy of it. I'm
16 looking at it right now.

17 THE COURT: Okay. Good, good. And did you have a
18 chance to review and discuss it with Mr. Donahoe?

19 THE DEFENDANT: I did. We discussed it.

20 THE COURT: So, Ms. Clark, would you please describe
21 for the Court the evidence you believe the government could
22 show if it had to try its case.

23 MS. CLARK: Yes. The government anticipates that
24 this is the evidence that would be presented at trial:

25 Alison Gendreau worked for Yellowstone Harley

1 Davidson in Belgrade, Montana. She began stealing money
2 through multiple means as identified in the Indictment. When
3 confronted by management, Ms. Gendreau admitted to stealing
4 money. The United States estimates restitution totals
5 approximately \$377,468.40. Ms. Gendreau disputes that amount
6 and claims restitution is less.

7 With respect to the specific wires charged in the
8 Indictment, for Count I, Ms. Gendreau's daughter,
9 Hanna Waldear had an account balance of \$140.84 on
10 August 23, 2018. Ms. Gendreau deposited into
11 Hanna Walear's [sic] -- I don't know which one is correct --
12 Waldear? -- Waldear's account, \$1,100 from Yellowstone Harley
13 Davidson as, quote, payroll.

14 Ms. Waldear spent the money in three days including
15 \$832.34 at Boise State University. Ms. Waldear was not
16 working for Yellowstone Harley Davidson at the time, and
17 Ms. Waldear was not entitled to any of the money in Count I.

18 For Count II, on October 9, 2018, Ms. Gendreau
19 deposited into Ms. Waldear's account \$5,200 from Yellowstone
20 Harley Davidson as, quote, payroll. Six days later, on
21 October 15, 2021, Ms. Waldear wrote a check in the amount of
22 \$4,500 to Boise State University for, quote, tuition.
23 Ms. Waldear was not working for Yellowstone Harley Davidson at
24 the time, and Ms. Waldear was not entitled to any of the money
25 in Count II.

1 For Count III, on October 17, 2018, Ms. Gendreau
2 deposited an inflated amount of payroll from Yellowstone
3 Harley Davidson into her account in the amount of \$1,805.69.
4 Despite already receiving payment for working, even at an
5 inflated amount, Ms. Gendreau issued herself two additional
6 checks of \$1,681.68 each totaling \$3,363.36 that covered the
7 same pay periods.

8 Ms. Gendreau deposited the first additional check on
9 October 19, 2021, and she deposited the second additional
10 check on November 2, 2021. Ms. Gendreau used the stolen
11 money, at least in part, for a vacation in Mexico.

12 For Count IV, on November 9, 2018, Ms. Gendreau
13 issued a check to Ms. Waldear in the amount of \$3,875. Prior
14 to depositing the check, Ms. Waldear's account balance was
15 \$49.86. Ms. Waldear was not working for Yellowstone Harley
16 Davidson at the time, and Ms. Waldear is not entitled to any
17 of the money in Count IV.

18 For Count V, on January 29, 2019, Ms. Gendreau
19 deposited \$1,500 into Ms. Waldear's bank account. Prior to
20 depositing the money, Ms. Waldear's account balance was
21 \$13.57. Ms. Waldear was not working for Yellowstone Harley
22 Davidson at the time, and Ms. Waldear was not entitled to any
23 of the money in Count V. All of the above deposits for Counts
24 I through V generated interstate wires.

25 THE COURT: Ms. Clark, on Count III, am I

1 understanding that the two checks were deposited after
2 Ms. Gendreau was indicted?

3 MS. CLARK: Judge, I think that was the --

4 THE COURT: It must be a typographical error.

5 MS. CLARK: I believe -- my understanding is that
6 they were deposited around the same time, so it would have
7 been in 2018.

8 THE COURT: Okay.

9 MS. CLARK: But I would move to amend that through
10 interlineation.

11 MR. DONAHOE: No objection.

12 THE COURT: Okay. So just -- just so the record is
13 clear, in relation to Count III, with the two additional
14 checks of 1681 and 68 cents each, that the first check was
15 deposited on October 19, 2018; and the second, on
16 November 2, 2018; is that --

17 MS. CLARK: That's my understanding, Your Honor, in
18 discussion, that these were all three in a --

19 THE COURT: At the same time?

20 MS. CLARK: -- (indiscernible) timeframe.

21 THE COURT: All right. So with that amendment,
22 Mr. Donahoe, is there anything in the offer of proof that you
23 disagree with or that you don't believe is accurate?

24 MR. DONAHOE: Well, just the recitation of the
25 phrase "over means" -- I don't know what that means.

1 THE COURT: Okay.

2 MR. DONAHOE: What we're pleading guilty to is
3 Ms. Gendreau pilfering the payroll account and sending money
4 to her daughter, to which she was not entitled.

5 THE COURT: Okay.

6 MR. DONAHOE: (Indiscernible.)

7 THE COURT: Okay.

8 MR. DONAHOE: Say that one, that the transfer to
9 herself.

10 THE COURT: Okay.

11 MR. DONAHOE: Yeah.

12 THE COURT: All right. So, Ms. Gendreau, were you
13 able to hear what Mr. Donahoe just said?

14 THE DEFENDANT: I did hear what Mr. Donahoe just
15 said.

16 THE COURT: Okay. So with that, with that
17 clarification, let me ask you the same question: Is there
18 anything in the offer of proof that you heard that you
19 disagree with or that you do not believe is true?

20 THE DEFENDANT: I guess going back to Count III,
21 it's a different amount to -- than the actual Count III on the
22 initial Indictment so I'm confused as to what is the actual
23 amount.

24 THE COURT: I think that's accurate.

25 MS. CLARK: So it looks...

1 THE COURT: So it looks to me like in the
2 Indictment, Count III alleges \$1,420.56, and the offer of
3 proof it's -- I don't know what to do about the inflated
4 amount of payroll because I don't know what her regular
5 payroll was, but the two additional checks for the same pay
6 periods, 1681 and 68 cents, totaling \$3,363.46.

7 MS. CLARK: Judge, initially, I'm thinking, he just
8 put in the wired -- or the transfer amount that was deposited
9 in her account, but that also has a different amount. And
10 going back to maybe even perhaps the elements that the
11 government must prove and not the amounts that --

12 THE COURT: Right.

13 MS. CLARK: -- whichever amount is correct will be
14 sorted out. But the initial -- the proof would be that she
15 deposited money that she was not entitled to into her account.

16 THE COURT: Um-hum.

17 MS. CLARK: And that that was done by triggering a
18 wire that went through interstate commerce.

19 THE COURT: Okay. I think that's right. The
20 elements don't require a specific amount to be pled.

21 So let me ask you -- and I don't know the answer to
22 the discrepancy there, Ms. Gendreau, and I don't think we're
23 going to be able to get that clarified here today. But other
24 than that, is there anything in the offer of proof that you
25 heard that you disagree with or that you don't believe is

1 true?

2 THE DEFENDANT: No. I agree with the five counts on
3 the offer of proof.

4 THE COURT: Okay.

5 THE DEFENDANT: Including Count III with an
6 understanding that what was just said.

7 THE COURT: Okay.

8 THE DEFENDANT: That it was just that the wire was
9 initiated -- I understand that.

10 THE COURT: Okay. So what I need you to do then,
11 Ms. Gendreau, is just tell me in your own words what you did
12 that makes you think that you ought to plead guilty to Counts
13 I through V. So what did you do that makes you think that it
14 justifies a guilty plea?

15 THE DEFENDANT: I did siphon the money from payroll
16 into my daughter's account to assist her with her tuition
17 expenses and also into my own personal account.

18 THE COURT: And how would you accomplish that? What
19 did you use?

20 THE DEFENDANT: Through direct deposits out of the
21 payroll account.

22 THE COURT: Okay. So you were using the Internet to
23 do that?

24 THE DEFENDANT: Yes.

25 THE COURT: Okay. And you knew that it wasn't your

1 money to use as you wished with?

2 THE DEFENDANT: I did know that, yes.

3 THE COURT: Okay. And presumably you took -- you
4 concealed it from your employer?

5 THE DEFENDANT: Yes.

6 THE COURT: All right. Well, Ms. Gendreau, based on
7 our discussions here today, I am going to grant your motion to
8 withdraw your previously entered not guilty pleas to Count I
9 through V. And let me ask you now, how do you plead to Counts
10 I through V of the Indictment?

11 THE DEFENDANT: I plead guilty to Counts I through
12 V.

13 THE COURT: All right. Well, I find that you are
14 fully competent and capable of entering an informed and
15 voluntary plea. I find that you are aware of the nature of
16 the charges to which you have pled guilty, the potential
17 consequences that you will face by pleading guilty here today,
18 as well as the maximum penalties that can be imposed upon you
19 by pleading guilty here today.

20 I find that you fully understand your constitutional
21 rights and the extent to which you have waived those rights by
22 pleading guilty here today. And I find that your guilty plea
23 is supported by an independent basis in fact which would
24 support each of the essential elements of the charges.

25 And, Ms. Gendreau, I further find that if a jury

1 heard the offer of proof, even with the clarifications made --
2 that if a jury heard that, then heard the admissions that you
3 made here in court, it would, in fact, find you guilty beyond
4 a reasonable doubt of all five of those counts, so I will
5 recommend to Judge Christensen that he accept your guilty plea
6 on Counts I through V and sentence you in this matter.

7 So let's talk about what's going to happen next.
8 You are going to be interviewed by a member of the United
9 States Probation Office, and there will be some forms that you
10 have to sign. They are releases, they allow the government to
11 get -- or the probation office, I'm sorry -- to get
12 information that they need -- you know, tax information,
13 employment information, sometimes there's health -- mental
14 health, things like that.

15 But during the interview what's going to happen is
16 you're going to be asked a lot of questions about your
17 background, who you are and so forth, because part of the
18 presentence report that gets used at sentencing, part of it is
19 like a biographical sketch of who you are.

20 And it's important that the Court has that because
21 it helps the Court see you more fully and see who you are and,
22 you know, take that into account when it's looking at, you
23 know, your history and background.

24 You have to answer all the questions that are asked
25 by the probation officer, and you have to answer them

1 truthfully. If you don't answer them truthfully, that can
2 impact your guidelines because -- remember when I was talking
3 about those enhancements and adjustments that could make that
4 offense level go up or down?

5 Well, one of them is for obstruction, and so you
6 need to make sure you answer the questions and answer them
7 truthfully. But you will have Mr. Donahoe present -- I
8 believe you're doing this by Zoom; is that correct? The
9 interview?

10 THE DEFENDANT: Telephone.

11 THE COURT: Telephone, okay. By phone so -- but
12 Mr. Donahoe will be on the phone with you, and if there is a
13 question that you feel that you can't answer without speaking
14 to him first, you can ask for a break and then talk with
15 Mr. Donahoe without the presence of the probation officers,
16 and then you can get back on the call and resume the
17 interview.

18 But the other components of the presentence report
19 are, of course, related to the guideline calculation. And so
20 they are the computation of your criminal history category and
21 the computation of the offense level.

22 It takes a fair amount of time to get all this
23 information put together. But after the report is done in
24 draft, it gets sent to the attorneys for the parties. And
25 what happens after that is called the informal objection

1 period.

2 And what you do during that time period is you and
3 your attorney will go through the draft report very carefully.
4 You want to make sure it's accurate. You want to make sure
5 that there aren't things that you need to have clarified, and
6 if there are, what you do is you make informal objections to
7 the presentence report writer.

8 Oftentimes, those are things that don't have any
9 impact at all on the guidelines. So it could be, you know, a
10 wrong or incorrect name or an address that's not listed, you
11 know, accurately, things like that, that it's important to be
12 accurate in the report, but those things won't change the
13 guideline calculation.

14 But there could be other objections that might
15 potentially change or affect the guideline calculation. Those
16 tend to be more legal in nature although sometimes it's a mix
17 of law and fact. Mr. Donahoe can help you with those.

18 But what you do is, you make all those objections to
19 the presentence report writer, and then she can either accept
20 those changes, and then the report gets modified, or decline
21 to accept those changes. And then what happens is generally
22 the report itself doesn't get modified, but what happens is,
23 there's an addendum or supplement that will list out all of
24 the objections and what the response to those objections were.

25 And the reason that's important is, what happens

1 next is that the report gets finalized and it goes to the
2 parties again, but it also goes to the Court. And at the time
3 of sentencing, if there are any unresolved objections, what
4 will happen at the beginning of the sentencing hearing is the
5 Court will have like a little mini hearing on those objections
6 because it has to calculate and consider the accurate
7 guideline range.

8 And it can only do that if it has, you know,
9 resolved those objections one way or the other. So whichever
10 way it goes, it has to handle them and resolve them and then
11 calculate and consider the guideline range. So that's the
12 presentence report writing phase and how it gets used at the
13 time of sentencing.

14 Do you have any question about what entail -- what
15 that entails or what it means for you?

16 THE DEFENDANT: No, I don't have any questions.

17 THE COURT: Okay. All right. Sentencing will be on
18 April 15, 2022. That will be at 9:00 a.m. here in Missoula
19 with Judge Christensen. No problem with continued release,
20 but the one thing we do have to talk about is processing.

21 So, Ms. Gendreau, what we're going to need you to
22 do, and I think that you can work with either Mr. Donahoe
23 and/or probation to get this accomplished, but we're going to
24 need you to go down to the Boise courthouse, the Boise Federal
25 Courthouse, because the United States Marshals Service has to

1 process you.

2 That's one of the things that -- you know, your
3 initial appearance was virtual as well, so you weren't
4 actually processed by the Marshals up here for that initial
5 appearance, and that needs to get done.

6 So I think if the Marshals know that's coming, and
7 they can work with your attorney to make sure that there's a
8 time and a place set for you to get down to the courthouse and
9 get that taken care of. Okay?

10 THE DEFENDANT: Okay.

11 THE COURT: Okay. Anything else, Mr. Donahoe?

12 MR. DONAHOE: No, thank you.

13 THE COURT: Anything from the government?

14 MS. CLARK: No, thank you.

15 THE COURT: All right. We'll be in recess.

16 Thank you, Ms. Gendreau.

17 (Whereupon, the proceedings concluded at 2:36:54 p.m.)

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19 --o0o--

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CERTIFICATE OF TRANSCRIBER

1
2 I, Kim Marchwick, a Registered Professional Reporter
3 and Certified Realtime Reporter, do hereby certify that the
4 foregoing 53 pages of transcript is an accurate transcription,
5 done to the best of my ability, from the digital audio
6 recording of the proceedings given at the time and place
7 hereinbefore mentioned; that the proceedings were reported by
8 me in machine shorthand and thereafter reduced to typewritten
9 form using Computer-Aided Transcription; that after being
10 reduced to typewritten form, a certified copy of this
11 transcript will be filed electronically with the court.

12 I further certify that I am not an attorney for, nor
13 employed by, nor related to any of the parties or attorneys to
14 this action, nor financially interested in this action.

15 Whereupon, this document was signed by me in
16 Billings, Montana, this Monday, the 28th day of March, 2022.

17
18
19 */s/ Kim Marchwick 3.28.2022*

20 _____
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23 Federal Certified Realtime Reporter
24 Certified Realtime Reporter
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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

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

UNITED STATES OF AMERICA,	CR 21-22-BU-DLC
Plaintiff,	
vs.	OFFER OF PROOF
ALISON LEE GENDREAU,	
Defendant.	

THE CHARGE

The defendant, ALISON LEE GENDREAU, is charged by indictment with five counts of Wire Fraud, in violation of 18 U.S.C. § 1343.

PLEA

The defendant, ALISON LEE GENDREAU, will plead guilty to all counts in the indictment without the benefit of a plea agreement. The motion for change of plea filed with the Court represents, in the government's view, the most favorable disposition of the case against the defendant. *See, e.g., Missouri v. Frye*, 132 S. Ct. 1399 (2012).

ELEMENTS

The defendant will plead guilty to all counts in the indictment. In pleading guilty to all counts, the defendant acknowledges that for each count:

First, the defendant knowingly participated in, devised, and intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third, the defendant acted with the intent to defraud, that is, the intent to deceive and cheat; and,

Fourth, the defendant used, or caused to be used, a wire communication to carry out or attempt to carry out an essential part of the scheme.

PENALTY

Each count of the indictment charges the crime of Wire Fraud, in violation of 18 U.S.C. § 1343. Each count carries a maximum term of imprisonment of 20 years, a \$250,000 fine, up to three years supervised release, and a \$100 special assessment. The defendant is also responsible for restitution, which the United States estimates is approximately \$377,468.40.

ANTICIPATED EVIDENCE

If this case were tried in United States District Court, the United States would prove the following:

Alison Gendreau worked for Yellowstone Harley Davidson in Belgrade, Montana. She began stealing money through multiple means as identified in the indictment. When confronted by management, Gendreau admitted to stealing money. The United States estimates restitution totals approximately \$377,468.40. Gendreau disputes that amount and claims restitution is less.

With respect to the specific wires charged in the indictment, for count I, Ms. Gendreau's daughter, Hanna Waldear, had an account balance of \$140.84 on August 23, 2018. Gendreau deposited into Hanna Walear's account \$1,100 from Yellowstone Harley Davidson as "payroll." Waldear spent the money in three days, including \$832.34 at Boise State University. Waldear was not working for

Yellowstone Harley Davidson at the time, and Waldear was not entitled to any of the money in count I.

For count II, on October 9, 2018, Gendreau deposited into Waldear's account \$5,200 from Yellowstone Harley Davidson as "payroll." Six days later, on October 15, 2021, Waldear wrote a check in the amount of \$4,500 to Boise State University for "tuition." Waldear was not working for Yellowstone Harley Davidson at the time, and Waldear was not entitled to any of the money in count II.

For count III, on October 17, 2018, Gendreau deposited an inflated amount of payroll from Yellowstone Harley Davidson into her account in the amount of \$1,805.69. Despite already receiving payment for working (even at an inflated amount), Gendreau issued herself two additional checks of \$1,681.68 each (totaling \$3,363.36) that covered the same pay periods. Gendreau deposited the first additional check on October 19, 2021, and she deposited the second additional check on November 2, 2021. Gendreau used the stolen money, at least in part, for a vacation in Mexico.

For count IV, on November 9, 2018, Gendreau issued a check to Waldear in the amount of \$3,875. Prior to depositing the check, Waldear's account balance was \$49.86. Waldear was not working for Yellowstone Harley Davidson at the time, and Waldear was not entitled to any of the money in count IV.

For count V, on January 29, 2019, Gendreau deposited \$1,500 into Waldear's bank account. Prior to depositing the money, Waldear's account balance was \$13.57. Waldear was not working for Yellowstone Harley Davidson at the time, and Waldear was not entitled to any of the money in count V.

All of the above deposits for counts I-V generated interstate wires.

The United States would have presented this evidence through the testimony of law enforcement and lay witnesses.

DATED this 3rd day of December, 2021.

LEIF JOHNSON
United States Attorney

/s/ Ryan G. Weldon
RYAN G. WELDON
Assistant U.S. Attorney

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FILED

JUL 28 2021

Clerk, U.S. Courts
District Of Montana
Missoula Division

**ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA**

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

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>ALISON LEE GENDREAU,</p> <p style="text-align: center;">Defendant.</p>	<p>CR 21- 22 -BU- DLC</p> <p>INDICTMENT</p> <p>WIRE FRAUD (Counts I-V) Title 18 U.S.C. § 1343 (Penalty: 20 years imprisonment, \$250,000 fine, and three years supervised release)</p>
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THE GRAND JURY CHARGES:

COUNTS I-V

Beginning in or about December 2014, and continuing thereafter until in or about May 2019, at Belgrade and Gallatin County, in the State and District of Montana, and other places, the defendant, ALISON LEE GENDREAU, having

devised and intending to devise a material scheme and artifice to defraud, and for the purpose of executing such scheme and artifice, and attempting to do so, did knowingly transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice.

THE FRAUDULENT SCHEME

During the period of the indictment, it was part of the material scheme and artifice to defraud that the defendant, ALISON LEE GENDREAU, while working as an employee for Yellowstone Harley Davidson, which is located in Belgrade, Montana, fraudulently, and without any authorization, stole money by various means, including diverting payroll, inflating her own compensation, using a business credit card for personal expenses, skimming cash deposits, and paying family members as if they were employees for Yellowstone Harley Davidson (even though the family members did not work for Yellowstone Harley Davidson), none of which was authorized by Yellowstone Harley Davidson.

In order to cover the fraud, the defendant, ALISON LEE GENDREAU, did not report full payments received by Yellowstone Harley Davidson, and did not pay bills and taxes owed by Yellowstone Harley Davidson, which allowed the defendant to continue to embezzle funds without detection.

THE INTERSTATE WIRE COMMUNICATIONS

During the period of the indictment, the defendant, ALISON LEE GENDREAU, having devised and intending to devise a material scheme and artifice to defraud, as described herein, for the purpose of executing the scheme to defraud, used checks, direct deposits, credit cards, and other forms of money, thereby transmitting and causing to be transmitted by means of wire communication affecting interstate commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, from the State of Montana, through Minneapolis, Minnesota, and elsewhere, which is identified in the table identified below, all in violation of 18 U.S.C. § 1343.

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Count	Amount	Date	Account Deposited and Transferred
I	\$1,100.00	8/24/2018	1904
II	\$5,200.00	10/9/2018	1904
III	\$1,420.56	10/17/2018	3462
IV	\$3,875.00	11/13/2018	1904
V	\$1,500.00	1/29/2019	1904

A TRUE BILL.

Foreperson signature redacted. Original document filed under seal.


LEIF M. JOHNSON
Acting United States Attorney


(Er) JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

Summons: IA/Arrestment - 8/30/21 @ 1:30 p.m. w/ KLD

Warrant: _____

IRS Form **8300**
(Rev. August 2014)

**Report of Cash Payments Over \$10,000
Received in a Trade or Business**

FinCEN **8300**
Form
(Rev. August 2014)

▶ See instructions for definition of cash.
▶ Use this form for transactions occurring after August 29, 2014. Do not use prior versions after this date.

OMB No. 1506-0018
Department of the Treasury
Financial Crimes
Enforcement Network

Department of the Treasury
Internal Revenue Service

For Privacy Act and Paperwork Reduction Act Notice, see the last page.

1 Check appropriate box(es) if: a Amends prior report; b Suspicious transaction.

Part I Identity of Individual From Whom the Cash Was Received

2 If more than one individual is involved, check here and see instructions ▶

3 Last name 4 First name 5 M.I. 6 Taxpayer identification number

7 Address (number, street, and apt. or suite no.) 8 Date of birth . . . ▶ M M D D Y Y Y Y (see instructions)

9 City 10 State 11 ZIP code 12 Country (if not U.S.) 13 Occupation, profession, or business

14 Identifying document (ID) a Describe ID ▶ c Number ▶ b Issued by ▶

Part II Person on Whose Behalf This Transaction Was Conducted

15 If this transaction was conducted on behalf of more than one person, check here and see instructions ▶

16 Individual's last name or organization's name 17 First name 18 M.I. 19 Taxpayer identification number

20 Doing business as (DBA) name (see instructions) Employer identification number

21 Address (number, street, and apt. or suite no.) 22 Occupation, profession, or business

23 City 24 State 25 ZIP code 26 Country (if not U.S.)

27 Alien identification (ID) a Describe ID ▶ c Number ▶ b Issued by ▶

Part III Description of Transaction and Method of Payment

28 Date cash received 29 Total cash received 30 If cash was received in more than one payment, check here . . . ▶ 31 Total price if different from item 29

32 Amount of cash received (in U.S. dollar equivalent) (must equal item 29) (see instructions):
a U.S. currency \$.00 (Amount in \$100 bills or higher \$.00)
b Foreign currency \$.00 (Country ▶)
c Cashier's check(s) \$.00 Issuer's name(s) and serial number(s) of the monetary instrument(s) ▶
d Money order(s) \$.00
e Bank draft(s) \$.00
f Traveler's check(s) \$.00

33 Type of transaction
a Personal property purchased f Debt obligations paid
b Real property purchased g Exchange of cash
c Personal services provided h Escrow or trust funds
d Business services provided i Bail received by court clerks
e Intangible property purchased j Other (specify in item 34) ▶
34 Specific description of property or service shown in 33. Give serial or registration number, address, docket number, etc. ▶

Part IV Business That Received Cash

35 Name of business that received cash 36 Employer identification number

37 Address (number, street, and apt. or suite no.) Social security number

38 City 39 State 40 ZIP code 41 Nature of your business

42 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Signature ▶ Authorized official Title ▶

43 Date of signature M M D D Y Y Y Y 44 Type or print name of contact person 45 Contact telephone number

Multiple Parties

(Complete applicable parts below if box 2 or 15 on page 1 is checked.)

Part I Continued—Complete if box 2 on page 1 is checked

Form section for Part I, entry 1: 3 Last name, 4 First name, 5 M.I., 6 Taxpayer identification number, 7 Address, 8 Date of birth, 9 City, 10 State, 11 ZIP code, 12 Country, 13 Occupation, 14 Identifying document (ID).

Form section for Part I, entry 2: 3 Last name, 4 First name, 5 M.I., 6 Taxpayer identification number, 7 Address, 8 Date of birth, 9 City, 10 State, 11 ZIP code, 12 Country, 13 Occupation, 14 Identifying document (ID).

Part II Continued—Complete if box 15 on page 1 is checked

Form section for Part II, entry 1: 16 Individual's last name or organization's name, 17 First name, 18 M.I., 19 Taxpayer identification number, 20 Doing business as (DBA) name, 21 Address, 22 Occupation, 23 City, 24 State, 25 ZIP code, 26 Country, 27 Alien identification (ID).

Form section for Part II, entry 2: 16 Individual's last name or organization's name, 17 First name, 18 M.I., 19 Taxpayer identification number, 20 Doing business as (DBA) name, 21 Address, 22 Occupation, 23 City, 24 State, 25 ZIP code, 26 Country, 27 Alien identification (ID).

Comments – Please use the lines provided below to comment on or clarify any information you entered on any line in Parts I, II, III, and IV

Horizontal lines provided for entering comments.

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form 8300 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/form8300.

Important Reminders

- Section 6050I (26 United States Code (U.S.C.) 6050I) and 31 U.S.C. 5331 require that certain information be reported to the IRS and the Financial Crimes Enforcement Network (FinCEN). This information must be reported on IRS/FinCEN Form 8300.
- Item 33, box i, is to be checked only by clerks of the court; box d is to be checked by bail bondsmen. See *Item 33* under *Part III*, later.
- The meaning of the word “currency” for purposes of 31 U.S.C. 5331 is the same as for the word “cash” (See *Cash* under *Definitions*, later).

General Instructions

Who must file. Each person engaged in a trade or business who, in the course of that trade or business, receives more than \$10,000 in cash in one transaction or in two or more related transactions, must file Form 8300. Any transactions conducted between a payer (or its agent) and the recipient in a 24-hour period are related transactions. Transactions are considered related even if they occur over a period of more than 24 hours if the recipient knows, or has reason to know, that each transaction is one of a series of connected transactions.

Keep a copy of each Form 8300 for 5 years from the date you file it.

Clerks of federal or state courts must file Form 8300 if more than \$10,000 in cash is received as bail for an individual(s) charged with certain criminal offenses. For these purposes, a clerk includes the clerk’s office or any other office, department, division, branch, or unit of the court that is authorized to receive bail. If a person receives bail on behalf of a clerk, the clerk is treated as receiving the bail. See *Item 33* under *Part III*, later.

If multiple payments are made in cash to satisfy bail and the initial payment does not exceed \$10,000, the initial payment and subsequent payments must be aggregated and the information return must be filed by the 15th day after receipt of the payment that causes the aggregate amount to exceed \$10,000 in cash. In such cases, the reporting requirement can be satisfied by sending a single written statement with the

aggregate Form 8300 amounts listed relating to that payer. Payments made to satisfy separate bail requirements are not required to be aggregated. See Treasury Regulations section 1.6050I-2.

Casinos must file Form 8300 for nongaming activities (restaurants, shops, etc.).

Voluntary use of Form 8300. Form 8300 may be filed voluntarily for any suspicious transaction (see *Definitions*, later) for use by FinCEN and the IRS, even if the total amount does not exceed \$10,000.

Exceptions. Cash is not required to be reported if it is received:

- By a financial institution required to file FinCEN Report 112, BSA Currency Transaction Report (CTR);
- By a casino required to file (or exempt from filing) FinCEN Report 112, if the cash is received as part of its gaming business;
- By an agent who receives the cash from a principal, if the agent uses all of the cash within 15 days in a second transaction that is reportable on Form 8300 or on FinCEN Report 112, and discloses all the information necessary to complete Part II of Form 8300 or FinCEN Report 112 to the recipient of the cash in the second transaction;
- In a transaction occurring entirely outside the United States. See Publication 1544, Reporting Cash Payments of Over \$10,000 (Received in a Trade or Business), regarding transactions occurring in Puerto Rico and territories and possessions of the United States; or
- In a transaction that is not in the course of a person’s trade or business.

When to file. File Form 8300 by the 15th day after the date the cash was received. If that date falls on a Saturday, Sunday, or legal holiday, file the form on the next business day.

Where to file. File the form with the Internal Revenue Service, Detroit Computing Center, P.O. Box 32621, Detroit, MI 48232.



You may be able to electronically file Form 8300 using FinCEN’s Bank Secrecy Act (BSA) Electronic Filing (E-Filing) System as an alternative method to filing a paper Form 8300. To get more information, visit the BSA E-Filing System, at <http://bsaeefiling.fincen.treas.gov/main.html>.

Statement to be provided. You must give a written or electronic statement to each person named on a required Form 8300 on or before January 31 of the year following the calendar year in which the

cash is received. The statement must show the name, telephone number, and address of the information contact for the business, the aggregate amount of reportable cash received, and that the information was furnished to the IRS. Keep a copy of the statement for your records.

Multiple payments. If you receive more than one cash payment for a single transaction or for related transactions, you must report the multiple payments any time you receive a total amount that exceeds \$10,000 within any 12-month period. Submit the report within 15 days of the date you receive the payment that causes the total amount to exceed \$10,000. If more than one report is required within 15 days, you may file a combined report. File the combined report no later than the date the earliest report, if filed separately, would have to be filed.

Taxpayer identification number (TIN).

You must furnish the correct TIN of the person or persons from whom you receive the cash and, if applicable, the person or persons on whose behalf the transaction is being conducted. You may be subject to penalties for an incorrect or missing TIN.

The TIN for an individual (including a sole proprietorship) is the individual’s social security number (SSN). For certain resident aliens who are not eligible to get an SSN and nonresident aliens who are required to file tax returns, it is an IRS Individual Taxpayer Identification Number (ITIN). For other persons, including corporations, partnerships, and estates, it is the employer identification number (EIN).

If you have requested but are not able to get a TIN for one or more of the parties to a transaction within 15 days following the transaction, file the report and use the comments section on page 2 of the form to explain why the TIN is not included.

Exception. *You are not required to provide the TIN of a person who is a nonresident alien individual or a foreign organization if that person or foreign organization:*

- Does not have income effectively connected with the conduct of a U.S. trade or business;
- Does not have an office or place of business, or a fiscal or paying agent in the U.S.;
- Does not furnish a withholding certificate described in §1.1441-1(e)(2) or (3) or §1.1441-5(c)(2)(iv) or (3)(iii) to the extent required under §1.1441-1(e)(4)(vii); or
- Does not have to furnish a TIN on any return, statement, or other document as required by the income tax regulations under section 897 or 1445.

Penalties. You may be subject to penalties if you fail to file a correct and complete Form 8300 on time and you cannot show that the failure was due to reasonable cause. You may also be subject to penalties if you fail to furnish timely a correct and complete statement to each person named in a required report. A minimum penalty of \$25,000 may be imposed if the failure is due to an intentional or willful disregard of the cash reporting requirements.

Penalties may also be imposed for causing, or attempting to cause, a trade or business to fail to file a required report; for causing, or attempting to cause, a trade or business to file a required report containing a material omission or misstatement of fact; or for structuring, or attempting to structure, transactions to avoid the reporting requirements. These violations may also be subject to criminal prosecution which, upon conviction, may result in imprisonment of up to 5 years or fines of up to \$250,000 for individuals and \$500,000 for corporations or both.

Definitions

Cash. The term "cash" means the following.

- U.S. and foreign coin and currency received in any transaction; or
- A cashier's check, money order, bank draft, or traveler's check having a face amount of \$10,000 or less that is received in a designated reporting transaction (defined below), or that is received in any transaction in which the recipient knows that the instrument is being used in an attempt to avoid the reporting of the transaction under either section 6050I or 31 U.S.C. 5331.

Note. Cash does not include a check drawn on the payer's own account, such as a personal check, regardless of the amount.

Designated reporting transaction. A retail sale (or the receipt of funds by a broker or other intermediary in connection with a retail sale) of a consumer durable, a collectible, or a travel or entertainment activity.

Retail sale. Any sale (whether or not the sale is for resale or for any other purpose) made in the course of a trade or business if that trade or business principally consists of making sales to ultimate consumers.

Consumer durable. An item of tangible personal property of a type that, under ordinary usage, can reasonably be expected to remain useful for at least 1 year, and that has a sales price of more than \$10,000.

Collectible. Any work of art, rug, antique, metal, gem, stamp, coin, etc.

Travel or entertainment activity. An item of travel or entertainment that pertains to a single trip or event if the combined sales price of the item and all other items relating to the same trip or event that are sold in the same transaction (or related transactions) exceeds \$10,000.

Exceptions. A cashier's check, money order, bank draft, or traveler's check is not considered received in a designated reporting transaction if it constitutes the proceeds of a bank loan or if it is received as a payment on certain promissory notes, installment sales contracts, or down payment plans. See Publication 1544 for more information.

Person. An individual, corporation, partnership, trust, estate, association, or company.

Recipient. The person receiving the cash. Each branch or other unit of a person's trade or business is considered a separate recipient unless the branch receiving the cash (or a central office linking the branches), knows or has reason to know the identity of payers making cash payments to other branches.

Transaction. Includes the purchase of property or services, the payment of debt, the exchange of cash for a negotiable instrument, and the receipt of cash to be held in escrow or trust. A single transaction may not be broken into multiple transactions to avoid reporting.

Suspicious transaction. A suspicious transaction is a transaction in which it appears that a person is attempting to cause Form 8300 not to be filed, or to file a false or incomplete form.

Specific Instructions

You must complete all parts. However, you may skip Part II if the individual named in Part I is conducting the transaction on his or her behalf only. For voluntary reporting of suspicious transactions, see *Item 1*, next.

Item 1. If you are amending a report, check box 1a. Complete the form in its entirety (Parts I-IV) and include the amended information. Do not attach a copy of the original report.

To voluntarily report a suspicious transaction (see *Suspicious transaction* above), check box 1b. You may also telephone your local IRS Criminal Investigation Division or call the FinCEN Financial Institution Hotline at 1-866-556-3974.

Part I

Item 2. If two or more individuals conducted the transaction you are reporting, check the box and complete Part I on page 1 for any one of the individuals. Provide the same

information for the other individual(s) by completing Part I on page 2 of the form. If more than three individuals are involved, provide the same information in the comments section on page 2 of the form.

Item 6. Enter the taxpayer identification number (TIN) of the individual named. See *Taxpayer identification number (TIN)*, earlier, for more information.

Item 8. Enter eight numerals for the date of birth of the individual named. For example, if the individual's birth date is July 6, 1960, enter "07" "06" "1960."

Item 13. Fully describe the nature of the occupation, profession, or business (for example, "plumber," "attorney," or "automobile dealer"). Do not use general or nondescriptive terms such as "businessman" or "self-employed."

Item 14. You must verify the name and address of the named individual(s). Verification must be made by examination of a document normally accepted as a means of identification when cashing checks (for example, a driver's license, passport, alien registration card, or other official document). In item 14a, enter the type of document examined. In item 14b, identify the issuer of the document. In item 14c, enter the document's number. For example, if the individual has a Utah driver's license, enter "driver's license" in item 14a, "Utah" in item 14b, and the number appearing on the license in item 14c.

Note. You must complete all three items (a, b, and c) in this line to make sure that Form 8300 will be processed correctly.

Part II

Item 15. If the transaction is being conducted on behalf of more than one person (including husband and wife or parent and child), check the box and complete Part II for any one of the persons. Provide the same information for the other person(s) by completing Part II on page 2. If more than three persons are involved, provide the same information in the comments section on page 2 of the form.

Items 16 through 19. If the person on whose behalf the transaction is being conducted is an individual, complete items 16, 17, and 18. Enter his or her TIN in item 19. If the individual is a sole proprietor and has an employer identification number (EIN), you must enter both the SSN and EIN in item 19. If the person is an organization, put its name as shown on required tax filings in item 16 and its EIN in item 19.

Item 20. If a sole proprietor or organization named in items 16 through 18 is doing business under a name other than that entered in item 16 (for example, a "trade" or "doing business as (DBA)" name), enter it here.

Item 27. If the person is not required to furnish a TIN, complete this item. See *Taxpayer identification number (TIN)*, earlier. Enter a description of the type of official document issued to that person in item 27a (for example, a “passport”), the country that issued the document in item 27b, and the document’s number in item 27c.

Note. You must complete all three items (a, b, and c) in this line to make sure that Form 8300 will be processed correctly.

Part III

Item 28. Enter the date you received the cash. If you received the cash in more than one payment, enter the date you received the payment that caused the combined amount to exceed \$10,000. See *Multiple payments*, earlier, for more information.

Item 30. Check this box if the amount shown in item 29 was received in more than one payment (for example, as installment payments or payments on related transactions).

Item 31. Enter the total price of the property, services, amount of cash exchanged, etc. (for example, the total cost of a vehicle purchased, cost of catering service, exchange of currency) if different from the amount shown in item 29.

Item 32. Enter the dollar amount of each form of cash received. Show foreign currency amounts in U.S. dollar equivalent at a fair market rate of exchange available to the public. The sum of the amounts must equal item 29. For cashier’s check, money order, bank draft, or traveler’s check, provide the name of the issuer and the serial number of each instrument. Names of all issuers and all serial numbers involved must be provided. If necessary, provide this information in the comments section on page 2 of the form.

Item 33. Check the appropriate box(es) that describe the transaction. If the transaction is not specified in boxes a–i, check box j and briefly describe the transaction (for example, “car lease,” “boat lease,” “house lease,” or “aircraft rental”). If the transaction relates to the receipt of bail by a court clerk, check box i, “Bail received by court clerks.” This box is only for use by court clerks. If the transaction relates to cash received by a bail bondsman, check box d, “Business services provided.”

Part IV

Item 36. If you are a sole proprietorship, you must enter your SSN. If your business also has an EIN, you must provide the EIN as well. All other business entities must enter an EIN.

Item 41. Fully describe the nature of your business, for example, “attorney” or “jewelry dealer.” Do not use general or nondescriptive terms such as “business” or “store.”

Item 42. This form must be signed by an individual who has been authorized to do so for the business that received the cash.

Comments

Use this section to comment on or clarify anything you may have entered on any line in Parts I, II, III, and IV. For example, if you checked box b (Suspicious transaction) in line 1 above Part I, you may want to explain why you think that the cash transaction you are reporting on Form 8300 may be suspicious.

Privacy Act and Paperwork Reduction Act Notice.

Except as otherwise noted, the information solicited on this form is required by the IRS and FinCEN in order to carry out the laws and regulations of the United States. Trades or businesses and clerks of federal and state criminal courts are required to provide the information to the IRS and FinCEN under section 6050l and 31 U.S.C. 5331, respectively. Section 6109 and 31 U.S.C. 5331 require that you provide your identification number. The principal purpose for collecting the information on this form is to maintain reports or records which have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counter-intelligence activities, by directing the federal government’s attention to unusual or questionable transactions.

You are not required to provide information as to whether the reported transaction is deemed suspicious. Failure to provide all other requested information, or providing fraudulent information, may result in criminal prosecution and other penalties under 26 U.S.C. and 31 U.S.C.

Generally, tax returns and return information are confidential, as stated in section 6103. However, section 6103

allows or requires the IRS to disclose or give the information requested on this form to others as described in the Internal Revenue Code. For example, we may disclose your tax information to the Department of Justice, to enforce the tax laws, both civil and criminal, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions, to carry out their tax laws. We may disclose this information to other persons as necessary to obtain information which we cannot get in any other way. We may disclose this information to federal, state, and local child support agencies; and to other federal agencies for the purposes of determining entitlement for benefits or the eligibility for and the repayment of loans. We may also provide the records to appropriate state, local, and foreign criminal law enforcement and regulatory personnel in the performance of their official duties. We may also disclose this information to other countries under a tax treaty, or to federal and state agencies to enforce federal nontax criminal laws and to combat terrorism. In addition, FinCEN may provide the information to those officials if they are conducting intelligence or counter-intelligence activities to protect against international terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any law under 26 U.S.C. or 31 U.S.C.

The time needed to complete this form will vary depending on individual circumstances. The estimated average time is 21 minutes. If you have comments concerning the accuracy of this time estimate or suggestions for making this form simpler, we would be happy to hear from you. You can send us comments from www.irs.gov/formspubs. Click on *More Information* and then click on *Give us feedback*. Or you can send your comments to Internal Revenue Service, Tax Forms and Publications Division, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send Form 8300 to this address. Instead, see *Where to file*, earlier.

UNITED STATES CODE
18 U.S. Code §3663

18 U.S. Code § 3663A - Mandatory restitution to victims of certain crimes.

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)

(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A)that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 3 of the Rodchenkov Anti-Doping Act of 2019;

(iv) an offense described in section 1365 (relating to tampering with consumer products); or

(v) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3)This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) or (iii) if the court finds, from facts on the record, that—

(A)the number of identifiable victims is so large as to make restitution impracticable; or

(B)determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

UNITED STATES CODE

18 U.S. Code §3664

18 U.S. Code § 3664 - Procedure for issuance and enforcement of order of restitution.

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)

(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

- (i) the offense or offenses of which the defendant was convicted;
- (ii) the amounts subject to restitution submitted to the probation officer;
- (iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;
- (iv) the scheduled date, time, and place of the sentencing hearing;
- (v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and
- (vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after

discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

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

(f)

(1)

(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of—

(A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

(B) projected earnings and other income of the defendant; and

(C) any financial obligations of the defendant; including obligations to dependents.

(3)

(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of—

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)

(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)

(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept

notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)

(1)

(A)

(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that—

(1) such a sentence can subsequently be—

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32.2

Rule 32.2 Criminal Forfeiture.

(a) Notice to the Defendant. A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute. The notice should not be designated as a count of the indictment or information. The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.

(b) Entering a Preliminary Order of Forfeiture.

(1) Forfeiture Phase of the Trial.

(A) Forfeiture Determinations. As soon as practical after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) Evidence and Hearing. The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

///

(2) Preliminary Order.

(A) Contents of a Specific Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(B) Timing. Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(C) General Order. If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

(i) lists any identified property;

(ii) describes other property in general terms; and

(iii) states that the order will be amended under Rule 32.2(e)(1) when additional specific property is identified or the amount of the money judgment has been calculated.

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Sentence and Judgment.

(A) When Final. At sentencing—or at any time before sentencing if the defendant consents—the preliminary forfeiture order becomes final as to the defendant. If the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c).

(B) Notice and Inclusion in the Judgment. The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

(C) Time to Appeal. The time for the defendant or the government to file an appeal from the forfeiture order, or from the court's failure to enter an order, begins to run when judgment is entered. If the court later amends or declines to amend a forfeiture order to include additional property under Rule 32.2(e), the defendant or the government may file an appeal regarding that property under Federal Rule of Appellate Procedure 4 (b). The time for that appeal runs from the date when the order granting or denying the amendment becomes final.

(5) Jury Determination.

(A) Retaining the Jury. In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict.

(B) Special Verdict Form. If a party timely requests to have the jury determine forfeiture, the government must submit a proposed Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite

nexus between the property and the offense committed by the defendant.

(6) Notice of the Forfeiture Order.

(A) Publishing and Sending Notice. If the court orders the forfeiture of specific property, the government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

(B) Content of the Notice. The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.

(C) Means of Publication; Exceptions to Publication Requirement. Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

(D) Means of Sending the Notice. The notice may be sent in accordance with Supplemental Rules G(4)(b)(iii)–(v) of the Federal Rules of Civil Procedure.

(7) Interlocutory Sale. At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

(c) Ancillary Proceeding; Entering a Final Order of Forfeiture.

(1) In General. If, as prescribed by statute, a third party files a petition asserting an interest in the property to be forfeited, the court must conduct an ancillary proceeding, but no ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.

(A) In the ancillary proceeding, the court may, on motion, dismiss the petition for lack of standing, for failure to state a claim, or for any other lawful reason. For purposes of the motion, the facts set forth in the petition are assumed to be true.

(B) After disposing of any motion filed under Rule 32.2(c)(1)(A) and before conducting a hearing on the petition, the court may permit the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure if the court determines that discovery is necessary or desirable to resolve factual issues. When discovery ends, a party may move for summary judgment under Federal Rule of Civil Procedure 56.

(2) Entering a Final Order. When the ancillary proceeding ends, the court must enter a final order of forfeiture by amending the preliminary order as necessary to account for any third-party rights. If no third party files a timely petition, the preliminary order becomes the final order of forfeiture if the court finds that the defendant (or any combination of defendants convicted in the case) had an interest in the property that is forfeitable under the applicable statute. The defendant may not object to the entry of the final order on the ground that the property belongs, in whole or in part, to a codefendant or third party; nor may a third party object to the final order on the ground that the third party had an interest in the property.

(3) Multiple Petitions. If multiple third-party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all the petitions, unless the court determines that there is no just reason for delay.

(4) Ancillary Proceeding Not Part of Sentencing. An ancillary proceeding is not part of sentencing.

(d) Stay Pending Appeal. If a defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review. A stay does not delay the ancillary proceeding or the determination of a third party's rights or interests. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but must not transfer any property interest to a third

party until the decision on appeal becomes final, unless the defendant consents in writing or on the record.

(e) Subsequently Located Property; Substitute Property.

(1) In General. On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

(A) is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or

(B) is substitute property that qualifies for forfeiture under an applicable statute.

(2) Procedure. If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court must:

(A) enter an order forfeiting that property, or amend an existing preliminary or final order to include it; and

(B) if a third party files a petition claiming an interest in the property, conduct an ancillary proceeding under Rule 32.2(c).

(3) Jury Trial Limited. There is no right to a jury trial under Rule 32.2(e).