

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PAMELA KATHRYN CONLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

LYNN C. HARTFIELD
CJA Counsel of Record for Petitioner
Law Office of Lynn C. Hartfield, LLC
387 Corona Street, Suite 617
Denver, Colorado 80218
(720) 588-0571
lynn@lhartfieldlaw.com

QUESTION PRESENTED

On June 8, 2023, this Court issued an opinion in *Dubin v. United States*, 599 U.S. 110 (2023), in which it narrowed the scope of 18 U.S.C. § 1028A, the aggravated identity theft statute, to limit its reach to only those cases where the defendant’s “use” of another’s means of identification is at the “crux” of the underlying offense. *Id.* at 132. In a concurring opinion, Justice Gorsuch opined that the new standard left much to interpretation and would prove difficult to apply in practice, leading lower courts to reach inconsistent conclusions. *Id.* at 134-39, (Gorsuch, J. concurring). Since the *Dubin* decision, circuit and district courts have in fact struggled to apply the “crux” test, leading to inconsistent results, as forecast by Justice Gorsuch. This Court should grant review to clarify the contours of the test, and to provide lower courts with guidance as to factors that render a particular use of another’s identity at the “crux” of the primary offense.

The question presented here is:

Whether a defendant’s forging of a signature of a bank employee on a lien release, used as supporting documentation for a bank loan in the defendant’s own name, is sufficiently central to the underlying offense to support a conviction under 18 U.S.C. § 1028A, where the bank employee suffered no loss and where the primary offense involved the defendant providing inflated salary and employment information for herself.

LIST OF PARTIES

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

RELATED CASES

None known.

TABLE OF CONTENTS

QUESTION PRESENTED	i
LIST OF PARTIES	ii
RELATED CASES	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION.....	12
 APPENDIX A	
Court of Appeals Opinion in <i>United States v. Conley</i> , 89 F.4th 815 (10th Cir. 2023)	
 APPENDIX B	
Judgment in <i>United States v. Conley</i> , N.D. Okla. No. 4:21-cr-00064, November 23, 2022	
 APPENDIX C	
Plea Agreement in <i>United States v. Conley</i> , N.D. Okla. No. 4:21-cr-00064, September 22, 2021	
 APPENDIX D	
Excerpt of Change of Plea Hearing in <i>United States v. Conley</i> , N.D. Okla. No. 4:21-cr-0064, September 22, 2021	

TABLE OF AUTHORITIES

CASES

<i>Dubin v. United States</i> , 599 U.S. 110 (2023)	passim
<i>United States v. Conley</i> , 89 F.4th 815 (10th Cir. 2023)	1, 4, 7, 10
<i>United States v. Croft</i> , 87 F.4th 644 (5th Cir. 2023)	8, 9, 10
<i>United States v. Fullerton</i> , 2023 WL 6150782 (W.D. Texas, 2023)	11
<i>United States v. Gladden</i> , 78 F.4th 1232 (11th Cir. 2023)	7, 8, 9, 10
<i>United States v. Noble</i> , __ F.Supp.3d __, 2024 WL 253623 (N.D. Georgia 2024)..	11
<i>United States v. O'Lear</i> , 90 F.4th 519 (6th Cir. 2024).....	9, 10

STATUTES

18 U.S.C. § 1028A	passim
18 U.S.C. § 1344.....	2
18 U.S.C. § 3231.....	1
18 U.S.C. § 3742.....	1
28 U.S.C. § 1254.....	1
28 U.S.C. § 1291.....	1
28 U.S.C. § 2101.....	1

PETITION FOR WRIT OF CERTIORARI

Petitioner, Pamela Kathryn Conley, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Conley*, 89 F.4th 815 (10th Cir. 2023), is found at Appendix A. The judgment on conviction is found at Appendix B. Ms. Conley's written plea agreement and an excerpt of proceedings on September 21, 2022, during which Ms. Conley orally provided a factual basis for her plea, are found at Appendix C and D respectively.

JURISDICTION

The Tenth Circuit entered judgment on December 22, 2023. (See App. at A). Pursuant to 28 U.S.C. § 2101(c), the deadline to file a petition for writ of certiorari is March 21, 2024.

The United States District Court for the District of Colorado had jurisdiction pursuant to 18 U.S.C. § 3231. The Tenth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1028A(a)(1) provides:

Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

STATEMENT OF THE CASE

Petitioner Pamela Conley pled guilty to a superseding indictment charging her, with 24 counts of bank fraud, in violation of 18 U.S.C. § 1344, and four counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A. The bank fraud counts all involved largely the same conduct: in connection with applications for loans from multiple banks and credit unions, Ms. Conley provided falsified employment information and inflated salary declarations, which induced the financial institutions to approve her for loans totaling approximately \$1 million. Although Ms. Conley frequently used the proceeds of newer loans to pay off older loans, at the time she was apprehended the total outstanding balance on the loans was approximately \$450,0000.

With respect to the aggravated identity theft charges, the government alleged that to create fraudulent lien releases for four items of collateral pledged to obtain some of the loans, Ms. Conley forged the signatures of four bank employees. In her petition to enter a guilty plea, Ms. Conley provided the following factual basis for her plea to the four charges, which she read aloud in court during her change of plea hearing:

On or about the dates set forth in the Second Superseding Indictment, within the Northern District of Oklahoma and in relation to the crimes set forth in Counts 1-24, I knowing [sic] utilized the names of [J.B.] (Count 25), [J.E.] (Count 26), [K.S.] (Count 27) and [R.D.] (count 28) and without their permission and authority to transmit lien releases to the Oklahoma Tax Commission to effect lien releases on mortgaged collateral.

(App. C at C-10; App. D at D3-D-4).

Following preparation of the Presentence Investigation Report, Ms. Conley was sentenced to 30 months imprisonment on the 24 bank fraud counts, and 24 months on each of the four aggravated identity theft counts, to be served concurrently to each other, but as required by statute, consecutively to the bank fraud sentence. (App. B).

In her appeal to the Tenth Circuit Court of Appeals, Ms. Conley originally challenged only the sentence on the bank fraud counts, contesting the district court's interpretation of a sentencing guideline provision not relevant here. However, after this Court decided *Dubin v. United States*, 599 U.S. 110 (2023), she requested leave to file an amended opening brief, arguing that the district court plainly erred in finding a sufficient factual basis for the aggravated identity theft counts. *Dubin*, she argued, significantly narrowed the scope of § 1028A, and because her conduct in forging the lien releases did not lie at the “crux” of her offense, those convictions should have been vacated.

On December 22, 2023, the Tenth Circuit issued an opinion vacating Ms. Conley's sentence on the bank fraud counts, but affirming her aggravated identity theft convictions. Although it agreed that plain error is assessed at the time of appeal (and therefore *Dubin* applied), it found that the district court's acceptance of

Ms. Conley's plea was not contrary to well-settled law. *United States v. Conley*, 89 F.4th 815, 825 (10th Cir. 2023) (App. A). Specifically, the Court noted that since *Dubin*, this Court had not "applied its crux test or provided further guidance on how to do so," and that the facts in *Dubin* were too divergent from the facts in Ms. Conley's case to establish "well-settled law" with respect to her case. *Id.* at 825-26. The Court also found insufficient factually similar precedent from other circuits to establish plain error. *Id.* at 826. "Without more definitive legal authority," the Court concluded, "any error in accepting Ms. Conley's guilty plea cannot be plain." *Id.*

REASONS FOR GRANTING THE PETITION

In *Dubin, supra*, this Court for the first time took a comprehensive look at the scope of 18 U.S.C. § 1028A, recognizing that prosecutors across the nation had been sweeping an extremely large swath of conduct into a statute that carried a mandatory consecutive term of imprisonment. 143 S.Ct. at 1564. Not only had this led to inconsistent decisions across circuits, but it had in some cases led to prosecutions that stretched far beyond the ordinary understanding of what it means to commit identity theft. *Id.*

The statute proscribing aggravated identity theft, provides that:

Whoever, during and in relation to any [enumerated] felony violation ... knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028A(a)(1). The defendant in *Dubin* managed a psychological services company and, in connection with his duties, submitted a Medicaid reimbursement

claim in which he misrepresented the qualifications of the service provider, stating the patient had seen a licensed psychologist rather than a licensed psychological associate, who would have been reimbursable at a lower rate. *Id.* at 1563. In addition to charging Dubin with healthcare fraud, the government charged him with aggravated identity theft, reasoning that Dubin had “used” the identity of another “during and in relation to” the underlying offense, because in submitting the fraudulent bill, he had included the patient’s Medicaid reimbursement number – a “means of identification.” *Id.* The defendant challenged the government’s interpretation, and, following a split decision by an *en banc* Fifth Circuit, this Court agreed to review the matter. *Id.* at 1564.

The Court began its analysis by noting that both the terms “uses” and “in relation to” are “context sensitive,” and must be interpreted in conjunction with the ordinary meaning of the term “identity theft.” *Dubin*, 143 S.Ct.. at 1565-66. Noting that the title of the statute – “aggravated identity theft” — suggests conduct that involves both unlawful appropriation of another’s identity, and conduct that is qualitatively more serious than average, the Court rejected the government’s overly broad reading of the statute. *Id.* at 1568-69. The Court also reasoned that because the term “uses” in the statute is contained in a phrase that includes “transfers, possesses, or uses, without lawful authority,” Congress must have intended to proscribe “classic identity theft,” that is, an act in which someone steals personal information belonging to another, and then uses the information to deceive others. *Id.* at 1570.

In rejecting the government’s interpretation of the statute, the Court additionally focused on the severity of the penalty, and rejected the premise that the mere use of another’s name in connection with an underlying fraud was sufficient. *Dubin*, 143 S.Ct. at 1571. Summing up its analysis, the Court concluded that for a defendant to be guilty of aggravated identity theft under § 1028A, the use of another’s identity must be at the “crux” of the criminality. *Id.* at 1573. For the defendant in *Dubin*, the Court found that the crux of the offense was a misrepresentation of the qualifications of the employee, and that the patient’s name was a mere “ancillary feature” of the criminal conduct. *Id.* at 1573-74.

In a concurring opinion, Justice Gorsuch expressed concern that the majority opinion failed to give sufficient guidance to lower courts on how to apply the statute: “Having told lower courts how *not* to read the statute, we owe them some guidance on how they *should* read it.” *Dubin*, 143 S.Ct. at 1575 (Gorsuch, J. concurring). In particular, Justice Gorsuch pointed to challenges interpreting terms such as “at the crux,” “key mover” or playing a “central role” in an offense. *Id.* Indeed, depending on how those terms are interpreted, Dubin’s use of the patient’s Medicaid number could either be ancillary to the healthcare fraud or a “key mover” “at the crux” of the fraud. *Id.* at 1576. To Justice Gorsuch, these intractable difficulties with interpreting the statute rendered it unconstitutionally vague. *Id.* at 1577.

The Tenth Circuit’s opinion in this case demonstrates that Justice Gorsuch’s concerns were indeed prescient. Ms. Conley’s conduct, the Court opined, was factually disparate from the defendant in *Dubin*’s conduct. As a result, the

analytical framework employed by this Court – distinguishing between instances in which the fraud involved “*how* and *when* services were provided ... and *who* received the services” – was not transferable when analyzing Ms. Conley’s conduct, which did not involve the provision of services at all. *Conley*, 89 F.4th at 825-26.

Cases from lower courts have reached inconsistent decisions on the application of *Dubin* to various fact scenarios. In *United States v. Gladden*, 78 F.4th 1232 (11th Cir. 2023), the first opinion to issue post-*Dubin*, the Eleventh Circuit considered the scope of § 1028A in relation to a fraud conspiracy involving billing pharmacy benefit managers for medically unnecessary and fraudulent prescriptions. *Id.* at 1238. One of the defendants, Linton, managed the billing department, and instructed her employees to submit fraudulent bills using several different means: 1) obtaining prescriptions for themselves, for the most expensive products; 2) adding additional items to valid prescriptions without the approval of the prescribing physician; 3) obtaining prescriptions for products that the patients never received or would not use; and 4) using automatic refills to continue to fill prescriptions even if patients did not want the refills. *Id.* at 1238-39. The other defendant, Gladden, was a district manager, and his conduct consisted of encouraging employees to obtain unneeded prescriptions for themselves and their family members. *Id.* at 1240. Linton and Gladden were both charged with health care fraud, mail fraud and aggravated identity theft, and were convicted after trial of all charges, and challenged the sufficiency of the evidence on appeal. *Id.* at 1241.

Reviewing under a plain error standard, the Eleventh Circuit affirmed Linton’s aggravated identity theft convictions, but reversed Gladden’s. *Gladden*, 78 F.4th at 1244-49. With respect to Linton, the Court found that because her conduct involved using the identities of real people to continue refilling prescriptions in their names, “the deception centered on the identity of the individual receiving the product,” and therefore was central to the scheme. *Id.* at 1245. The Court also found that when Linton altered a signed prescription without the prescribing doctor’s knowledge, she “used” the doctor’s identity in a manner that was central to the deception. *Id.* at 1245-46. With respect to Gladden, on the other hand, the Court found that his conduct in directing an employee to obtain a medically unnecessary prescription for her daughter, using a pre-filled prescription, did not meet the requirements of § 1028A: “The deception at the heart of Whitten and Gladden’s conduct ... was obtaining the medically unnecessary prescriptions. The use of Whitten’s daughter’s identifying information was merely ancillary to the deception; indeed, at no point did Whitten and Gladden misrepresent who received the prescriptions.” *Id.* at 1248.

Only two other circuits have published opinions applying *Dubin*. In *United States v. Croft*, 87 F.4th 644 (5th Cir. 2023), the Fifth Circuit affirmed aggravated identity theft convictions for an owner of a school that trained handlers and dogs for police work. *Id.* at 645. In order to be able to enroll veterans, whose training would be paid for by the Department of Veterans Affairs (“VA”), Croft’s program had to be certified by the VA, which required him to employ dog trainers who had specified

qualifications. *Id.* In his applications to the VA, however, Croft listed four instructors who did not in fact work for his school and who had not given permission to be named as instructors. *Id.* at 646. In affirming the defendant's aggravated identity theft convictions, the Court reasoned that his misrepresentations about "who" was teaching the courses at the school were the basis and "heart of" the wire fraud convictions. *Id.* at 648. However, in a separate opinion, Judge Ho questioned whether the use of the instructors' identities truly lay at the "crux" of the offense:

The panel majority reasonably theorizes that *Dubin* doesn't foreclose affirmance here because Croft's "application would not have been approved without the names of the instructors, their qualifications, and information about the classes they would teach." *Ante* at 646. But it would also be reasonable to respond that the real "crux" of Croft's fraud turned, not on any person's name, but rather on their qualifications to teach.

Id. at 651 (Ho, J., dubitante).

In *United States v. O'Lear*, 90 F.4th 519 (6th Cir. 2024), the defendant engaged in a healthcare fraud scheme whereby he billed Medicare and Medicaid for fictitious x-ray services for nursing home residents. *Id.* at 523. As part of the scheme, he also forged the names of x-ray technicians and doctors on forms justifying the x-rays. *Id.* at 524. In affirming the defendant's aggravated identity theft convictions, the Sixth Circuit distinguished *Dubin*, explaining that O'Lear, unlike *Dubin*, was not charged in connection with his use of patients' identities; rather, his misconduct involved forging his staff's signatures, and that deception was at the "crux" of the scheme to submit fraudulent invoices. *Id.* at 533.

The Tenth Circuit found *Gladden* and *Croft* to be too factually dissimilar to Ms. Conley's case to shed any light on the question of whether her conduct was at

the “crux” of the offense. *Conley*, 89 F.4th at 826. The opinion in *O’Lear* had not been issued at the time Ms. Conley’s case was decided.

More important, though, these cases illustrate the difficulty with applying *Dubin*’s “crux” test. In *Gladden*, both defendants used others’ identities to further their fraudulent scheme, but the Eleventh Circuit affirmed one defendant’s convictions and reversed the other’s, reasoning that the second defendant’s use of another’s identity was merely ancillary to the primary scheme. *Gladden, supra*, 78 F.4th at 1248. Yet arguably, both defendants did fundamentally the same thing: they directed employees to fill prescriptions in their own names or family members’ names, for products they did not need or want. *Id.* at 1239-40. The primary difference between the two defendants’ conduct was largely a matter of volume, not whether the use of others’ identities was central to the scheme.

In *Croft*, the defendant used others’ identities – and their qualifications – to obtain certification required for reimbursement of tuition by the VA. *Croft, supra*, 87 F.4th at 646. Two judges found the use of the dog handlers’ names to be at the heart of the fraud, while another judge questioned whether it was actually their qualifications, not their identities, that were at the heart of the fraud. *Id.* at 648-51. And in *O’Lear*, the defendant used his employees’ identities to justify bills he submitted for reimbursement. *O’Lear, supra*, 90 F.4th at 533. Yet arguably *Dubin* also used the identity of a staff psychologist in a very similar manner to the way the defendant in *O’Lear* used his staff’s identities.

District court opinions similarly offer conflicting analyses and fail to clearly delineate when the use of another's identity is at the "crux" or "heart" of an offense and when it is not. *Compare, e.g., United States v. Noble*, ___ F.Supp.3d ___, 2024 WL 253623 (N.D. Georgia 2024) (defendant's conduct in submitting fraudulent applications for COVID-19 small business loans, did *not* support a factual basis for a § 1028A conviction, where he used names of real people, but made misrepresentations about their businesses) *with United States v. Fullerton*, 2023 WL 6150782 (W.D. Texas, 2023) (Slip Copy) (unpublished) (defendant's use of name of accountant to create false tax records to support fraudulent loan application was sufficiently central to loan fraud scheme to support a § 1028A charge).

Ms. Conley's case highlights the difficulty in applying *Dubin* to cases that do not present an extremely close factual posture and do not involve the provision of services. A compelling case can be made that unlike in the vast majority of bank fraud cases that involve some form of identity theft, Ms. Conley's conduct in misrepresenting her own salary and employment information to obtain loans in her own name was not classic identity theft. To the extent that she forged lien releases, the crux of that part of the offense was in misrepresenting that the property was unencumbered (the "what"); her forging of bank employees' signatures (the "who") was an ancillary part of the offense.

Yet the Tenth Circuit found that *Dubin* did not answer the question of whether or not she committed aggravated identity theft, and no existing opinions from other circuits answered the question definitively enough for the court. Given

the already apparent difficulty courts are having with applying *Dubin* to factually disparate cases, this Court should grant review, to clarify the holding and provide lower courts with guidance on how to determine when conduct falls within the statute and when it does not.

CONCLUSION

For the foregoing reasons, Ms. Conley respectfully requests that her petition for a writ of certiorari be granted.

DATED this 19th day of March, 2024

Respectfully submitted,



LYNN C. HARTFIELD
CJA Counsel of Record for Petitioner
Law Office of Lynn C. Hartfield, LLC
387 Corona St., Suite 617
Denver, Colorado 80218
(720) 588-0571
lynn@lhartfieldlaw.com

APPENDIX A

89 F.4th 815

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Pamela Kathryn CONLEY, Defendant - Appellant.

No. 22-5112

|

FILED December 22, 2023

Synopsis

Background: Defendant pled guilty in the United States District Court for the Northern District of Oklahoma, *John F. Heil, III.*, J., to bank fraud and aggravated identity theft, and she appealed.

Holdings: The Court of Appeals, *Matheson*, Circuit Judge, held that:

[1] district court clearly erred by adopting presentence report's (PSR) loss calculation over defendant's objection without requiring government to prove it;

[2] district court's error in relying on PSR's loss amount was not harmless; and

[3] any error in district court's acceptance of defendant's guilty plea to aggravated identify theft charge was not plain.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (21)

[1] Criminal Law  Sentencing

Court of Appeals reviews sentencing decisions for abuse of discretion.

[2] Criminal Law  Review De Novo

Criminal Law  Sentencing

When reviewing district court's application of Sentencing Guidelines, Court of Appeals reviews legal questions de novo and reviews any factual findings for clear error.  U.S.S.G. § 1B1.1 et seq.

[3] Criminal Law  Sentencing

District court's loss calculation at sentencing is factual question reviewed for clear error.

[4] Criminal Law  Sentencing

Court of Appeals may disturb district court's loss determination—and consequent Sentencing Guidelines enhancement—only if court's finding is without factual support in record or if, after reviewing all evidence, Court of Appeals is left with definite and firm conviction that mistake has been made.

[5] Criminal Law  Scope of Inquiry

Court of Appeals may review party's argument according to its substance rather than party's characterization.

[6] Criminal Law  Sentencing

Court of Appeals evaluates sentences imposed by district court for reasonableness.

[7] Sentencing and Punishment  Sentencing Proceedings in General

“Procedural reasonableness” involves using proper method to calculate sentence.

[8] Sentencing and Punishment  Operation and effect of guidelines in general

Sentencing and Punishment  Mandatory or advisory

In setting procedurally reasonable sentence, district court must calculate proper advisory Guidelines range.  U.S.S.G. § 1B1.1 et seq.

[9] **Criminal Law**  **Sentencing and Punishment**
Criminal Law  **Sentence**

Any error in Sentencing Guidelines calculation renders sentence procedurally unreasonable and, if error is not harmless, requires remand.

 U.S.S.G. § 1B1.1 et seq.

[10] **Criminal Law**  **Sentencing and Punishment**

When government is beneficiary of error in Sentencing Guidelines calculation, it must prove harmlessness by preponderance of evidence.

 U.S.S.G. § 1B1.1 et seq.

[11] **Sentencing and Punishment**  **Objections and disposition thereof**

If defendant fails to specifically object to fact in presentence report (PSR), fact is deemed admitted by defendant and government need not produce additional evidence in support of admitted fact.

[12] **Sentencing and Punishment**  **Objections and disposition thereof**

When defendant objects to fact in presentence report (PSR) and notifies sentencing court that fact is disputed, government must prove that fact at sentencing hearing by preponderance of evidence, which it may do by either presenting new evidence at sentencing or referring to evidence presented at trial.

[13] **Sentencing and Punishment**  **Objections and disposition thereof**

Defendant objects to fact in presentence report (PSR) by making specific allegations of factual inaccuracy, rather than challenging only ultimate conclusions in PSR or inferences to be drawn from facts; test is whether district court was adequately alerted to factual issue.

[14] **Sentencing and Punishment**  **Objections and disposition thereof**

Defendant convicted of bank fraud sufficiently alerted district court that she disputed presentence report's (PSR) loss calculation, and thus district court clearly erred by adopting PSR's loss calculation over her objection without requiring government to prove it by preponderance of evidence, even though she was incorrect that district court should have used restitution amount as loss amount, where defendant contested loss amount in PSR, insisting it did not include appropriate deductions, and district court said it understood her to argue that "because her loans were collateralized ..., because many of the loans were paid off with proceeds of new loans, and because various institutions recovered and/or set-off collateral, she's entitled to have the loss reduced in the amount of restitution."  18

U.S.C.A. § 3663A(b);  U.S.S.G. § 2B1.1; Fed. R. Crim. P. 32(i)(3).

[15] **Sentencing and Punishment**  **Use and effect of report**

Sentencing and Punishment  **Sufficiency**

District court may not satisfy its obligation to make finding as to controverted factual allegations regarding sentencing by simply adopting presentence report (PSR) as its finding.

[16] **Criminal Law**  **Sentencing proceedings in general**

District court's error in relying on presentence report's (PSR) loss amount to calculate defendant's Guidelines range in bank fraud prosecution was not harmless, even though district court said at close of sentencing hearing that it would have reached same Guidelines range even if it made additional deductions urged by defendant, and that it would have imposed same sentence regardless of any error, where government failed to prove by preponderance of evidence that properly calculated loss would

have still been above minimum sum required for Guidelines range, and district court did not explain its reasoning behind alternative sentence of same length.  U.S.S.G. § 2B1.1.

[17] Criminal Law  Necessity of Objections in General

Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects fairness, integrity, or public reputation of judicial proceedings.

[18] Criminal Law  Necessity of Objections in General

Error is “plain” when it is clear or obvious under current, well-settled law at time of appeal, meaning either Supreme Court or Court of Appeals has addressed issue.

[19] Criminal Law  Requisites and Proceedings for Entry

To determine whether factual basis exists for defendant's plea, district court must compare conduct admitted or conceded by defendant with elements of charged offense to ensure that admissions are factually sufficient to constitute charged crime. [Fed. R. Crim. P. 11\(b\)\(3\)](#).

[20] False Pretenses  Nature of identifying information

Signature is “means of identification” under aggravated identity theft statute. [18 U.S.C.A. § 1028A](#).

[1 Case that cites this headnote](#)

[21] Criminal Law  Arraignment and plea

Any error in district court's acceptance of defendant's guilty plea to charge of aggravated identify theft was not plain, notwithstanding Supreme Court's intervening decision in

 [Dubin v. United States](#), 143 S.Ct. 1557, that

aggravated identify theft statute was violated only when defendant's misuse of another person's means of identification was at crux of what made conduct criminal; Supreme Court had not applied its crux test or provided further guidance on how to do so, *Dubin* relied on distinction between how and when services were provided and who received services, whereas defendant falsified both substance of lien releases and who had authored them, and there were no decisions from other circuits supporting defendant's argument. [18 U.S.C.A. § 1028A](#).

[1 Case that cites this headnote](#)

***818 Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:21-CR-00064-JFH-1)**

Attorneys and Law Firms

[Lynn C. Hartfield](#), Law Office of Lynn C. Hartfield, LLC, Denver, Colorado, for Defendant – Appellant.

Steven J. Briden, Assistant United States Attorney, ([Clinton J. Johnson](#), United States Attorney with him on the brief), Tulsa, Oklahoma, for Plaintiff – Appellee.

Before [MATHESON](#), [PHILLIPS](#), and [MORITZ](#), Circuit Judges.

Opinion

[MATHESON](#), Circuit Judge.

Pamela Kathryn Conley pled guilty to 24 counts of bank fraud and 4 counts of aggravated identity theft. The district court sentenced her to 30 months in prison for bank fraud and a consecutive 24 months for aggravated identity theft.

On appeal, Ms. Conley argues the district court erred in relying on the loss calculation in the presentence report (“PSR”) to determine her U.S. Sentencing Guidelines (“U.S.S.G.” or the “Guidelines”) range for bank fraud. She also argues that in light of  [Dubin v. United States](#), 599 U.S. 110, 143 S.Ct. 1557, 216 L.Ed.2d 136 (2023), the court plainly erred in accepting her guilty plea to aggravated identity theft.

Exercising jurisdiction under  28 U.S.C. § 1291, we vacate Ms. Conley's sentence for bank fraud and remand for resentencing on those counts, and we affirm her convictions for aggravated identity theft.

I. BACKGROUND

A. *Factual History*

Between September 2016 and August 2021, Ms. Conley applied for loans at seven financial institutions using false employment and salary information. She sought \$1,028,643.20 in loans and received \$998,643.20. She used various cars, boats, and trailers as collateral.

In four instances, Ms. Conley used the names and forged signatures of financial-institution employees to create false lien releases for already encumbered vehicles. She used these lien releases to repledge the same vehicles as collateral for new loans.

B. *Procedural History*

A grand jury indicted Ms. Conley on 24 counts of bank fraud under 18 U.S.C. § 1344 and 4 counts of aggravated identity theft under 18 U.S.C. § 1028A(a)(1). She pled guilty, without a plea agreement, to all 28 counts.

The Probation Office's PSR found the "loss" caused by Ms. Conley's offense was  *819 \$1,020,591.62,¹ which triggered a 14-level increase in Ms. Conley's Guidelines offense level. Ms. Conley argued that the properly calculated loss amount should have been below \$550,000, which would have triggered only a 12-level increase.

At the sentencing hearing, the district court, over Ms. Conley's objection, relied on the PSR's loss amount to calculate her Guidelines range for bank fraud as 30 to 37 months. The court sentenced her to 30 months in prison. It also sentenced her to a mandatory consecutive 24 months for aggravated identity theft, U.S.S.G. § 2B1.6, and three years of supervised release. The court ordered her to pay \$451,064.64 in restitution.

Ms. Conley timely appealed.

II. DISCUSSION

Ms. Conley raises two issues. First, she challenges the district court's calculation of her Guidelines range for bank fraud.

Second, she argues  *Dubin v. United States* renders the court's acceptance of her guilty plea to aggravated identity theft plainly erroneous. We vacate Ms. Conley's sentence for bank fraud and remand for resentencing. We affirm her aggravated identity theft convictions.

A. *Loss Calculation*

The district court clearly erred in relying on disputed facts in the PSR to calculate Ms. Conley's Guidelines range for bank fraud, making her sentence procedurally unreasonable.

1. Legal Background

a. *Standard of review*

[1] [2] We review sentencing decisions for abuse of discretion.  *Peugh v. United States*, 569 U.S. 530, 537, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013). "When reviewing a district court's application of the Sentencing Guidelines, we review legal questions *de novo* and we review any factual findings for clear error." *United States v. Maldonado-Passage*, 4 F.4th 1097, 1103 (10th Cir. 2021) (alterations and quotations omitted).

[3] [4] [5] "A district court's loss calculation at sentencing is a factual question we review for clear error."  *United States v. Griffith*, 584 F.3d 1004, 1011 (10th Cir. 2009) (quotations omitted).² "[W]e may disturb the district court's loss determination—and consequent Guidelines enhancement—only if the court's finding is without factual support in the record or if, after reviewing all the evidence, we are left with a definite and firm conviction that a mistake has been made."  *United States v. Mullins*, 613 F.3d 1273, 1292 (10th Cir. 2010) (quotations omitted).

*820 b. *Procedural reasonableness and the Guidelines*

[6] [7] [8] "[W]e evaluate sentences imposed by the district court for reasonableness."  *United States v. Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007); see  *United States*

v. Booker, 543 U.S. 220, 261-62, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Ms. Conley challenges only the procedural reasonableness of her sentence. “Procedural reasonableness involves using the proper method to calculate the sentence.”

Conlan, 500 F.3d at 1169; see Gall v. United States, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

“In setting a procedurally reasonable sentence, a district court must calculate the proper advisory Guidelines range”

United States v. Chee, 514 F.3d 1106, 1116 (10th Cir. 2008) (quotations omitted); see Rosales-Mireles v. United States, — U.S. —, 138 S. Ct. 1897, 1904, 201 L.Ed.2d 376 (2018).

[9] [10] “Any error in the Guidelines calculation renders a sentence procedurally unreasonable and, if the error is not harmless, requires remand.” United States v. Scott, 529 F.3d 1290, 1300 (10th Cir. 2008); see also Peugh, 569 U.S. at 537, 133 S.Ct. 2072. When the government is the “beneficiary of the error,” it must prove harmlessness by a preponderance of the evidence. United States v. Sanchez-Leon, 764 F.3d 1248, 1262-63 (10th Cir. 2014) (quotations omitted).

c. U.S.S.G. § 2B1.1

U.S.S.G. § 2B1.1 provides a two-step formula to calculate the base offense level for § 1344 bank fraud convictions: (1) § 2B1.1(a) sets the base offense level, then (2) § 2B1.1(b) increases it based on specific offense characteristics.

Section 2B1.1(b)(1) increases the base offense level according to the “loss” caused by the offense.³ To calculate loss, the sentencing court must take “the greater of actual loss or intended loss,” U.S.S.G. § 2B1.1 cmt. n.3(A), then subtract certain “[c]redits” or deductions, id. § 2B1.1 cmt. n.3(E).

“Actual loss” is the monetary harm that resulted from the offense. *Id.* § 2B1.1 cmt. n.3(A)(i).⁴ “Intended loss” is the monetary “harm that the defendant purposely sought to inflict,” regardless of the harm actually inflicted. *Id.* § 2B1.1 cmt. n.3(A)(ii). The greater of these amounts is the starting point for the loss calculation. *Id.* § 2B1.1 cmt. n.3(A).

The sentencing court then deducts (1) the amount of “money returned ... by the defendant ... to the victim before the offense was detected,” *id.* § 2B1.1 cmt. n.3(E)(i),⁵ and (2) the value of any collateral that the victim has recovered by the time of sentencing, *id.* § 2B1.1 cmt. n.3(E)(ii).⁶

In summary, loss is the greater of actual or intended loss, less (1) the money returned before detection of the offense and *821 (2) the value of any collateral recovered before sentencing.⁷ The resulting amount determines the increase to the defendant’s base offense level. Relevant here, the sentencing court increases the base offense level by 12 if the loss is more than \$250,000 and less than \$550,000, and by 14 if the loss is more than \$550,000 and less than \$1,500,000.

Id. § 2B1.1(b)(1).

d. PSR at sentencing

Sentencing courts often rely on facts in the PSR. Federal Rule of Criminal Procedure 32(i)(3) provides:

At sentencing, the court:

- (A) may accept any undisputed portion of the [PSR] as a finding of fact; [and]
- (B) must—for any disputed portion of the [PSR] or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing

[11] [12] “If a defendant fails to specifically object to a fact in the PSR, the fact is deemed admitted by the defendant and the government need not produce additional evidence in support of the admitted fact.” United States v. Hooks, 551 F.3d 1205, 1217 (10th Cir. 2009). But “[w]hen a defendant objects to a fact in a [PSR] and notifies the sentencing court that the fact is disputed, “the government must prove that fact at a sentencing hearing by a preponderance of the evidence.”

United States v. Barnett, 828 F.3d 1189, 1192 (10th Cir. 2016) (quotations omitted); see Fed. R. Crim. P. 32(i)(3). “The government can meet its burden by either presenting new evidence at sentencing or referring to evidence presented at trial.” United States v. McDonald, 43 F.4th 1090, 1095 (10th Cir. 2022).

[13] A defendant objects to a fact in the PSR by “mak[ing] specific allegations of factual inaccuracy” rather than challenging only “the ultimate conclusions in the [PSR]” or “the inferences to be drawn” from the facts.  *Barnett*, 828 F.3d at 1192-93, 1195 (quotations omitted). “[T]he test is whether the district court was adequately alerted to the [factual] issue.” *United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014).

A sufficient objection may be “imprecise.” *Id.*; see *United States v. E.F.*, 920 F.3d 682, 687 (10th Cir. 2019) (“All that is required to preserve an issue for appeal is that the party ‘informs the court of the party’s objection and the grounds for that objection.’ ” (alterations omitted) (quoting Fed. R. Crim. P. 51(b))). For example, we found it sufficient that a defendant said at sentencing, “There were several mistakes in … [t]he amounts that were on [the PSR],” and the district court confirmed that it understood the defendant “disagree[d] with the probation officer’s calculation.” *Harrison*, 743 F.3d at 763.

2. Additional Procedural History

a. PSR

Ms. Conley’s PSR calculated her loss as \$1,020,591.62, which increased her base offense level by 14. An addendum to the PSR explained that this number was calculated by taking the total amount of fraudulent loans that Ms. Conley sought (\$1,028,643.00) and subtracting the value of one vehicle that was returned to a victim financial institution (\$8,051.38).

*822 b. Written objections

Ms. Conley received the draft PSR before her sentencing hearing. She filed written objections in a letter to the Probation Office, in which she objected that the loss amount had not been reduced by the amounts paid on the loans or the value of recovered collateral.

c. Sentencing hearing

At the sentencing hearing, the district court stated that it had “reviewed [Ms. Conley]’s [written] objections” and believed that it “fully understand[ed]” the objection. ROA, Vol. III at 40.⁸

Ms. Conley told the court that she “maintain[ed] [her] objection with regard to the total loss for purposes of calculating the [Guidelines] enhancement on that basis.” *Id.*

She further explained that the commentary to  U.S.S.G. § 2B1.1 “requires the court to reduce loss by any amounts, including the return of collateral or any money that is returned.” *Id.* at 41. And she again stated her belief “that the loss amount should be reduced by any return of property or any collection of collateral.” *Id.* at 42. She argued that the loss amount with the appropriate deductions would equal the restitution amount. *Id.* at 46.

The Government responded that Ms. Conley was “conflating intended loss and actual loss,” *id.* at 46, and argued that her false lien releases meant that the “banks could not repossess their collateral,” *id.* at 47. It said that “for sentencing [the court should] go by the intended loss.” *Id.* The Government presented no evidence in support of the PSR’s loss calculation, and the district court did not request it. *See id.*

The district court overruled Ms. Conley’s objection. It “believe[d] the intended loss [wa]s calculated correctly and … all amounts that were credited ha[d] been deducted from the intended loss.” *Id.* at 47-48. And it “d[id]n’t think there[] [was] any way … to calculate the intended loss less than \$550,000 based upon [the PSR],” which would be required for Ms. Conley to receive a 12-level increase to her offense level rather than a 14-level increase. *Id.* at 48. Finally, the court said that “for [Ms. Conley] to get credit for returned items or returned amounts …, she would have had to return that before detection, and that[] … doesn’t seem to be the case.” *Id.*

The district court then decided that “the [PSR] [would] form the factual basis for [its] sentence.” *Id.* at 62. It calculated Ms. Conley’s offense level as 19 with a criminal history category of I,⁹ which resulted in a Guidelines range of 30 to 37 months. It sentenced her to 30 months in prison for bank fraud.

3. Analysis

a. Sufficiency of objection and the Government’s burden

The Government argues Ms. Conley’s objections to the PSR were “insufficient to trigger the district court’s factfinding responsibilities.” Aplee. Br. at 14. We disagree.

To determine whether her objections were sufficient, “the sole question is whether the district court was adequately alerted to the issue.” *E.F.*, 920 F.3d at 687 (quotations omitted). Ms. Conley contested the loss amount in the PSR, insisting it did not include the appropriate deductions. *823 The

district court said it understood her to argue that “because her loans were collateralized ..., because many of the loans were paid off with proceeds of new loans, and because various institutions recovered and/or set-off collateral, she's entitled to have the loss reduced in the amount of restitution.” ROA, Vol. III at 46.

[14] Because restitution includes only actual damages and makes deductions that are excluded from the loss calculation, *see* 18 U.S.C. § 3663A(b), Ms. Conley was incorrect that the district court should have used the restitution amount as the loss amount. Nonetheless, she sufficiently alerted the district court that she disputed the PSR's loss calculation. *E.F.*, 920 F.3d at 687. Because her objections were sufficient under Rule 32(i)(3) and our case law, *see* *Barnett*, 828 F.3d at 1192-93; *E.F.*, 920 F.3d at 687; *Harrison*, 743 F.3d at 763, the Government was required to prove the loss amount at the sentencing hearing by a preponderance of the evidence.

b. Clear error and procedural unreasonableness

[15] The district court clearly erred by adopting the PSR's loss calculation over Ms. Conley's objection without requiring the Government to prove it by a preponderance of the evidence. “We repeatedly have held that a district court may not satisfy its obligation to make a finding as to controverted factual allegations regarding sentencing by simply adopting the PSR as its finding.” *United States v. Wilken*, 498 F.3d 1160, 1170 (10th Cir. 2007) (alterations and quotations omitted); *see also* *United States v. West*, 550 F.3d 952, 974 (10th Cir. 2008). Once Ms. Conley alerted the district court that she disputed the PSR's loss calculation, the Government was required to present evidence at the sentencing hearing to support it. *See McDonald*, 43 F.4th at 1095.

The district court's failure to hold the Government to its burden was procedurally unreasonable. “In setting a procedurally reasonable sentence, a district court must calculate the proper advisory Guidelines range” *Chee*, 514 F.3d at 1116 (quotations omitted); *see also* *Rosales-Mireles*, 138 S. Ct. at 1904 (“District courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” (alterations and quotations omitted)). To do so, it cannot rely on a disputed loss calculation that the Government failed to prove by a preponderance. *See Harrison*, 743 F.3d at 763-64. The court

clearly erred in relying on unproven facts in the PSR, and it therefore abused its discretion by “selecting a sentence based on clearly erroneous facts.” *Gall*, 552 U.S. at 51, 128 S.Ct. 586.

c. Harmlessness

[16] The district court's error in relying on the PSR's loss amount to calculate Ms. Conley's Guidelines range was not harmless. A calculation error may be harmless if the district court nonetheless considers the correct Guidelines range. *See* *U.S. v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006); *United States v. Tom*, 494 F.3d 1277, 1282 (10th Cir. 2007). The court did not do so here.

At the close of the sentencing hearing, the district court said it would have reached the same Guidelines range even if it made the additional deductions urged by Ms. Conley. It said that it “d[id]n't think there[] [was] any way ... to calculate the intended loss less than \$550,000 based upon [the PSR],” which would have been required to increase Ms. Conley's base offense level by 12 rather than 14. ROA, Vol. III at 48. But this statement is “without factual support in the record.”

Mullins, 613 F.3d at 1292 (quotations omitted); *see* *824 *United States v. Wieck*, No. 19-6075, 2021 WL 4949177, at *10-11 (10th Cir. Oct. 25, 2021) (unpublished) (remanding for resentencing when the district court made the unsupported finding that even with “a liberal deduction ..., you're still left with a net number in excess of 550,000”).

The Government failed to prove by a preponderance of the evidence that the properly calculated loss would still be above \$550,000. *See* *Sanchez-Leon*, 764 F.3d at 1262-63. “[A] procedural error is not harmless if it requires us to speculate on whether the court would have reached the same determination absent the error.” *United States v. Gieswein*, 887 F.3d 1054, 1062 (10th Cir. 2018) (quotations omitted). Without record evidence supporting the PSR's loss calculation, we cannot say that the district court's error was harmless. We vacate Ms. Conley's sentence for bank fraud and remand for resentencing on those counts. ¹⁰

B. Aggravated Identity Theft

As described above, Ms. Conley pled guilty to aggravated identity theft. She now argues the district court plainly erred in finding a factual basis for her plea after  *Dubin*. We affirm.

1. Plain Error Standard of Review

[17] Ms. Conley did not object to the court's acceptance of her aggravated identity theft plea, so we review for plain error.  *United States v. Olano*, 507 U.S. 725, 730, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). “Plain error occurs when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.”  *United States v. Gonzalez-Huerta*, 403 F.3d 727, 732 (10th Cir. 2005) (en banc) (quotations omitted).

[18] An error is plain when it is “clear or obvious under current, well-settled law” at the time of appeal, meaning “either the Supreme Court or this court [has] addressed the issue.” *United States v. Brooks*, 736 F.3d 921, 930 (10th Cir. 2013) (quotations omitted). “[I]n certain circumstances, the weight of authority from other circuits may make an error plain”  *United States v. Hill*, 749 F.3d 1250, 1258 (10th Cir. 2014) (quotations omitted).

2. Legal Background

a. Factual basis for a guilty plea

[19] To enter judgment on a guilty plea, the court must determine there is an appropriate factual basis for the plea. *Fed. R. Crim. P. 11(b)(3)*. “To determine whether a factual basis exists for the defendant's plea, the district court must compare the conduct admitted or conceded by the defendant with the elements of the charged offense to ensure the admissions are factually *825 sufficient to constitute the charged crime.” *United States v. Gonzales*, 918 F.3d 808, 811-12 (10th Cir. 2019) (quotations omitted).

b. Title 18 U.S.C. § 1028A: Aggravated identity theft

[20] Title 18 U.S.C. § 1028A(a)(1) provides:

Whoever, during and in relation to any felony violation enumerated in [18 U.S.C. § 1028A(c)], including bank fraud, knowingly transfers,

possesses, or uses, without lawful authority, a means of identification of another person, shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

A signature is a “means of identification” for § 1028A. *United States v. Porter*, 745 F.3d 1035, 1042-43 (10th Cir. 2014).

c. *Dubin v. United States*

In between Ms. Conley's sentencing and this appeal, the Supreme Court decided  *Dubin v. United States*, 599 U.S. 110, 143 S.Ct. 1557, 216 L.Ed.2d 136 (2023). In  *Dubin*, the Court resolved a circuit split over when a defendant “uses” another's identification “in relation to” a predicate offense under 18 U.S.C. § 1028A(a)(1).  *Id.* at 116, 143 S.Ct. 1557. After defendant David Dubin conducted psychological testing on a patient, he submitted a bill to Medicaid that used the patient's name but falsely inflated the reimbursement amount.  *Id.* at 114, 143 S.Ct. 1557. He was charged under § 1028A with aggravated identity theft during and in relation to healthcare fraud.  *Id.* at 114-15, 143 S.Ct. 1557.

The Court held that “§ 1028A(a)(1) is violated when the defendant's misuse of another person's means of identification is at the crux of what makes the conduct criminal.”  *Id.* at 131, 143 S.Ct. 1557. “[W]ith fraud or deceit crimes,” the means of identification is at the crux of the conduct's criminality when it is “used in a manner that is fraudulent or deceptive ..., [which] can often be succinctly summarized as [deception about] ‘who’ is involved.”  *Id.* at 131-32, 143 S.Ct. 1557. Because “the crux of [Mr. Dubin's] fraud was a misrepresentation about ... *how* and *when* services were provided to a patient, not *who* received the services,” the Court held that the identification was not at the crux of his conduct and vacated his conviction.  *Id.* at 132, 143 S.Ct. 1557.

3. Analysis

Ms. Conley argues the district court plainly erred in accepting her plea under *Rule 11(b)(3)* because her use of the employees' signatures to create fake lien releases was not at

the “crux” of her fraud and thus, in light of  *Dubin*, was not factually sufficient to constitute aggravated identity theft. Aplt. Br. at 25-27.

[21] Any error here was not plain. Under the second prong of plain error review, we will reverse a district court’s decision only if it is “contrary to well-settled law” at the time of the appeal.  *United States v. Whitney*, 229 F.3d 1296, 1309 (10th Cir. 2000). Accepting Ms. Conley’s plea was not contrary to well-settled law. Neither (1) the Supreme Court, (2) our circuit, nor (3) any other circuit has addressed the issue presented in Ms. Conley’s case.

First, since  *Dubin*, the Supreme Court has not applied its crux test or provided further guidance on how to do so.

And the facts in  *Dubin* differ significantly from those here.  599 U.S. at 114, 143 S.Ct. 1557. Mr. Dubin treated the patients that he named in his reimbursement requests, changing only the amount of the reimbursement.  *Id.* The Court relied on the distinction between “*how* and *when* services were provided ... [and] *who* received the services.”

 *826 *Id.* at 132, 143 S.Ct. 1557. By contrast, Ms. Conley falsified both the substance of the lien releases and who had authored them.

Second, this circuit has applied  *Dubin*’s test only once in an unpublished decision, noting without explanation that the government met its burden to show a forged signature was “used in a manner that is fraudulent or deceptive” and “play[ed] a key role” in the crime.  *United States v. Herman*, Nos. 22-8057, 22-8061, 2023 WL 6861766, at *8 n.6 (10th Cir. Oct. 18, 2023) (unpublished) (quoting

 *Dubin*, 599 U.S. at 129, 132, 143 S.Ct. 1557).  *Herman* does not settle the law. Unpublished decisions are not precedential. 10th Cir. R. 32.1; *see also*   *United States v. Story*, 635 F.3d 1241, 1248 (10th Cir. 2011) (finding “no controlling circuit ... precedent” where neither of the relevant cases were “published or binding on this court or the district courts”).

Further,  *Herman* involved a scheme to “control[] a publicly traded company, artificially inflat[e] the value of the company’s shares, and then sell[] [the] shares.”  2023 WL 6861766, at *1. The defendant used a forged signature to create a “fake attorney-opinion letter.”  *Id.* at *2. We did not explain why this letter was at the “crux” of the defendant’s criminal conduct or what evidence the government presented at trial to show the signature “play[ed] a key role” in the scheme.  *Id.* at *8 n.

Third, as for other circuits, only the Eleventh and Fifth Circuits have applied  *Dubin*’s test. The Eleventh Circuit did so in *United States v. Gladden*, 78 F.4th 1232 (11th Cir. 2023), which, like  *Dubin*, was a healthcare fraud case that bears little factual resemblance to Ms. Conley’s case. *See id.* at 1238-40, 1248. The Fifth Circuit applied  *Dubin* to find that a defendant who forged employment paperwork was properly convicted of aggravated identity theft. *United States v. Croft*, 87 F.4th 644 (5th Cir. 2023). Neither case supports Ms. Conley’s argument. And two opinions from our sister circuits do not constitute “the weight of authority from other circuits” needed to establish plain error.  *Hill*, 749 F.3d at 1258.

Neither “the Supreme Court [n]or this court [has] addressed the issue” presented in Ms. Conley’s case, *Brooks*, 736 F.3d at 930, and no other circuit court has applied  *Dubin*’s test to bank fraud. Without more definitive legal authority, any error in accepting Ms. Conley’s guilty plea cannot be plain. We affirm.

III. CONCLUSION

We vacate Ms. Conley’s sentence for bank fraud and remand for resentencing on her bank fraud convictions. We affirm her convictions for aggravated identity theft.¹¹

All Citations

89 F.4th 815

Footnotes

- 1 The Probation Office reached this number by taking the amount of loans Ms. Conley sought (\$1,028,643.00) and subtracting the value of one returned vehicle (\$8,051.38). We detail the formula for loss below.
- 2 Although Ms. Conley describes her challenge to the loss calculation as a legal one, Aplt. Reply Br. at 3, the substance of her brief contests the factual basis for the loss number, Aplt. Br. at 10-18. For example, she argues the Government failed to present evidence supporting the loss amount and asks us to “remand for further findings” on the payments made and the value of recovered collateral. *Id.* at 17-18. The Government also treats her argument as factual, countering that her objection to the loss amount was “insufficient to trigger the district court’s factfinding responsibilities.” Aplee. Br. at 14. We may review a party’s argument according to its substance rather than the party’s characterization. See, e.g., [Tucker v. Makowski](#), 883 F.2d 877, 881 (10th Cir. 1989); [Alcivar v. Wynne](#), 268 F. App’x 749, 754 (10th Cir. 2008) (unpublished).

We cite the unpublished cases in this opinion for their persuasive value. See [Fed. R. App. P. 32.1\(a\)](#); [10th Cir. R. 32.1\(A\)](#).

- 3 [§ 2B1.1\(b\)](#) calls for further adjustments based on other offense characteristics, but only [§ 2B1.1\(b\)\(1\)](#) is relevant to this appeal.
- 4 Actual loss is limited to “reasonably foreseeable” harm. [U.S.S.G. § 2B1.1](#) cmt. n.3(A)(i), (iv).
- 5 “The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected” [U.S.S.G. § 2B1.1](#) cmt. n.3(E)(i).
- 6 The value of the collateral is “the amount the victim has recovered ... from disposition of the collateral” or, if the victim has not disposed of the collateral, “the fair market value of the collateral at the time of sentencing.” [U.S.S.G. § 2B1.1](#) cmt. n.3(E)(ii).
- 7 Loss = (the greater of actual or intended loss) – (the amount of money returned before detection of the offense) – (the value of any collateral recovered before sentencing).
- 8 The Probation Office issued a revised PSR the morning of Ms. Conley’s sentencing hearing. The loss amount was changed from \$1,028,643.00 to \$1,020,591.62.
- 9 The court started with the base offense level of 7 under [U.S.S.G. § 2B1.1\(a\)](#), added 14 levels under [§ 2B1.1\(b\)](#), and subtracted 2 levels for acceptance of responsibility under § 3E1.1(a).
- 10 The district court also said that 30 months was “the same sentence [it] would impose if given the broadest possible discretion and the same sentence [it] would impose notwithstanding any judicial findings of fact by adoption of the [PSR] or at th[e] [sentencing] hearing.” ROA, Vol. III at 76. We have “rejected the notion that district courts can insulate sentencing decisions from review by making such statements.” [United States v. Burris](#), 29 F.4th 1232, 1239 (10th Cir. 2022) (quotations omitted).

This case stands in contrast, for example, to [Sanchez-Leon](#), in which we held the district court procedurally erred by failing to consider the defendant’s deportability in sentencing. [764 F.3d 1248](#). There, we held the error was harmless based on the court’s insistence that, even if it had considered deportability, it would have

imposed the same sentence to avoid disparities with similarly situated defendants.  *Id.* at 1264-66. The district court here did not provide a similar explanation. See  *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1117-18 (10th Cir. 2008) (concluding error was not harmless where district court failed to explain the reasoning behind alternative sentence of the same length).

11 We also deny Ms. Conley's motion to expedite as moot.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

APPENDIX B



UNITED STATES DISTRICT COURT

Northern District of Oklahoma

UNITED STATES OF AMERICA

v.

PAMELA KATHRYN CONLEY

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:21CR00064-1

USM Number: 31636-509

Meredith Blake Curnutt

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One through Twenty-Eight of the Second Superseding Indictment

pleaded nolo contendere to count(s) _____ which was accepted by the Court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1344	Bank Fraud	12/28/20	1-24
18 U.S.C. § 1028A(a)(1)	Aggravated Identity Theft	3/7/19	25-28

The defendant is sentenced as provided in this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

The Indictment and Superseding Indictment 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.

November 18, 2022

Date of Imposition of Judgment

John F. Heil, III, Chief United States District Judge
Name and Title of Judge

November 23, 2022

Date

AO 245B (Rev. 10/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Pamela Kathryn Conley
CASE NUMBER: 4:21CR00064-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Fifty-four months. Said sentence shall consist of 30 months as to each of Counts One through Twenty-Four to run concurrently, each with the other, and 24 months as to each of Counts Twenty-Five through Twenty-Eight, to run concurrently with each other but consecutively to Counts One through Twenty-Four.

The Court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be evaluated for the Residential Drug Abuse Program.

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

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

at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

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

before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Pamela Kathryn Conley
CASE NUMBER: 4:21CR00064-1

SUPERVISED RELEASE

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

Three years. Said terms shall consist of three years as to each of Counts One through Twenty-four and one year as to each of Count Twenty-five through Twenty-eight. Said terms shall run concurrently, each with the other.

MANDATORY CONDITIONS

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

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

DEFENDANT: Pamela Kathryn Conley
CASE NUMBER: 4:21CR00064-1

Text

STANDARD CONDITIONS OF SUPERVISION

As part of your supervision, 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 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 to 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 the 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 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.
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 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, after obtaining Court approval, notify the person about the risk or 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.

DEFENDANT: Pamela Kathryn Conley
CASE NUMBER: 4:21CR00064-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall successfully participate in a program of mental health treatment and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will determine the treatment modality, location, and treatment schedule. The defendant shall waive any right of confidentiality in any records for mental health treatment to allow the probation officer to review the course of treatment and progress with the treatment provider. The defendant must pay the cost of the program or assist (co-payment) in payment of the costs of the program if financially able.
2. The defendant shall abide by the "Special Financial Conditions" previously adopted by the Court, as follows:
 - a. The defendant shall maintain a checking account in the defendant's name and deposit into this account all income, monetary gains or other pecuniary proceeds, and make use of this account for payment of all personal expenses. All other bank accounts must be disclosed to the probation officer.
 - b. The defendant shall not make application for any loan or enter into any credit arrangement, without first consulting with the probation officer.
 - c. The defendant shall disclose all assets and liabilities to the probation officer. The defendant shall not transfer, sell, give-away, or otherwise convey any asset, without first consulting with the probation officer.
 - d. If the defendant owns or maintains interest in any profit or nonprofit entity, you shall, upon request, surrender and/or make available for review, any and all documents and records of said profit or nonprofit entity to the probation officer.
 - e. The defendant shall, upon request of the probation officer, complete a personal financial affidavit and authorize release of any and all financial information, to include income and tax return records, by execution of a Release of Financial Information form, or by any other appropriate means.
3. The defendant shall abide by the "Special Computer Restriction Conditions" previously adopted by the Court, as follows:
 - a. The defendant shall disclose all e-mail accounts, Internet connections and Internet connection devices, including screen names and passwords, to the probation officer; and shall immediately advise the probation officer of any changes in his or her e-mail accounts, connections, devices, or passwords.
 - b. The probation officer shall have authority to monitor all computer activity, to include all e-mail or Internet connections, to include but not limited to installation of remote monitoring software. Unless waived by the probation officer, the cost of remote monitoring software shall be paid by the defendant.
 - c. The defendant shall not access any on-line service using an alias, or access any on-line service using the Internet account, name, or designation of another person or entity; and report immediately to the probation officer access to any Internet site containing prohibited material.
 - d. The defendant is prohibited from using any form of encryption, cryptography, stenography, compression, password-protected files or other methods that limit access to, or change the appearance of, data and/or images.
 - e. The defendant is prohibited from altering or destroying records of computer use, including the use of software or functions designed to alter, clean or "wipe" computer media, block monitoring software, or restore a computer to a previous state.
 - f. If instructed, the defendant shall provide all personal and business telephone records and credit card statements to the probation officer.
4. The defendant is prohibited from engaging, directly or indirectly, in any form of gambling or game of chance; and shall not loiter about or enter any dwelling or enterprise whose principal business purpose is gambling or the offering of games of chance. The defendant shall successfully participate in a program for the treatment of gambling addiction at a program and on a schedule approved by the probation officer. The defendant shall waive any right of confidentiality in any records for gambling addiction treatment to allow the probation officer to review the course of treatment and progress with the treatment provider.

U.S. Probation Officer Use Only

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

Defendant's Signature _____

Date _____

DEFENDANT: Pamela Kathryn Conley
CASE NUMBER: 4:21CR00064-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$2,800	\$451,064.64	N/A	N/A	N/A

The determination of restitution is deferred until

An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

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

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

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or</u>
First Oklahoma Federal Credit Union 1419 South Denver Avenue Tulsa, Oklahoma 74119		\$55,548.06	
Oklahoma Central Credit Union Attn: Shelli Schroeder 4956 South Peoria Avenue Tulsa, Oklahoma 74105		\$118,757.87	
First Priority Bank 10632 South Memorial Drive Tulsa, Oklahoma 74133		\$31,559.00	
Western Sun Federal Credit Union 4620 West Kenosha, Broken Arrow, Oklahoma 74012		\$18,414.76	
Red Crown Credit Union 5001 East 91st Street Tulsa, Oklahoma 74137		\$39,770.77	
Equity Bank Attn: June Pressnell 7701 East Kellogg Avenue Wichita, Kansas 67207		\$25,068.10	
Tinker Federal Credit Union - Fraud Department Attn: Jack Kelley 715 Metropolitan Avenue Oklahoma City, Oklahoma 73108		\$105,224.99	
Fidelity Bank NA Attn: Jennifer King 100 East English Wichita, Kansas 67202		\$27,059.43	
Grand Savings Bank 198 Atlanta Street SE Gravette, Arkansas 72736		\$29,661.66	
TOTALS	\$	\$ 451,064.64	

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

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

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

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

AO 245B (Rev. 10/17) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Pamela Kathryn Conley
CASE NUMBER: 4:21CR00064-1

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 payment of \$ 2,800 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

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

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

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

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 90 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:

Any monetary payment is due in full immediately, but payable on a schedule to be determined pursuant to the policy provision of the Federal Bureau of Prisons' Inmate Financial Responsibility Program if the defendant voluntarily participates in this program. If a monetary balance remains, payment is to commence no later than 60 days following release from imprisonment to a term of supervised release in equal monthly payments of \$100 or 10% of net income (take home pay), whichever is greater, over the duration of the term of supervised release and thereafter as prescribed by law for as long as some debt remains. Notwithstanding establishment of a payment schedule, nothing shall prohibit the United States from executing or levying upon property of the defendant discovered before or after the date of this Judgment.

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

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

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

The defendant shall forfeit the defendant's interest in the following property to the United States:
United States currency in the amount of \$938,020.63 is forfeited as directed in the Forfeiture Money Judgment, Dkt. # 81.

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.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

United States of America,

Plaintiff,

vs.

Case Number:

21-CR-64-JFH

Pamela Kathryn Conley,

Defendant.

**PETITION TO ENTER PLEA OF GUILTY
AND ORDER ENTERING PLEA**
(Federal Rules of Criminal Procedure, Rules 10 and 11)

The defendant represents to the Court

My full true name is Pamela Kathryn Conley. I am fifty-nine (59) years of age. I have gone to school up to and including Bach. Degree. I request that all proceedings against me be in my true name.

I am represented by an attorney; his name is Keith A. Ward.

I received a copy of the Second Superseding Indictment before being called upon to plead. I read the Second Superseding Indictment and have discussed it with my attorney. I fully understand every charge made against me.

I told my attorney all the facts and circumstances known to me about the charges made against me in the Second Superseding Indictment. I believe that my attorney is fully informed on all such matters.

My attorney has counseled and advised me on the nature of each charge, on all lesser included charges, and on all possible defenses that I might have in this case.

WAIVER OF CONSTITUTIONAL RIGHTS

I know that I have the right to plead "NOT GUILTY" to any offense charged against me. If I plead "NOT GUILTY," I know the Constitution guarantees me:

- (a) the right to a speedy and public trial by a jury;
- (b) at that trial, and at all stages of the proceedings, the right to the assistance of an attorney;
- (c) the right to see and hear all witnesses called to testify against me, and the right to cross-examine those witnesses;
- (d) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor; and
- (e) the right not to be compelled to incriminate myself by taking the witness stand; and, if I do not take the witness stand, no inference of guilt may be drawn from such failure.

In regard to my right to a jury trial, I know that I am the only person that can waive, that is, give up, that right. I also fully understand that if I have trial by a jury, I have the right of the assistance of an attorney; also the right to confront and cross-examine witnesses against me; and the right not to be compelled to incriminate myself. Furthermore, I understand that to convict me, all twelve (12) jury members would have to agree that I am "GUILTY."

I know that, if I plead "GUILTY," I am thereby waiving my right to a trial, and that there will be no further trial of any kind, either before a Court or jury, and further, I realize that the Court may impose the same punishment as if I had pleaded "NOT GUILTY," stood trial, and been convicted by a jury.

I further understand that my waiver of Sixth Amendment rights to a jury is a waiver of trial by jury in all respects, both as to guilt or innocence and as to sentencing, and I consent that all matters in these proceedings be determined by the Court in accordance with Rule 23 of the Federal Rules of Criminal Procedure.

PLEA OF GUILTY

I know that, if I plead "GUILTY," the Court will ask me questions about the offense(s) to which I have pleaded, and since I will be answering these questions under oath, on the record, and in the presence of my attorney, that my answers may later be used against me in a prosecution for perjury or false statement.

I know that the Court must be satisfied that there is a factual basis for a plea of "GUILTY" before my plea can be accepted. I represent to the Court that I did the following act(s) in connection with the charge(s) made against me in Count 1-24.

Counts 1-24 - KAW QMC

On or about the dates set forth in the Second Superseding Indictment, and within the Northern District of Oklahoma, I schemed and executed a scheme to obtain money funds and credits from the financial institutions identified in Exhibit No. 1 to this Plea Petition. I executed the scheme by submitting false documents to obtain loans and to re-finance loans. I stipulate and agree that the financial institutions were insured by agencies of the federal government. Exhibit No. 1 contains a description of the false representations I made to obtain loans and to re-finance loans.

Counts 25, 26, 27, 28 See Ex. No 2 - KAW QMC

In deciding to enter my plea of guilty, I rely upon the following advice from my attorney.

My attorney has stated that he will attempt to mitigate the punishment I receive from the Court.

I also inform the Court that I am not relying, in entering my plea(s) of Guilty, on any representation from my attorney or from the Government or any other source that has not been revealed to the Court and made a part of this record.

By pleading guilty, I understand that I waive, that is, give up, all pretrial motions, and cannot assert any such motions before the Court or on appeal after pleading guilty.

I also understand that a conditional plea pursuant to Rules of Criminal Procedure, Rule 11(a)(2) can only be entered WITH THE APPROVAL OF THE COURT, and the GOVERNMENT reserving IN WRITING the right, on appeal from the judgment, to review of any adverse determination of any pretrial motions. The writing must be presented in open court and made part of the record.

I know that the Court will not permit anyone to plead "GUILTY" who maintains (s)he is innocent and, with that in mind, and because I am "GUILTY" and do not believe I am innocent, I wish to plead "GUILTY," respectfully request the Court to accept my plea of "GUILTY," and to have the Clerk enter my plea of "GUILTY," as follows:

Guilty as to Counts 1 through 24 of the Second Superseding Indictment

MINIMUM SENTENCE AND MANDATORY MINIMUM SENTENCE

I have been informed and understand that a plea of guilty may subject me to a minimum sentence of prison and/or fine. In addition, my attorney has informed me that I will not be subject to any mandatory minimum sentences.

Two years Imprisonment

\$250,000 fine per each count

1 year Supervised Release

MAXIMUM SENTENCE REQUIRED UNDER LAW

Coumts 1-24 Coumts 25,26,27,28 PNC - KAW

My attorney informed me that the plea of "GUILTY" could subject me to a maximum punishment, which, as provided by law, is thirty (30) years imprisonment per count and/or a fine of \$1,000,000.00 per count. My attorney has further advised me that if the offense(s) to which I plead "GUILTY" occurred on or after January 1, 1985, the maximum fine is the largest of:

- (a) The amount specified in law defining the offense
- (b) Double the gross pecuniary gain derived by a defendant from the offense
- (c) Double the pecuniary loss caused by the offense to another person
- (d)

	<u>Individual Defendant</u>	<u>Other Defendant</u>
Any Felony; Misdemeanor resulting in death	\$250,000	\$500,000
Other Misdemeanor punishable by more than six months	\$100,000	\$200,000

My attorney has also advised me that a Special Monetary Assessment in the amount of \$ 100.00 will be assessed per count if the offense(s) occurred on or after November 12, 1984.

Further, my attorney has advised me that if the offense(s) to which I plead "GUILTY" occurred after December 31, 1982, and the offense(s) charge violation(s) of any statute found under Title 18 of the United States Code or certain subsections of the Federal Aviation Act (Title 49 U.S.C. 1472), that Title 18 U.S.C. et seq. authorizes a court to sentence a defendant to pay restitution in addition to, or in lieu of, any other penalty permitted by law, to any victim(s) of the offense(s).

In addition, I understand that if I am sentenced to prison, a term of supervised release of up to five years may be imposed. If the term of supervised release is revoked, an additional term of imprisonment and supervised release may be imposed at each revocation.

IMMIGRATION CONSEQUENCES OF PLEA

If I am not a citizen of the United States, I understand that my plea of guilty in this case may subject me to deportation and/or removal from the United States.

I have been advised that, because I am a citizen of the United States, there are no immigration consequences to my pleas of guilty.

PLEA AGREEMENT

My plea of "GUILTY" is not the result of a plea agreement entered into between the government attorney, my attorney, and me.

Since my plea of "GUILTY" is not the result of a plea agreement, I hereby state that there are no terms.

I believe that my attorney has done all that anyone could do to counsel and assist me, AND I AM SATISFIED WITH THE ADVICE AND HELP HE HAS GIVEN ME.

STATE OF MIND

My mind is clear. I am not under the influence of alcohol or drugs, and I am not under a doctor's care. The only drugs, medicine or pills that I took within the past seven (7) days are: I take many prescription drugs daily but none affect my ability to know and understand the consequences of this proceeding.

I have never been confined in any institution for the treatment of mental illness. I have never been adjudicated mentally incompetent. No psychiatrist, physician or psychologist has ever found me to be mentally ill. I know of no reason

why my mental competence at the time of the commission of the alleged offense(s), or at the present time, should be questioned.

I was briefly hospitalized in 2019 for treatment of depression and suicidal ideation resulting from an overdose of prescription medication.

I offer my plea of "GUILTY" freely and voluntarily, and further state that my plea of "GUILTY" is not the result of any force or threats against me, or of any promises made to me other than those noted in this petition. I further offer my plea of "GUILTY" with full understanding of all the matters set forth in the **Second Superseding Indictment** and in this petition, and in the certificate of my attorney which is attached to this petition.

SENTENCING

I have been advised by counsel that I will be sentenced pursuant to the advisory sentencing guidelines procedure established by Title 18 U.S.C. §3553 *et seq.* I understand that sentencing is a matter left exclusively in the province of the Court; and I understand that the sentence imposed by the Court may be within the guideline table range provided by law or, for good cause stated, the Court may depart therefrom after all relevant facts and circumstances of my case have been considered by the Court, or the Court may impose a non-guideline sentence. further understand that the Court may impose a term of Supervised Release that will run after any term of confinement that might be imposed.

Further, I understand that probation is not available as a sentencing alternative to the Court in most cases under the advisory sentencing guidelines and that, whenever probation is permissible under the advisory sentencing guidelines, it is exclusively within the Court's province to grant or deny probation.

If I am currently on supervised release, probation or parole in this or any other Court, I know that by pleading "GUILTY" here, my probation, supervised release or parole may be revoked, and I may be required to serve time in that case which may be consecutive, that is, in addition to any sentence imposed on me in this case.

I declare that no officer or agent of any branch of government (Federal, State, or local) has promised, suggested or predicted that I will receive a lighter sentence, or probation, or any other form of lenience, if I plead "GUILTY" except as follows:

NONE

If anyone else, including my attorney, made such a promise, suggestion, or prediction, except as noted in the previous sentence, I know that (s)he had no authority to do so.

I know that the sentence I will receive is solely a matter within the control of the Judge. I hope to receive lenience, but I am prepared to accept any punishment permitted by law which the Court sees fit to impose. However, I respectfully request the Court to consider, in mitigation of punishment, that I have voluntarily entered a plea of "GUILTY."

I have been advised and do understand that, subject to any waiver of my appellate and post-conviction rights contained in my written plea agreement, I have the right of appeal of any sentence imposed by the Court to the Tenth Circuit Court of Appeals. Also, I understand that any appeal must be filed no more than fourteen (14) days from date of the judgment.

I waive the reading of the **Second Superseding Indictment** in open Court, and I request the Court to enter my plea of "GUILTY" as set forth in this petition.

I swear that I have read, understood, and discussed with my attorney, each and every part of this Petition to Enter Plea of Guilty, and that the answers which appear in every part of this petition are true and correct.

Signed and sworn to by me in open court, in the presence of my attorney, this 22 day of September, 2021.

Pamela Kathryn Conley
Pamela Kathryn Conley

Subscribed and sworn to before me this 22nd day of September, 2021.

Christine Potts
Deputy Clerk

CERTIFICATE OF COUNSEL

The undersigned, as attorney and counselor for the defendant Pamela Kathryn Conleyhereby certifies:

- (1) I have read and fully explained to the defendant the allegation(s) contained in the **Second Superseding Indictment** in this case.
- (2) To the best of my knowledge and belief, the statements, representations and declarations made by the defendant in the foregoing petition are in all respects accurate and true.

I have further explained to my client the provisions of advisory guideline sentencing as established by Title 18 U.S.C. 3553 *et seq.* Although I have discussed with my client the maximum sentence imposed for the offense for which (s)he is charged, I have not promised, suggested or predicted a possible sentence. I have specifically advised my client that sentencing is left solely within the province of the Court.

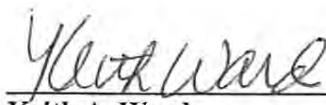
My client fully understands that, for good cause shown, the Court may depart from the advisory guideline range or impose a non-guideline sentence and, further, that probation is not available as a sentencing alternative in most cases under advisory guideline sentencing. Also, my client fully understands that, whenever probation is a permissible sentencing alternative, it is exclusively within the Court's discretion to grant or deny probation.

- (3) The plea of "GUILTY" offered by the defendant accords with my understanding of the facts (s)he related to me and is consistent with my advice to the defendant.
- (4) In my opinion, the defendant's waiver of reading of the **Second Superseding Indictment** in open court as provided in Rule 10 is voluntarily and understandingly made, and I recommend to the Court that the waiver be accepted by the Court.
- (5) In my opinion, the plea of "GUILTY" offered by the defendant in the petition is voluntarily and understandingly made. I recommend that the Court accept the plea of "GUILTY."
- (6) I have made no predictions or promises to the defendant concerning any sentence the Court may award, except as noted in the space below:

None

I further represent to the Court that the defendant's plea of "GUILTY" is not the result of a plea agreement.

Signed by me in open court in the presence of the defendant above-named and after full discussion of the contents of this certificate with the defendant, this 32nd day of September, 2021.

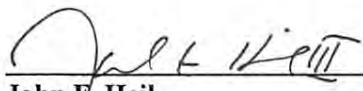

Keith A. Ward
Attorney for the Defendant

ORDER

I find that the plea of "GUILTY" was made by the defendant freely, voluntarily, and because (s)he is "GUILTY" as charged, and not out of ignorance, fear, inadvertence, or coercion, and with full understanding of its consequences. I further find that the defendant has admitted the essential elements of the crime(s) charged, that there is a factual basis for the pleas(s) of "GUILTY," and that the defendant is mentally competent.

IT IS THEREFORE ORDERED that the defendant's plea(s) of "GUILTY" is accepted and entered as prayed for in the petition and as recommended in the certificate of his/her attorney.

Done in open court this 22nd day of September, 2021.


John F. Heil
UNITED STATES DISTRICT JUDGE

**EXHIBIT NO. 1 TO PETITION TO PLEAD GUILTY
OF DEFENDANT PAMELA K. CONLEY**

Count	Financial Institution	False Means of Obtaining Credit
1	First Oklahoma Federal Credit Union ("FOFCU")	I provided false information stating that I was employed by Resource Mortgage, CFS and Genesis Capital and provided false information as to my income
2	Oklahoma Central Credit Union ("OCCU")	I provided false information stating that I was employed by Resource Mortgage and CFS and provided false information as to my income
3	OCCU	Same as No. 2, above
4	First Priority Bank ("FPB")	I falsely represented that I was employed by a company known as CFS and that CFS paid me in excess of \$200,000 annually
5	FPB	Same as No. 4, above
6	FPB	Same as No. 4, above
7	FPB	Same as No. 4, above
8	Western Sun Federal Credit Union ("WSFCU")	I falsely stated that I was employed by CFS and made in excess of \$18,000 per month
9	WSFCU	Same as No. 8, above
10	WSFCU	Same as No. 8, above
11	WSFCU	Same as No. 8, above
12	Red Crown Credit Union ("RCCU")	Same as No. 8, above
13	RCCU	Same as No. 8, above
14	RCCU	Same as No. 8, above
15	RCCU	Same as No. 8, above
16	Tinker Federal Credit Union ("TFCU")	I falsely stated that I was employed by CFS and Resource Mortgage and gave false information about my income

17	TFCU	Same as No. 16, above
18	TFCU	Same as No. 16, above
19	TFCU	Same as No. 16, above
20	TFCU	Same as No. 16, above
21	Yorktown Bank	I falsely stated that I had been employed by Genesis Capital for 11 years, was its CFO and that I made \$133,000 per year
22	Spirit Bank	Same as No. 21, above
23	Spirit Bank	Same as No. 21, above
24	Grand Savings Bank	Same as No. 21, above

CONFERENCE NOTES



DATE

ACTION NOTES

1 Ex 2 to Plea Petition of
2 Pamela Conley - Count 25,26,27
3 28

4 On or about the dates set forth in
5 the Second Superseding Indictment,
6 within the Northern District of
7 Oklahoma and in relation to the
8 crimes set forth in Counts 1-24,
9 I knowing utilized the names
10 of Jessica Bilby (Count 25),
11 Jody Edwards (Count 26),
12 Katherine Stevens (Count 27) and
13 Ron Davenport (Count 28) and
14 without their permission and
15 authority to transmit her releases
16 to the Oklahoma Tax Commission
17 to effect her releases on
18 mortgaged collateral

20

21

22

23

24

25

26

27

28

29

30

31

32

APPENDIX D

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF OKLAHOMA
3
4 UNITED STATES OF AMERICA,)
5)
6 Plaintiff,)
7 vs.) CASE NO. 21-CR-64-JFH
8)
9 PAMELA KATHRYN CONLEY,)
10 Defendant.)

18 APPEARANCES:

20 For the Plaintiff: MR. RICHARD CELLA
21 MS. MELODY NELSON
U.S. ATTORNEY'S Office
110 W. 7th St., Ste 300
Tulsa, OK 74119
22
23 For the Defendant: MR. KEITH WARD
24 Attorney at Law
1874 S. Boulder Ave.
Tulsa, OK 74119

Terri Beeler, RMR-FCRR
U.S. District Court - NDOK

1 or dead.

2 Ma'am, do you understand the elements of these charges?

3 THE DEFENDANT: Yes.

4 THE COURT: Ms. Conley, I need you to tell me in your
5 own words what you did that makes you guilty of these offenses.

6 MR. WARD: If the court please, I'm going to assist
7 her and place before her Exhibits 1 and 2 to the plea petition
8 to help her.

9 THE COURT: That would be just fine, Mr. Ward. Thank
10 you.

11 MR. WARD: She will address the court first as to
12 Counts 1 through 24.

13 THE COURT: Okay. Thank you, sir.

14 THE DEFENDANT: So on or about the dates set forth in
15 that second superseding indictment and within the Northern
16 District of Oklahoma, I schemed and executed a scheme to obtain
17 money, funds, and credits from the financial institutions
18 identified in Exhibit No. 1 to this plea petition. I executed
19 this scheme by submitting false documents to obtain loans and
20 to refinance loans.

21 I stipulate and agree that the financial institutions were
22 insured by agencies of the federal government. Exhibit No. 1
23 contains a description of the false representations I made to
24 obtain loans and to refinance loans.

25 THE COURT: Okay. And before you go to the other

Terri Beeler, RMR-FCRR
U.S. District Court - NDOK

1 part, Ms. Conley, did you -- when you did that, was it your
2 intent to defraud or to deceive the financial institutions?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: And when you made certain
5 representations, did you know they were false when you made
6 them?

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: And did you understand or believe that it
9 would be natural in the normal course of the business of the
10 financial institutions to rely on those representations?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Did you understand that that could place
13 the financial institutions at risk of either civil liability or
14 at a financial loss?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: Okay. Thank you. You may proceed,
17 ma'am.

18 MR. WARD: She'll address the court as to Counts 25,
19 -6, -7, and -8 at this time.

20 THE COURT: Okay. Thank you, sir.

21 THE DEFENDANT: All right. So on or about the dates
22 set forth in the second superseding indictment, within the
23 Northern District of Oklahoma and in relation to the crimes set
24 forth in Counts 1 through 24, I knowing utilized the names of
25 Jessica Bilby, Count 25; Jody Edwards, Count 26; Katherine

Terri Beeler, RMR-FCRR
U.S. District Court - NDOK

1 Stevens, Count 27; and Ron Davenport, Count 28, and without
2 their permission and authority to transmit lien releases to the
3 Oklahoma Tax Commission to effect lien releases on mortgaged
4 collateral.

5 THE COURT: Okay. And when you used those names, did
6 you sign their signatures or made it look like their signature
7 was attached to the document, is that what happened?

8 THE DEFENDANT: Made it look like their signature
9 attached to the document.

10 THE COURT: Okay. Mr. Cella, would you make a
11 representation for the record concerning the facts the
12 government would be prepared to prove at trial to establish an
13 independent factual basis for this plea.

14 MR. CELLA: Yes, Your Honor. If this case were to
15 proceed to trial, the United States would present evidence,
16 including testimony from law officers, bank surveillance
17 footage, and other financial records showing the following:
18 First, the United States would show that the following banks
19 were FDIC insured at all times pertinent to the indictment,
20 First Priority Bank, Equity Bank, Yorktown Bank, Spirit Bank
21 and Grand Savings Bank; the United States would further present
22 evidence that First Oklahoma Federal Credit Union, Oklahoma
23 Central Credit Union, Western Sun Federal Credit Union, Red
24 Crown Federal Credit Union, and Tinker Federal Credit Union
25 were at all pertinent times to the second superseding

Terri Beeler, RMR-FCRR
U.S. District Court - NDOK

1 indictment federally insured by the National Credit Union Share
2 Insurance Fund.

3 The United States would present evidence that on the dates
4 enumerated in Counts 1 through 24, within the Northern District
5 of Oklahoma, and through bank locations located within the
6 Northern District of Oklahoma, Ms. Conley applied for loans in
7 the approximate months set forth in the table in page 8 through
8 10 of the second superseding indictment.

9 In applying for those loans Ms. Conley knowingly made
10 false statements regarding her employment and income, including
11 that she worked for an entity known as CFS2 where she purported
12 to be the CFO earning up to \$200,000 a year.

13 The United States would further present evidence that as a
14 part of these applications Ms. Conley submitted purported
15 earning statements or pay stubs which were in fact forgeries.

16 Additionally, as to counts -- additionally, Ms. Conley
17 presented evidence that she received income from Genesis
18 Capital and purported pay stubs from Genesis Capital and those
19 pay stubs were in fact forgeries produced by Ms. Conley.

20 As to Counts 25 through 28, the United States would
21 present evidence that Ms. Conley knowingly caused forged lien
22 releases to be filed with the Oklahoma Tax Commission on the
23 approximate dates set forth in the table at page 11, and those
24 lien releases have the signature of bank employees from the
25 aforementioned credit unions or banks, specifically Ms. Conley

Terri Beeler, RMR-FCRR
U.S. District Court - NDOK

1 utilized the signature of Jessica Holbrook whose maiden name is
2 Bilby, Jody Edwards, Katherine Stevens and Ron Davenport, and
3 knowingly caused these lien releases to be submitted to the
4 Oklahoma Tax Commission so that she could obtain clear title to
5 encumbered collateral.

6 THE COURT: Thank you, sir.

7 Ms. Conley, understanding the nature of the charges and
8 your right to a jury trial and that you voluntarily waived that
9 right knowing the effect and consequences of a plea of guilty,
10 how do you plead to the charges in Counts 1 through 24 of bank
11 fraud, in violation of Title 18, U.S.C., Sections 1344?

12 THE DEFENDANT: Guilty.

13 THE COURT: Ms. Conley, understanding the nature of
14 the charges and your right to a jury trial, that you
15 voluntarily waived that right knowing the effect and
16 consequences of a plea of guilty, how do you plead to the
17 charges in Counts 25 through 28 of aggregated identity theft,
18 in violation of Title 18, U.S.C., Sections 1028A(a)(1)?

19 THE DEFENDANT: Guilty.

20 THE COURT: Ma'am, are the waivers of your rights and
21 your plea of guilty here today made voluntarily? Are they
22 completely of your own free will?

23 THE DEFENDANT: Yes.

24 THE COURT: Are they free of any force or threats or
25 pressures from anyone?

Terri Beeler, RMR-FCRR
U.S. District Court - NDOK