

Nº. _____

IN THE
Supreme Court of the United States

RANDALL CRATER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents.

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

APPENDIX

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93 F.4th 581

United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,
v.
Randall CRATER, Defendant, Appellant.

No. 23-1159

February 23, 2024

West Headnotes (12)

[1] **Criminal Law**—Construction of Evidence

On appeal from conviction, Court of Appeals begins with facts, recounted in light most favorable to verdict.

[2] **Public Employment**—Authority and Powers
United States—Authority and Powers

Touhy regulations, promulgated under the federal housekeeping statute, govern the conditions and procedures by which agency employees may testify about work-related issues at trial. 5 U.S.C.A. § 301.

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Massachusetts, Denise J. Casper, J., of wire fraud, unlawful monetary transactions, and operating unlicensed money transmitting business based on his involvement in cryptocurrency scheme. Defendant appealed.

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

[1] defendant abandoned any argument that his inability to compel federal government agents to appear at trial resulted in loss of material and favorable testimony;

[2] testimony from federal government agents would not have been relevant, material, and vital to defendant's prosecution;

[3] district court did not abandon its gatekeeping function by declining to hold *Daubert* hearing to further explore qualifications of money laundering expert;

[4] *Daubert* did not require district court to hold evidentiary hearing on basis of defendant's vague methodological objections to expert's testimony; and

[5] district court faithfully executed its gatekeeping function under *Daubert* by resolving defendant's relevancy and prejudice objections to testimony from expert without holding hearing.

Affirmed.

[3] **Criminal Law**—Review De Novo

De novo review applied to defendant's challenges to district court's application of *Touhy* regulations in criminal proceeding and its decision to admit testimony from expert on money laundering without holding *Daubert* hearing, in his prosecution for wire fraud, unlawful monetary transactions, and operating unlicensed money transmitting business based on his involvement in cryptocurrency scheme. 5 U.S.C.A. § 301; 18 U.S.C.A. §§ 1343, 1957, 1960(a), 1960(b)(1)(B); Fed. R. Evid. 702.

[4] **Criminal Law**—Points and authorities

Defendant abandoned any argument that his inability to compel federal government agents to appear at trial resulted in loss of material and favorable testimony, in his prosecution for wire

fraud, unlawful monetary transactions, and operating unlicensed money transmitting business based on his involvement in cryptocurrency scheme, since defendant did not argue in his briefs on appeal that district court's ruling violated his Sixth Amendment right to compulsory process under controlling material and favorable standard, and he declined opportunity to reframe his position at oral argument. U.S. Const. Amend. 6; 5 U.S.C.A. § 301; 18 U.S.C.A. §§ 1343, 1957, 1960(a), 1960(b)(1)(B); 17 C.F.R. § 144.5(a); 28 C.F.R. § 16.23(c); 39 C.F.R. § 265.12(c)(2)(iii).

District court did not abandon its gatekeeping function by declining to hold *Daubert* hearing to further explore qualifications of money laundering expert, in defendant's prosecution for wire fraud, unlawful monetary transactions, and operating unlicensed money transmitting business based on his involvement in cryptocurrency scheme, since court heard oral argument on defendant's motion to exclude expert outside of presence of jury, during which it noted that it had reviewed defendant's motion, government's opposition, expert's report, and defense's expert summary, which cataloged expert's extensive professional experience in blockchain investigations. 18 U.S.C.A. §§ 1343, 1957, 1960(a), 1960(b)(1)(B); Fed. R. Evid. 702.

[5] **Witnesses**—Rights of accused in general

The protections of the Compulsory Process Clause are critical to an individual's constitutional right to mount a meaningful defense at trial against criminal charges brought by the government. U.S. Const. Amend. 6.

[6] **Witnesses**—Particular Cases and Contexts

Testimony from federal government agents would not have been relevant, material, and vital to defendant's prosecution for wire fraud, unlawful monetary transactions, and operating unlicensed money transmitting business based on his involvement in cryptocurrency scheme, based on proffer from defendant, and therefore district court's decision to not compel agents' testimony did not deprive him of material and favorable testimony in violation of his right to compulsory process. U.S. Const. Amend. 6; 5 U.S.C.A. § 301; 18 U.S.C.A. §§ 1343, 1957, 1960(a), 1960(b)(1)(B); 17 C.F.R. § 144.5(a); 28 C.F.R. § 16.23(c); 39 C.F.R. § 265.12(c)(2)(iii).

[8] **Criminal Law**—Hearing, ruling, and objections

A *Daubert* hearing is an evidentiary hearing used by district courts to resolve factual issues related to admissibility of expert testimony. Fed. R. Evid. 702.

[9] **Criminal Law**—Hearing, ruling, and objections

The trial court is not required to follow a particular procedure in executing its gatekeeping function under *Daubert*. Fed. R. Evid. 702.

[10] **Criminal Law**—Hearing, ruling, and objections

Daubert did not require district court to hold evidentiary hearing on basis of defendant's vague methodological objections to testimony from money laundering expert, in his prosecution for wire fraud, unlawful monetary transactions, and operating unlicensed money

[7] **Criminal Law**—Hearing, ruling, and objections

transmitting business based on his involvement in cryptocurrency scheme; defendant suggested that expert's report did not demonstrate that her conclusions were based on sufficient facts or data, or that her proposed testimony was the product of reliable principles and methods, but he did not identify which of expert's facts, data, methods, or principles to which he objected, and defendant's own expert agreed that blockchain analysis applied could reveal number of details of system and its contents. 18 U.S.C.A. §§ 1343, 1957, 1960(a), 1960(b)(1)(B); Fed. R. Evid. 702.

1 Case that cites this headnote

expert that defendant's virtual currency and company was associated with public blockchain after particular date, which led to inference that it was not associated with any blockchain, and therefore was not cryptocurrency, prior to that date, given that defendant had advertised product as cryptocurrency with functionality analogous to original and widely recognized cryptocurrency, was not unfairly prejudicial, and therefore it was admissible in defendant's prosecution for wire fraud, unlawful monetary transactions, and operating unlicensed money transmitting business based on his involvement in cryptocurrency scheme. 18 U.S.C.A. §§ 1343, 1957, 1960(a), 1960(b)(1)(B); Fed. R. Evid. 403.

[11] Criminal Law—Hearing, ruling, and objections

District court faithfully executed its gatekeeping function under *Daubert* by resolving defendant's relevancy and prejudice objections to testimony from money laundering expert without holding hearing, in his prosecution for wire fraud, unlawful monetary transactions, and operating unlicensed money transmitting business based on his involvement in cryptocurrency scheme; district court carefully considered defendant's claim that allowing expert to opine that his virtual currency and company was associated with public blockchain after particular date would lead to "unduly prejudicial" inference that it was not associated with any blockchain, and therefore was not cryptocurrency, prior to that date, and court both asked for clarification and offered opportunity to defendant to respond to government's opposing points and explained that defendant did not provide compelling reason to exclude expert testimony based on relevance or unfair prejudice but offered to return to the issue if he had more to add. 18 U.S.C.A. §§ 1343, 1957, 1960(a), 1960(b)(1)(B); Fed. R. Evid. 401, 403, 702.

[12] Criminal Law—Miscellaneous matters

Relevance of opinion of money laundering

***583 APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Denise J. Casper, U.S. District Judge]**

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Before Gelpi, Howard, and Rikelman, Circuit Judges.

Opinion

RIKELMAN, Circuit Judge.

***584** After an eight-day trial, a jury convicted Randall Crater of wire fraud, unlawful monetary transactions, and operating an unlicensed money transmitting business based on his involvement in a cryptocurrency scheme. On appeal, Crater challenges two of the district court's trial rulings. First, Crater argues that the district court violated

his Sixth Amendment right to compulsory process by refusing to enforce subpoenas against three federal agency witnesses on the ground that Crater had failed to comply with the agencies' Touhy regulations. Second, Crater contends that the district court abdicated its gatekeeping duty by admitting testimony from the government's cryptocurrency expert without conducting a Daubert hearing. Because Crater's arguments cannot be squared with controlling precedent or the record in this case, we affirm.

I. BACKGROUND

A. Relevant Facts

⁽¹⁾We begin with the facts, recounted in the "light most favorable to the verdict." United States v. Guerrero-Narváez, 29 F.4th 1, 5 (1st Cir. 2022).

In the early 2010s, interest in cryptocurrency was rapidly growing. The first well-known cryptocurrency, Bitcoin, rose in value from less than one dollar in 2010 to nearly \$100 per coin in 2013. That same year, Randall Crater took advantage of the market by launching My Big Coin (MBC), a new virtual currency and company. Crater credited himself as MBC's "Creator/Developer" on LinkedIn, and his colleague John Roche served as the company's chief executive officer.

MBC implicitly touted its similarities to Bitcoin on its website and social media pages. Like Bitcoin, MBC was purportedly a "virtual currency" that could be mined, bought, sold, traded, saved, donated, or "sen[t] to friends and family around the world." But MBC also claimed several unique features. First, MBC's virtual currency ostensibly was "backed 100 percent by gold." Second, MBC claimed to have a partnership with Mastercard, which would allow coin-holders to "buy stuff all over the world" using a Mastercard linked to their MBC account.

Crater also emphasized these unique features on his own social media and in communications with potential customers. On LinkedIn, he boasted that MBC was "the only cryptocurrency to be backed by gold" and that "[w]e are partners with Mastercard, which gives us a closed loop system so your [sic] able to brake [sic] down into any currency that's needed!" In an email to one customer, he wrote that "we have 300 million in gold backing us." To another, he wrote that a bank in Spain held "100 million dollars in my name in gold." Crater also told

potential customers about MBC's "elite deal" with Mastercard. In one instance, he claimed via text message to have "[b]een with [the] Mastercard guys all [morning]."

These representations successfully enticed customers to purchase MBC. For ^{*585} example, one customer, John Lynch, invested more than \$5.6 million in MBC based on his understanding that the currency "mimicked Bitcoin in many ways" but "had the additional advantage of being backed by gold."

Once customers purchased MBC, they were stuck with it. Although MBC purportedly could be sold on an exchange hosted on MBC's website, of the four MBC investors who testified for the government at trial, none were ever able to sell their coins on this exchange. Lynch, who needed liquidity to pay his taxes, tried to work with Crater to sell some of his investment outside of the exchange. Crater told Lynch that he had found a buyer and repeatedly assured Lynch that money was coming -- he claimed to be "[c]ounting cash," "waiting on the armored car service," and wiring funds from Europe -- but no sale ever materialized.

Nor could customers spend their coins via Mastercard, as Crater had promised. In lieu of a Mastercard linked to their MBC account, MBC customers received a plastic card embossed with the words "preferred customer," which provided no conduit to spend their coins. And Mastercard had no record of any proposal or deal with MBC.

Crater's representations about MBC's gold backing were also false. Crater had communicated with an individual about a "product" stored in barrels in a bonded warehouse in Texas -- but that product was high-grade mining waste, not gold bullion. And the documentation Crater had from the warehouse at the time he represented to investors that the coin was backed by \$300 million in gold said no such thing.

Customers purchased MBC by wiring money into one of three bank accounts: an account registered to Crater's other company, Greyshore Technology, or accounts registered to Crater's family members. Collectively, between 2014 and 2016, \$7.8 million flowed into these three accounts, over \$6.3 million of which could be traced to MBC purchases.

B. Legal Proceedings

The government charged Crater with four counts of wire fraud under 18 U.S.C. § 1343, three counts of unlawful monetary transactions under 18 U.S.C. § 1957, and one count of operating an unlicensed money transmitting business under 18 U.S.C. § 1960(a), (b)(1)(B).

Before trial, the government advised Crater that it planned to call an expert, Pamela Clegg, a “Certified Anti-Money Laundering Specialist,” to testify about virtual currencies generally and MBC specifically. Clegg worked as the Director of Financial Investigations and Education for CipherTrace, a blockchain analytics firm. In that role, she was responsible for “conduct[ing] cryptocurrency financial investigations and educat[ing] others to understand and investigate financial crimes, money laundering and other criminal activity within the cryptocurrency ecosystem.” Among the parties Clegg had educated on cryptocurrency were Interpol, Europol, and the United States Departments of Treasury, Homeland Security, and Justice.

At the government’s behest, CipherTrace had conducted a “blockchain analysis” of MBC. As Clegg’s expert report explained, cryptocurrencies like Bitcoin use “cryptography to validate and secure transactions that are digitally recorded on a distributed ledger” known as a “blockchain.” By analyzing these public blockchains, which are “available to the public and reviewable on several platforms,” an investigator can gather information about a cryptocurrency, such as transaction history and trading frequency. CipherTrace’s *586 investigation had revealed that MBC was not associated with a public blockchain and, therefore, lacked a crucial indicator of operating as a cryptocurrency, until June 2017 -- long after Crater had marketed MBC as a virtual currency comparable to Bitcoin.

Before trial, Crater moved to exclude Clegg’s testimony on several grounds. He argued that Clegg was not qualified to render an expert opinion regarding cryptocurrency because her undergraduate and graduate degrees were not in computer science and that CipherTrace’s investigation was based on unreliable methods. He also contended that Clegg’s proposed testimony was irrelevant or, to the extent it was relevant, that the danger of unfair prejudice substantially outweighed its probative value. Crater requested that the court hold a Daubert hearing to explore these issues.

After the government filed an opposing brief, the district court heard oral argument at the final pretrial conference on Crater’s motion to exclude Clegg. Crater emphasized that Clegg’s testimony risked confusing the jury because her opinion was “limited to public blockchains” and thus

did not sufficiently allow for the possibility that MBC was associated with a private blockchain during the relevant time. The district court rejected this as a reason to exclude Clegg’s testimony in its entirety but noted that the public versus private blockchain issue would provide Crater with “fertile ground” for cross-examination. The court also explained that, based on its review of the papers, which included Clegg’s curriculum vitae, Clegg’s qualifications were sufficient to render expert testimony on the relevant issues.

The case proceeded to trial, at which Crater attempted to call employees of three federal agencies -- the United States Postal Service (USPS), Commodity Futures Trading Commission (CFTC), and Federal Bureau of Investigation (FBI) -- as defense witnesses. The government maintained that the agents were not obligated to comply with Crater’s subpoenas because Crater had not followed the agencies’ Touhy regulations.

[2]These regulations, promulgated under the federal housekeeping statute, 5 U.S.C. § 301, “govern the conditions and procedures by which [agency] employees may testify about work-related issues at trial.” United States v. Soriano-Jarquin, 492 F.3d 495, 504 (4th Cir. 2007). They are known as “Touhy” regulations after the Supreme Court’s decision in United States ex rel. Touhy v. Ragen, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951), which held that the housekeeping statute conferred upon agency heads the ability to “validly withdraw from ... subordinates the power to release department papers” in civil proceedings. Id. at 467, 71 S.Ct. 416.

As a threshold step, before the employees would or could testify, the regulations required Crater to submit to their respective agencies a summary of the testimony he sought. 28 C.F.R. § 16.23(c) (DOJ, including FBI); 17 C.F.R. § 144.5(a) (CFTC); 39 C.F.R. § 265.12(c)(2)(iii) (USPS).¹ Crater made no attempt to comply. Instead, he argued to the district court that the agencies’ regulations could not apply in criminal proceedings because their application would impermissibly burden a defendant’s *587 Sixth Amendment right to compulsory process.

Over the course of the trial, the district court returned to the Touhy issue several times. Although the court heard oral argument on whether the regulations applied in criminal proceedings, it also invited Crater to explain why he wanted the agents to testify, indicating that the Touhy issue would be “moot” if the testimony Crater sought was irrelevant. Crater clarified that the purpose of subpoenaing the USPS and FBI agents was to question them about “how [they] conducted [the] interviews” in

their investigation of Crater because, “in reading through the reports of this investigation, [he] was struck by the approach [the agents] took to questioning witnesses and essentially corrupting their recollection of what was going on.” As for the CFTC agent, Crater explained that he wanted to question him about Roche’s refusal to comply with a CFTC subpoena, which Crater thought could help him make out a “third-party culprit argument.” The government responded that this evidence was irrelevant because Crater had not laid a foundation for it by questioning any of the testifying witnesses about their interactions with the agents.

After Crater’s proffer, the district court ruled on two separate grounds that it would not compel the agents to testify. First, it concluded that declining to compel the agents’ testimony would not deprive Crater of a defense because the testimony he sought was not relevant or material. At most, the court reasoned, the evidence could be used for impeachment, but given that the witnesses Crater sought to impeach were not called to testify by the government, the evidence was entirely irrelevant. Second, based on out-of-circuit case law applying Touhy regulations in criminal cases, the court concluded that the agencies’ regulations were operable and thus cited Crater’s non-compliance as a “separate basis” for its ruling.

At the conclusion of the eight-day trial, at which Clegg testified and the CFTC, FBI, and USPS agents did not, the jury returned a guilty verdict against Crater on all counts. The district court sentenced him to 100 months’ imprisonment.

II. DISCUSSION

^[3]The issues on appeal are narrow. Crater challenges only the district court’s application of the Touhy regulations in a criminal proceeding and its decision to admit Clegg’s testimony without holding a Daubert hearing. Either error, he contends, requires us to vacate the final judgment and order a new trial. We review each argument de novo and conclude that neither merits reversal. See United States v. Adams, 740 F.3d 40, 43 (1st Cir. 2014) (explaining that questions of law are subject to de novo review); Smith v. Jenkins, 732 F.3d 51, 64 (1st Cir. 2013) (“The question of whether the district court actually performed its gatekeeping function in the first place [under Daubert] is subject to de novo review.”).

A. The Touhy Issue

^[4]Crater argues that the district court erred by treating the agencies’ Touhy regulations as valid procedural requirements in the criminal context. He maintains that enforcing these regulations in a criminal proceeding violates a criminal defendant’s rights under the Sixth Amendment’s Compulsory Process Clause, which provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.” U.S. Const. amend. VI. Such restrictions on a defendant’s right to call witnesses, he contends, are incompatible with the text and history of *588 this clause.²

Crater premises this argument on the claim that the Supreme Court’s decision in New York State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022), controls our analysis. In Bruen, the Court announced the standard that courts must use to evaluate the constitutionality of regulations that burden an individual’s Second Amendment right to bear arms: If the regulation at issue burdens conduct that falls within the plain text of the Second Amendment, then it is unconstitutional unless the government can prove that its regulation is “consistent with the nation’s historical tradition of firearm regulation.” Id. at 24, 142 S.Ct. 2111. Crater argues that we must apply this same analytical framework to the regulations at issue here. And under this framework, he argues, the Touhy regulations are unconstitutional as applied to criminal proceedings.

^[5]The protections of the Compulsory Process Clause are certainly critical to an individual’s constitutional right to mount a meaningful defense at trial against criminal charges brought by the government. But Crater’s argument here suffers from a fundamental flaw: The Bruen decision articulated a “standard for applying the Second Amendment,” id., but it did not purport to supplant existing case law on any other constitutional right. And the Supreme Court has separately interpreted the Sixth Amendment’s Compulsory Process Clause. That case law, which provides an entirely different test for evaluating whether a restriction violates a defendant’s right to compulsory process, necessarily controls our constitutional analysis here, regardless of whether it is consistent with the Court’s mode of analysis in Bruen. See Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); United States v. Ivery, 427 F.3d 69, 75 (1st Cir. 2005) (“It is not

our place to anticipate the Supreme Court's reconsideration of its prior rulings").

We briefly summarize the relevant Sixth Amendment case law. The Supreme Court's decision in Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), "shaped the broad contours of the right to compulsory process." United States v. Hoffman, 832 F.2d 1299, 1302 (1st Cir. 1987). There, the Court explained that the Sixth Amendment's Compulsory Process Clause protects, "in plain terms[,] the right to present a defense." Washington, 388 U.S. at 19, 87 S.Ct. 1920. It then found that a rule that arbitrarily deprived the defendant of "relevant and material" testimony, which would have been "vital" to the defense's theory, violated this constitutional right. Id. at 16, 23, 87 S.Ct. 1920.

The Court "narrowed" the "lens of [the compulsory process] inquiry" in United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). Hoffman, 832 F.2d at 1302. Based on Washington, the Valenzuela-Bernal Court explained that "more than the mere absence of testimony is necessary to establish a violation of the [compulsory process] *589 right." Valenzuela-Bernal, 458 U.S. at 867, 102 S.Ct. 3440. Instead, to establish a violation, a defendant "must at least make some plausible showing of how [the excluded] testimony would have been both material and favorable to his defense." Id.

After the Supreme Court articulated these principles, we incorporated them into the law of our circuit. Based on Washington and Valenzuela-Bernal, we explained, "[t]here can be no violation of the defense's right to present evidence ... unless some contested act or omission (1) can be attributed to the sovereign and (2) causes the loss or erosion of testimony which is both (3) material to the case and (4) favorable to the accused." United States v. McLellan, 959 F.3d 442, 474 (1st Cir. 2020) (second alteration in original) (quoting Hoffman, 832 F.2d at 1303).

Crater did not argue in his briefs that the district court's ruling violated his Sixth Amendment right to compulsory process under this standard. And when we offered him the opportunity to reframe his position at oral argument, he declined. Crater has therefore abandoned any argument that his inability to compel the agents to appear at trial resulted in the loss of material and favorable testimony. Instead, he contends that he need not make such a showing because, after Bruen, Valenzuela-Bernal is no longer "good law." As we explained above, however, Bruen concerned only the Second Amendment, and we do not interpret it to alter the Supreme Court's Sixth

Amendment jurisprudence given that the "Court does not normally overturn, or so dramatically limit, earlier authority sub silentio." Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000).

Crater also contends that Valenzuela-Bernal does not control because it is factually distinguishable. In Valenzuela-Bernal, the government deported two non-citizens before a criminal defendant charged with transporting them could interview them. 458 U.S. at 861, 102 S.Ct. 3440. In reaching the conclusion that the deportation did not violate the defendant's compulsory process right, the Court explained that such prompt deportation of non-citizens both "satisf[ied] immigration policy" and was justified by several practical considerations unique to the immigration context, such as the "financial and physical burdens" that detaining non-citizens impose on the government. Id. at 864-65, 102 S.Ct. 3440. Thus, Crater argues, the Court's decision in Valenzuela-Bernal does not apply here because "the government's dual role of enforcing both criminal law and immigration law" informed its reasoning.

Crater is correct that the immigration context crucially informed the Court's decision in Valenzuela-Bernal. The Court announced the "material and favorable" standard for deported witnesses but noted that it "express[ed] no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses within the United States." Id. at 873 & n.9, 102 S.Ct. 3440 (emphasis added). Nonetheless, our prior cases, by which we are bound, have not confined the "material and favorable" standard to the immigration context. See, e.g., Hoffman, 832 F.2d at 1303. We have explained that "[t]he showing of materiality and favorableness that an accused must make in one setting may not be the same as in another," but we have never held that a defendant can entirely decline to make this showing and still succeed on their Sixth Amendment claim. United States v. Bailey, 834 F.2d 218, 223 (1st Cir. 1987).

^[6]As Crater acknowledged at oral argument, our rejection of his Bruen argument is fatal to his compulsory process claim. In declining to enforce the trial *590 subpoenas, the district court relied not only upon Crater's non-compliance with the agencies' Touhy regulations but also on Crater's proffer. Because it was "not clear from the proffer that the [agents'] testimony would be relevant, material, and vital to the defense," the court held that declining to enforce the subpoenas would not violate Crater's compulsory process right. By abandoning any argument under the material and favorable standard,

Crater fails to oppose this conclusion.

We end our analysis here. Crater bases his constitutional challenge to the Touhy regulations on inapplicable precedent. The district court separately declined to enforce the subpoenas because the agents' testimony was irrelevant, and Crater has not argued that this decision violated his right to compulsory process by depriving him of material and favorable testimony. Thus, without expressing any opinion on the constitutionality of enforcing Touhy regulations against criminal defendants, we conclude that the district court's decision not to compel the agents' testimony did not violate Crater's right to compulsory process. Cf. United States v. Vázquez-Rosario, 45 F.4th 565, 571-73 (1st Cir. 2022) (declining to rule on the sufficiency of a defendant's Touhy request and instead affirming the district court's decision to quash trial subpoenas against federal officers on relevance grounds).

B. The Daubert Issue

[7] [8]Crater also challenges the district court's decision to admit Clegg's expert testimony without holding a Daubert hearing, which is "an evidentiary hearing ... used by district courts to resolve factual issues related to admissibility" of expert testimony. Santos-Arrieta v. Hosp. Del Maestro, 14 F.4th 1, 5 n.11 (1st Cir. 2021). See generally Daubert v. Merrell Dow Pharmas., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Crater argues that a hearing was necessary to evaluate Clegg's qualifications, her investigatory methods, and whether the risk of unfair prejudice or confusing the jury substantially outweighed the probative value of her proposed testimony.

[9] Our case law does not support Crater's argument. As we have previously explained, "Daubert establishes that before admitting expert testimony, the trial court must fulfill its 'gatekeeping role' by making an independent determination that the expert's proffered ... knowledge is both reliable and relevant." United States v. Phillipos, 849 F.3d 464, 470 (1st Cir. 2017) (quoting Daubert, 509 U.S. at 597, 113 S.Ct. 2786). But "[t]here is no particular procedure that the trial court is required to follow in executing [this] gatekeeping function," Smith, 732 F.3d at 64 (quoting United States v. Diaz, 300 F.3d 66, 73 (1st Cir. 2002)), and we have specifically rejected the argument that a district court must necessarily hold an evidentiary hearing, see Phillipos, 849 F.3d at 471.

Crater does not grapple with this precedent or explain

why the district court's procedure was nonetheless insufficient, such that it "entirely abdicated its gatekeep[ing] role." Lestage v. Coloplast Corp., 982 F.3d 37, 49 (1st Cir. 2020). Nor could he, given that the record demonstrates that the district court took its gatekeeping role seriously. The court heard oral argument on Crater's motion outside of the presence of the jury, during which it noted that it had reviewed Crater's motion, the government's opposition, Clegg's report, and the defense's expert summary. These documents cataloged Clegg's extensive professional experience in blockchain investigations: In addition to her work as the Director of Financial Investigations and Education for CipherTrace, she had created multiple training courses, conducted *591 trainings for Interpol, Europol, and the United States Departments of Treasury, Homeland Security, and Justice, authored articles, and lectured at conferences and universities on blockchain technology and cryptocurrency investigations. Thus, the court was unpersuaded by Crater's argument that Clegg's educational background alone rendered her unfit to opine as an expert. Given that Federal Rule of Evidence 702 -- which governs the admissibility of expert testimony -- allows an expert witness to be qualified by "knowledge, skill, experience, training, or education," we conclude that the district court did not abandon its gatekeeping function by declining to hold a Daubert hearing to further explore Clegg's qualifications. Fed. R. Evid. 702 (emphasis added).

[10] Crater also suggests that Clegg's report "did not demonstrate that her conclusions were based on sufficient facts or data, or that her proposed testimony was the product of reliable principles and methods." But he has not identified which of Clegg's facts, data, methods, or principles he objects to, and given that Crater's own expert agreed that CipherTrace's blockchain analysis could "reveal a number of details of [a] system and its contents," we reject the argument that the district court should have held an evidentiary hearing because of Crater's vague methodological objections.

[11] [12]Finally, we disagree with Crater that the district court abdicated its gatekeeping function by resolving his relevancy and Federal Rule of Evidence 403 objections to Clegg's testimony without holding a Daubert hearing. In fact, Crater does not explain what more a Daubert hearing could have accomplished with regard to these inquiries. He argued to the district court that allowing Clegg to opine that MBC was associated with a public blockchain after 2017 would lead to the "unduly prejudicial" inference that it was not associated with any blockchain, and therefore was not a cryptocurrency, prior to 2017. The record shows that the district court carefully considered this claim. At oral argument, it both asked for

clarification and offered him the opportunity to respond to the government's opposing points. At the end of this colloquy, the court explained that Crater did not provide a compelling reason to exclude the testimony based on relevance or unfair prejudice but offered to return to the issue if Crater had more to add. Under these circumstances, we conclude that the district court faithfully executed its gatekeeping function under Daubert.³

III. CONCLUSION

For all these reasons, we affirm the judgment.

All Citations

93 F.4th 581

Footnotes

- 1 By their plain text, the USPS regulations do not apply to any proceeding in which the United States is a party. 39 C.F.R. § 265.12(a)(3)(i). For reasons we will explain, however, we do not rely upon the Touhy regulations in affirming the district court's decision and thus do not need to address this issue.
- 2 Crater also argues that application of the agencies' Touhy regulations violates a defendant's Sixth Amendment rights by "compelling the defendant to sacrifice his work-product privilege." The parties dispute whether Crater forfeited this argument by failing to raise it in the first instance to the district court. Because our decision to affirm does not rest on the validity of the Touhy regulations, we do not need to address this argument.
- 3 To the extent Crater challenges the district court's decision to actually admit the testimony under Federal Rules of Evidence 401 and 403, we see no abuse of discretion in the district court's ruling. See Smith, 732 F.3d at 64 ("If we are satisfied that the court did not altogether abdicate its role under Daubert, we review for abuse of discretion its decision to admit or exclude expert testimony."). Clegg's testimony was undoubtedly relevant, given that Crater had advertised MBC as a cryptocurrency with functionality analogous to Bitcoin. Moreover, Crater does not explain why the inferences a juror might draw from Clegg's testimony were "unfairly" prejudicial. United States v. Ross, 837 F.3d 85, 90 (1st Cir. 2016) ("In balancing the scales of Rule 403, it is important to note that only 'unfair' prejudice is to be avoided, as 'by design, all evidence is meant to be prejudicial.' " (citation omitted)).

§ 1254. Courts of appeals; certiorari; certified questions, 28 USCA § 1254

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

Part IV. Jurisdiction and Venue (Refs & Annos)

Chapter 81. Supreme Court (Refs & Annos)

28 U.S.C.A. § 1254

§ 1254. Courts of appeals; certiorari; certified questions

Currentness

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 928; Pub.L. 100-352, § 2(a), (b), June 27, 1988, 102 Stat. 662.)

Notes of Decisions (519)

28 U.S.C.A. § 1254, 28 USCA § 1254

Current through P.L. 118-49. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural
rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Notes of Decisions (6229)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L.118-19. Some statute sections may be more current, see credits for details.

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United States Code Annotated

Title 5. Government Organization and Employees (Refs & Annos)

Part I. The Agencies Generally

Chapter 3. Powers

Subchapter I. General Provisions

5 U.S.C.A. § 301

§ 301. Departmental regulations

Currentness

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 379.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 13433

For Executive Order No. 13433, "Protecting American Taxpayers from Payment of Contingency Fees", see Ex. Ord. No. 13433, May 16, 2007, 72 F.R. 28441, set out as a note under 5 U.S.C.A. § 3109.

Notes of Decisions (96)

5 U.S.C.A. § 301, 5 USCA § 301

Current through P.L.118-19. Some statute sections may be more current, see credits for details.

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Code of Federal Regulations
Title 28. Judicial Administration
Chapter I. Department of Justice
Part 16. Production or Disclosure of Material or Information (Refs & Annos)
Subpart B. Production or Disclosure in Federal and State Proceedings (Refs & Annos)

28 C.F.R. § 16.23

§ 16.23 General disclosure authority in Federal and
State proceedings in which the United States is a party.

Currentness

(a) Every attorney in the Department of Justice in charge of any case or matter in which the United States is a party is authorized, after consultation with the “originating component” as defined in § 16.24(a) of this part, to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, as such attorney shall deem necessary or desirable to the discharge of the attorney’s official duties: *Provided*, Such an attorney shall consider, with respect to any disclosure, the factors set forth in § 16.26(a) of this part: *And further provided*, An attorney shall not reveal or furnish any material, documents, testimony or information when, in the attorney’s judgment, any of the factors specified in § 16.26(b) exists, without the express prior approval by the Assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office for United States Trustees (hereinafter referred to as “the EOUST”), or such persons’ designees.

(b) An attorney may seek higher level review at any stage of a proceeding, including prior to the issuance of a court order, when the attorney determines that a factor specified in § 16.26(b) exists or foresees that higher level approval will be required before disclosure of the information or testimony in question. Upon referral of a matter under this subsection, the responsible Assistant Attorney General, the Director of EOUST, or their designees shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party’s attorney setting forth a summary of the testimony sought must be furnished to the Department attorney handling the case or matter.

SOURCE: Order No. 919–80, 45 FR 83210, Dec. 18, 1980; 51 FR 16677, May 6, 1986; 52 FR 33231, Sept. 2, 1987; Order No. 2156–98, 63 FR 29593, June 1, 1998; Order No. 2258–99, 64 FR 52226, Sept. 28, 1999; Order No. 3517–2015, 80 FR 18106, April 3, 2015; Order No. 008–2015, 80 FR 34051, June 15, 2015; Order No. 3803–2016, 82 FR 727, Jan. 4, 2017; Order No. 4442–2019, 84 FR 16777, April 23, 2019, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301, 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

Notes of Decisions (58)

Code of Federal Regulations

Title 17. Commodity and Securities Exchanges

Chapter I. Commodity Futures Trading Commission

Part 144. Procedures Regarding the Disclosure of Information and the Testimony of Present or Former Officers and Employees in Response to Subpoenas or Other Demands of a Court (Refs & Annos)

17 C.F.R. § 144.3

§ 144.3 Testimony by present or former Commission employees.

Currentness

(a) In any proceeding to which the Commission is not a party, an employee of the Commission shall not testify concerning matters related to the business of the Commission unless authorized to do so by the Commission upon the advice of the General Counsel.

(b) In any proceeding, an employee or former employee of the Commission shall not testify concerning non-public matters related to the business of the Commission unless authorized to do so by the Commission upon the advice of the General Counsel. See § 140.735–9 of these regulations.

SOURCE: 50 FR 11149, March 20, 1985, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 4a(j) and 12a(5); 31 U.S.C. 9701, unless otherwise noted.

Current through Oct. 17, 2023, 88 FR 71682.

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Code of Federal Regulations

Title 39. Postal Service

Chapter I. United States Postal Service

Subchapter D. Organization and Administration

Records and Information

Part 265. Production or Disclosure of Material or Information (Refs & Annos)

Subpart B. Production or Disclosure in Federal and State Proceedings

39 C.F.R. § 265.12

§ 265.12 Demands for testimony or records in certain legal proceedings.

Effective: December 27, 2016

Currentness

(a) Scope and applicability of this section.

(1) This section establishes procedures to be followed if the Postal Service or any Postal Service employee receives a demand for testimony concerning or disclosure of:

(i) Records contained in the files of the Postal Service;

(ii) Information relating to records contained in the files of the Postal Service; or

(iii) Information or records acquired or produced by the employee in the course of his or her official duties or because of the employee's official status.

(2) This section does not create any right or benefit, substantive or procedural, enforceable by any person against the Postal Service.

(3) This section does not apply to any of the following:

(i) Any legal proceeding in which the United States is a party;

- (ii) A demand for testimony or records made by either House of Congress or, to the extent of matter within its jurisdiction, any committee or subcommittee of Congress;
- (iii) An appearance by an employee in his or her private capacity in a legal proceeding in which the employee's testimony does not relate to the employee's official duties or the functions of the Postal Service; or
- (iv) A demand for testimony or records submitted to the Postal Inspection Service (a demand for Inspection Service records or testimony will be handled in accordance with rules in § 265.13).

(4) This section does not exempt a request from applicable confidentiality requirements, including the requirements of the Privacy Act, 5 U.S.C. 552a.

(b) Definitions. The following definitions apply to this section:

(1) Adjudicative authority includes, but is not limited to, the following:

(i) A court of law or other judicial forums, whether local, state, or federal; and

(ii) Mediation, arbitration, or other forums for dispute resolution.

(2) Demand includes a subpoena, subpoena duces tecum, request, order, or other notice for testimony or records arising in a legal proceeding.

(3) Employee means a current employee or official of the Postal Service.

(4) General Counsel means the General Counsel of the United States Postal Service, the Chief Field Counsels, or an employee of the Postal Service acting for the General Counsel under a delegation of authority.

(5) Legal proceeding means:

- (i) A proceeding before an adjudicative authority;
- (ii) A legislative proceeding, except for a proceeding before either House of Congress or before any committee or subcommittee of Congress; or
- (iii) An administrative proceeding.

(6) Private litigation means a legal proceeding to which the United States is not a party.

(7) Records custodian means the employee who maintains a requested record. For assistance in identifying the custodian of a specific record, contact the Manager, Records Office, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260, telephone (202) 268-2608.

(8) Testimony means statements made in connection with a legal proceeding, including but not limited to statements in court or other forums, depositions, declarations, affidavits, or responses to interrogatories.

(9) United States means the federal government of the United States and any of its agencies, establishments, or instrumentalities, including the United States Postal Service.

(c) Requirements for submitting a demand for testimony or records.

- (1) Ordinarily, a party seeking to obtain records from the Postal Service should submit a request in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Postal Service's regulations implementing the FOIA at 39 CFR 265.1 through 265.9, 265.14; or the Privacy Act, 5 U.S.C. 552a and the Postal Service's regulations implementing the Privacy Act at 39 CFR 266.1 through 266.10.
- (2) A demand for testimony or records issued pursuant to the rules governing the legal proceeding in which the demand arises must:

- (i) Be in writing;
- (ii) Identify the requested record and/or state the nature of the requested testimony, describe the relevance of the record or testimony to the proceeding, and why the information sought is unavailable by any other means; and

(iii) If testimony is requested, contain a summary of the requested testimony and a showing that no document could be provided and used in lieu of testimony.

(3) Procedures for service of demand are made as follows:

(i) Service of a demand for testimony or records (including, but not limited to, personnel or payroll information) relating to a current or former employee must be made in accordance with the applicable rules of civil procedure on the employee whose testimony is requested or the records custodian. The requester also shall deliver a copy of the demand to the District Manager, Customer Services and Sales, for all current employees whose work location is within the geographic boundaries of the manager's district, and any former employee whose last position was within the geographic boundaries of the manager's district. A demand for testimony or records must be received by the employee whose testimony is requested and the appropriate District Manager, Customer Services and Sales, at least ten (10) working days before the date the testimony or records are needed.

(ii) Service of a demand for testimony or records other than those described in paragraph (c)(3)(i) of this section must be made in accordance with the applicable rules of civil procedure on the employee whose testimony is requested or the records custodian. The requester also shall deliver a copy of the demand to the General Counsel, United States Postal Service, 475 L'Enfant Plaza SW., Washington DC 20260-1100, or the Chief Field Counsel. A demand for testimony or records must be received by the employee and the General Counsel or Chief Field Counsel at least ten (10) working days before the date testimony or records are needed.

(d) Procedures followed in response to a demand for testimony or records.

(1) After an employee receives a demand for testimony or records, the employee shall immediately notify the General Counsel or Chief Field Counsel and request instructions.

(2) An employee may not give testimony or produce records without the prior authorization of the General Counsel.

(3)(i) The General Counsel may allow an employee to testify or produce records if the General Counsel determines that granting permission:

(A) Would be appropriate under the rules of procedure governing the matter in which the demand arises and other applicable laws, privileges, rules, authority, and regulations; and

(B) Would not be contrary to the interest of the United States. The interest of the United States includes, but is not

limited to, furthering a public interest of the Postal Service and protecting the human and financial resources of the United States.

(ii) An employee's testimony shall be limited to the information set forth in the statement described at paragraph (c)(2) of this section or to such portions thereof as the General Counsel determines are not subject to objection. An employee's testimony shall be limited to facts within the personal knowledge of the employee. A Postal Service employee authorized to give testimony under this rule is prohibited from giving expert or opinion testimony, answering hypothetical or speculative questions, or giving testimony with respect to privileged subject matter. The General Counsel may waive the prohibition of expert testimony under this paragraph only upon application and showing of exceptional circumstances and the request substantially meets the requirements of this section.

(4) The General Counsel may establish conditions under which the employee may testify. If the General Counsel authorizes the testimony of an employee, the party seeking testimony shall make arrangements for the taking of testimony by those methods that, in the General Counsel's view, will least disrupt the employee's official duties. For example, at the General Counsel's discretion, testimony may be provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other means allowable by law.

(5) If a response to a demand for testimony or records is required before the General Counsel determines whether to allow an employee to testify, the employee or counsel for the employee shall do the following:

(i) Inform the court or other authority of the regulations in this section; and

(ii) Request that the demand be stayed pending the employee's receipt of the General Counsel's instructions.

(6) If the court or other authority declines the request for a stay, or rules that the employee must comply with the demand regardless of the General Counsel's instructions, the employee or counsel for the employee shall respectfully decline to comply with the demand, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), and the regulations in this section.

(7) The General Counsel may request the assistance of the Department of Justice or a U.S. Attorney where necessary to represent the interests of the Postal Service and the employee.

(8) At his or her discretion, the General Counsel may grant a waiver of any procedure described by this section, where waiver is considered necessary to promote a significant interest of the United States or for other good cause.

(9) If it otherwise is permissible, the records custodian may authenticate, upon the request of the party seeking disclosure, copies of the records. No employee of the Postal Service shall respond in strict compliance with the terms of a subpoena duces tecum unless specifically authorized by the General Counsel.

(e) Postal Service employees as expert witnesses. No Postal Service employee may testify as an expert or opinion witness, with regard to any matter arising out of the employee's official duties or the functions of the Postal Service, for any party other than the United States, except that in extraordinary circumstances, the General Counsel may approve such expert testimony in private litigation. A Postal Service employee may not testify as such an expert witness without the express authorization of the General Counsel. A litigant must obtain authorization of the General Counsel before designating a Postal Service employee as an expert witness.

(f) Substitution of Postal Service employees. Although a demand for testimony may be directed to a named Postal Service employee, the General Counsel, where appropriate, may designate another Postal Service employee to give testimony. Upon request and for good cause shown (for example, when a particular Postal Service employee has direct knowledge of a material fact not known to the substitute employee designated by the Postal Service), the General Counsel may permit testimony by a named Postal Service employee.

(g) Fees and costs.

(1) The Postal Service may charge fees, not to exceed actual costs, to private litigants seeking testimony or records by request or demand. The fees, which are to be calculated to reimburse fully the Postal Service for processing the demand and providing the witness or records, may include, among others:

(i) Costs of time spent by employees, including attorneys, of the Postal Service to process and respond to the demand;

(ii) Costs of attendance of the employee and agency attorney at any deposition, hearing, or trial;

(iii) Travel costs of the employee and agency attorney;

(iv) Costs of materials and equipment used to search for, process, and make available information.

(2) All costs for employee time shall be calculated on the hourly pay of the employee (including all pay, allowance, and benefits) and shall include the hourly fee for each hour, or portion of each hour, when the employee is in travel, in attendance at a deposition, hearing, or trial, or is processing or responding to a request or demand.

(3) At the discretion of the Postal Service, where appropriate, costs may be estimated and collected before testimony is given.

§ 265.12 Demands for testimony or records in certain legal..., 39 C.F.R. § 265.12

(h) Acceptance of service. This section does not in any way abrogate or modify the requirements of the Federal Rules of Civil Procedure (28 U.S.C. Appendix) regarding service of process.

SOURCE: 81 FR 86271, Nov. 30, 2016, unless otherwise noted.

AUTHORITY: 5 U.S.C. 552; 5 U.S.C. App. 3; 39 U.S.C. 401, 403, 410, 1001, 2601; Pub.L. 114-185.

Notes of Decisions (3)

Current through May 13, 2024, 89 FR 41848. Some sections may be more current. See credits for details.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

V.

July 14, 2022
8:46 a.m.

RANDALL CRATER,

Defendant.

TRANSCRIPT OF JURY TRIAL DAY 3

BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT

JOHN J. MOAKLEY U.S. COURTHOUSE

1 COURTHOUSE WAY

BOSTON, MA 02210

DEBRA M. JOYCE, RMR, CRR, FCRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way, Room 5204
Boston, MA 02210
joycedebra@gmail.com

1 give him his witness fee, and then --

2 THE COURT: We'll see. So, counsel, if you need
3 further action, I'm sure you'll let me know.

4 Counsel, today in terms of the schedule, obviously, as
5 I told the jury, we'll go until about 3:30 --

6 (Discussion off the record.)

7 THE COURT: So, counsel, we may end up stopping about
8 3:25 or so because my other matter is on at 3:30. And tomorrow
9 we will go until 4:00, and I'll remind the jury about that.

08:51 10 Counsel, at the end of today I'll ask about the lineup
11 for tomorrow.

12 Just to turn to the Touhy issue for the moment, and I
13 don't know if there's any further update on the parties'
14 relative positions, but I did read the filings on either side,
15 and I did read the key cases that were cited, both in the
16 government's brief and then the 9th Circuit case relied on by
17 Mr. Lopez.

18 The 9th Circuit in Bahamonde, 445 F.3d 1225 at 1228 to
19 29, which is a 9th Circuit case in 2006, appears, as I'm sure
08:52 20 Mr. Lopez would acknowledge, as an outlier as the dissent in
21 that case acknowledges.

22 The other circuits to reach this issue squarely, the
23 4th Circuit, the 5th Circuit, the 6th Circuit and the 10th,
24 those are at least the circuits that were either opinions that
25 were cited in the government's papers or were cases cited

1 within a number of these cases. At least those circuits have
2 determined that Touhy applies in criminal cases.

3 There appears to be no 1st Circuit precedent squarely
4 on point, I imagine counsel on either side would have provided
5 it if there were, and the Court hasn't been able to find any.
6 But Cabral v. U.S. DOJ, 587 F.3d 13 at 22, a 1st Circuit 2009
7 case, I acknowledge, Mr. Lopez, that was a civil case, but
8 certainly the 1st Circuit applied the Touhy regulations there.

9 Counsel, in the absence of any contrary binding
08:53 10 precedent, and also given the balance of what the other
11 circuits have decided, I'd be inclined to apply Touhy here
12 given what appears to be the state of the law in this circuit.

13 I know there was also a relevance argument on the
14 government's side. Perhaps I should hear you on that.

15 MR. MARKHAM: Yes, your Honor. I think it might be
16 more helpful for a proffer of what the relevance would be,
17 because the government is in a distinct disadvantage of not
18 knowing exactly why they would be called, but the precedent
19 makes clear that even if the Touhy regulations were complied
08:54 20 with, in order to have a court order to have them actually
21 come, there would have to be some demonstration that the
22 testimony would be relevant.

23 And what the caselaw also makes clear is that
24 preliminary agency determinations or the internal deliberations
25 about how, for instance, the CFTC might have gone about its

1 about how he conducted his interviews, and the same is true of
2 the postal inspector, who was even a worst offender in my mind.

3 THE COURT: And his name is?

4 MR. LOPEZ: Jan Kostka. I don't have the list in
5 front of me.

6 MR. MOORE: That's correct, Jan Kostka.

7 THE COURT: Okay. I'll hear Mr. Markham's response.

8 MR. MARKHAM: So, again, this is assuming he actually
9 puts that in a proper Touhy request. This is just about the
01:58 10 proffer and what they'd actually testify about. I note that
11 he's not actually laid any foundation for that through any
12 witnesses who are testifying. So if he talks to witnesses who
13 are testifying and he gets them to say like, yeah, David
14 Cirilli told me to say this, and, yeah, the FBI told me to say
15 that, that would be one thing. But until that happens, I don't
16 see the basis for it.

17 THE COURT: Mr. Lopez.

18 MR. LOPEZ: Are you done, Mr. Markham?

19 THE COURT: Yes.

01:59 20 MR. LOPEZ: Your Honor, I'm making this proffer for
21 purposes of the Sixth Amendment argument I'm making, not with
22 respect to Touhy.

23 THE COURT: Right. But, counsel, I guess, as I said
24 before, there's compelling -- there's compelling caselaw that
25 Touhy does apply in criminal cases. In some of those cases,

1 the Sixth Amendment issue was raised.

2 I was asking the relevance question as to both issues,
3 because Touhy is moot if I don't think there's -- if I either
4 think it's not relevant or not a basis to be admissible
5 evidence. So --

6 MR. LOPEZ: I understand.

7 THE COURT: Sure.

8 MR. LOPEZ: The relevance is that witnesses were --
9 for example, witnesses were asked questions such as, Well, did
02:00 10 Mr. Crater ever tell you that he spent his money on extravagant
11 items?

12 THE COURT: Counsel, and I just -- because I know the
13 jury is going to come in soon and I think it's important for
14 all of us that we get back to the evidence.

15 I guess, Mr. Lopez, where the government is not
16 relying on the witnesses that you point to, I think there are a
17 few links that have to be made about how that would be relevant
18 to what's before this jury, even for impeachment purposes. So
19 that's what I was trying to get at, Mr. Lopez.

02:01 20 THE CLERK: All set?

21 THE COURT: Yes.

22 THE CLERK: All rise for the jury.

23 THE COURT: Can we get Mr. Lynch back?

24 Counsel, obviously we'll have further discussion.

25 MR. LOPEZ: Yes, your Honor.

1 about next week before I let them go for the weekend.

2 MR. MARKHAM: Yes, your Honor. It will certainly
3 depend on the cross.

4 THE COURT: Understood. But perhaps you can talk
5 about it before both sides leave the courthouse.

6 MR. MARKHAM: And we haven't finished the Touhy
7 conversation, your Honor.

8 THE COURT: We haven't finished the Touhy
9 conversation.

03:29 10 Counsel, I guess, as I indicated before, I'm not --
11 Mr. Lopez, one, I think as the law stands right now, I don't
12 see a compelling reason not to follow the majority of circuits
13 that follow Touhy applying it also in the criminal context.
14 But the other matter I'm considering is whether or not you can
15 introduce something for impeachment for witnesses who are not
16 being offered by the government against Mr. Crater.

17 So that's what I'm focusing on. I'll just leave that
18 with you to give some further thought and I'll bring it up. We
19 can discuss it again tomorrow in terms of planning for next
03:30 20 week.

21 Thank you.

22 I will remain. Counsel should feel free to leave
23 while I'm still here so we can get the other criminal matter up
24 to counsel table.

25 Thank you.

PROCEEDINGS

2 (The following proceedings were held in open
3 court before the Honorable Denise J. Casper, United States
4 District Judge, United States District Court, District of
5 Massachusetts, at the John J. Moakley United States Courthouse,
6 1 Courthouse Way, Boston, Massachusetts, on July 15, 2022.

7 The defendant, Randall Crater, is present with
8 counsel. The Assistant U.S. Attorneys are present.)

9 THE CLERK: All rise.

08:45 10 (Court entered.)

11 THE CLERK: Court is in session. Please be seated.

12 THE COURT: Good morning.

13 ALL: Good morning, your Honor.

14 THE COURT: Counsel, there was one matter I was going
15 to return to, but are there any topics that counsel wants to
16 discuss before we start up again today?

17 MR. MARKHAM: Only as an FYI, your Honor. There are
18 two exhibits that are contested that will be coming through
19 Mr. Desa this morning. I spoke to counsel today. I don't
20 anticipate there will be an objection to them. Just so you
21 know, when they come up --

22 THE COURT: Which letters are those?

23 MR. MARKHAM: They're going to be Exhibits II and JJ.

24 THE COURT: And just what's the --

25 MR. MARKHAM: They're emails, two more emails from the

1 MR. LOPEZ: Yes, your Honor.

2 THE COURT: Anything else, Mr. Lopez, from your side?

3 MR. LOPEZ: No, your Honor.

4 THE COURT: Counsel, I just wanted to return to this
5 Touhy issue. Is there anything else, Mr. Lopez, first, that
6 you wanted to add in this regard?

7 MR. LOPEZ: No, your Honor.

8 THE COURT: Okay. So I would just say for the record,
9 and incorporating everything I said yesterday afternoon
08:49 10 regarding the scope of the law and the cases that each side
11 offered to the Court, I'm not going to repeat all of that, I'll
12 just incorporate it by reference, and also to incorporate
13 everything I said yesterday afternoon when we return to this
14 issue.

15 Given the proffer to date and the caselaw provided by
16 either side, and I understand, Mr. Lopez, you're raising this
17 issue not just as a matter of Touhy, but as a constitutional
18 issue separate from any Touhy -- any challenge to Touhy, I've
19 considered that. Some of the cases that were proffered by the
08:49 20 parties, including specifically U.S. v. Soriano-Jarquin, that's
21 492 F.3d 495, 504 to 505 (4th Cir. 2007), which separately
22 addressed this issue as a constitutional matter. As in that
23 case, I don't see a basis for allowing departure from the Touhy
24 process for constitutional reasons or allowing or compelling
25 the witnesses to testify as a constitutional issue, at least

1 based on the record as I have it based on the proffer and the
2 evidence I've heard to date. I don't think it amounts to a
3 deprivation of a defense here where it's not clear from the
4 proffer that the testimony would be relevant, material, and
5 vital to the defense. Again, I cite to Soriano. I think at
6 most it would be impeachment, but as I think I raised yesterday
7 afternoon, potentially impeachment of witnesses that the
8 government's not calling.

9 On the separate issue of Touhy, I think -- I don't
08:51 10 think, Mr. Lopez, you were suggesting there's been any attempt
11 to comply with Touhy, given your position that Mr. Crater
12 shouldn't be required to. So for that separate reason, that's
13 a separate basis for denial of any motion to compel the
14 government's witnesses or at least the two agents that were
15 referenced to testify in the defense case.

16 So that would be my ruling, Mr. Lopez, at this point
17 based on the proffer.

18 If you want me to revisit this in the future, next
19 week, just raise it with me and we can go from there. But just
08:52 20 for the benefit of planning, counsel, I wanted to give you my
21 thinking at this point.

22 MR. LOPEZ: Your Honor --

23 THE COURT: Yes.

24 MR. LOPEZ: I just -- just for the record.

25 THE COURT: Yes.

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES ATTORNEY
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

VS.

Case No.

JOHN DOE.

Federal Grand Jury
U.S. Courthouse
1 Courthouse Way
Boston, Massachusetts

Tuesday
February 26, 2019

APPEARANCE: JORDI de LLANO CAMPOS
Assistant U.S. Attorney

CAITLIN COTTINGHAM
Trial Attorney

WITNESS: DAVID CIRILLI



Apex Reporting
(617) 269-2900

DOJ-0000540962

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Apex Reporting
(617) 269-2900

1 (12:40 p.m.) P R O C E E D I N G S
3 DAVID CIRILLI, Sworn
4 EXAMINATION BY MS. COTTINGHAM:
5 Q Good afternoon, Agent Cirilli.
6 A Good afternoon.
7 Q Could you just say and spell your name for the
8 Court Reporter?
9 A David Cirilli, C-I-R-I-L-L-I.
10 Q Agent Cirilli, where do you work?
11 A I work at the FBI.
12 Q How long have you worked there?
13 A For eight and a half years, approximately.
14 Q At the FBI what types of cases do you investigate?
15 A I'm part of a White-Collar Criminal Squad
16 investigating matters that range from investment frauds,
17 embezzlement, Ponzi schemes, things of that nature.
18 Q Are you involved in an investigation into a
19 company called, My Big Coin and its principals?
20 A Yes.
21 Q When did you start working on the case?
22 A Approximately, February of 2018.
23 Q As part of your investigation have you issued
24 subpoenas?
25 A Yes.

1 Q Have you received documents in response?

2 A Yes.

3 Q What types of documents?

4 A Bank records, other financial records, and other
5 contracts and various documents.

6 Q Have you, in the course of your investigation,
7 obtained and reviewed evidence relating to websites and
8 social media accounts?

9 A Yes.

10 Q Have you, in the course of your investigation,
11 caused search warrants to be executed for email accounts and
12 text messages?

13 A Yes.

14 Q And have you reviewed the documents you've
15 received in this case?

16 A Yes.

17 Q In addition to the documents received as part of
18 your investigation, have you learned information about My
19 Big Coin by interviewing witnesses?

20 A Yes.

21 Q Roughly, how many witness interviews?

22 A Approximately, ten.

23 Q And have you interviewed individuals who invested
24 in My Big Coin?

25 A Yes.

1 Q And have you interviewed other individuals who
2 were at the *tk 7 @ 2:21* My Big Coin?

3 A Yes.

4 Q In addition to your investigation, are you
5 familiar with parallel civil proceedings relating to My Big
6 Coin?

7 A I am.

8 Q By what agency?

9 A The CFTC.

10 Q What's the status of the CFTCs investigation?

11 A (No reply.)

12 Q Has the CFTC filed a lawsuit against Randall
13 Crater and other individuals?

14 A Yes.

15 Q And have you had an opportunity to review
16 materials obtained by the CFTC, in the course of their
17 investigation?

18 A Yes.

19 Q Have you also had the opportunity to review
20 filings made by the defendant, Randall Crater, or the
21 defendant's in that litigation?

22 A Yes.

23 Q Agent Cirilli, are you also familiar with a FINRA
24 investigation into My Big Coin?

25 A Yes.

1 Q Have you reviewed materials or interview reports
2 prepared by FINRA, in connection with their investigation?

3 A Yes.

4 Q With respect to the My Big Coin investigation, are
5 you familiar with the name Randall Crater?

6 A Yes.

7 Q Was he affiliated with My Big Coin?

8 A He was.

9 Q What was his role?

10 A He was a creator and developer of My Big Coin and
11 My Big Coin Pay.

12 Q Are you familiar with an individual named John
13 Roche?

14 A Yes.

15 Q Was Mr. Roche affiliated with My Big Coin?

16 A Yes.

17 Q What was his role?

18 A He was listed on the corporate filings for the
19 company as an officer and a director of My Big Coin, and as
20 a president of My Big Coin Pay, and he's also included the
21 title of CEO in his email signature.

22 MS. COTTINGHAM: I'm going to pass you a copy of
23 the Indictment. The Grand Jurors all have a copy.

24 THE WITNESS: Okay.

25 BY MS. COTTINGHAM:

1 Q Did Mr. Roche, is he Individual One listed in the
2 Indictment?

3 A Yes.

4 Q And are you familiar with the name Michael Kruger?

5 A Yes.

6 Q Is he affiliated with My Big Coin?

7 A Yes.

8 Q What was his role?

9 A He was a promoter for the company, and he had a
10 4.9-percent ownership in the company.

11 Q And are you familiar with the name Mark Gillespie?

12 A Yes.

13 Q Was he affiliated with My Big Coin?

14 A He was.

15 Q And what was his role?

16 A He also promoted the company, and he was a
17 processor facilitator, helping get peoples accounts set-up.

18 Q Was he listed as Individual Two in the Indictment?

19 A Yes.

20 Q And I should take a step back.

21 I asked you, Agent Cirilli, a moment ago, about a
22 parallel investigation. Is the CFTC, is that the
23 Commodities Futures Trading Commission?

24 A It is.

25 Q And is the CFTC responsible with investigating,

1 among other things, misconduct in the financial and
2 commodities markets?

3 A Correct.

4 Q And I referred to FINRA. Does FINRA stand for the
5 Financial Industry Regulatory Association?

6 A I believe so.

7 Q And is FINRA also responsible with, among other
8 things, investigating misconduct in the financial markets?

9 A Yes.

10 Q Agent Cirilli, based on your investigation, did
11 you learn about a scheme to defraud investors in My Big
12 Coin?

13 A Yes.

14 Q Can you briefly describe the scheme for us?

15 A Effectively, these individuals were selling
16 cryptocurrency that was backed by gold. This was referred
17 to as My Big Coin. These were coins offered by the company
18 to investors.

19 Q You said, allegedly, they were selling this
20 cryptocurrency that was backed by gold. In the course of
21 your investigation, did you learn whether these coins were
22 in fact backed by gold?

23 A We learned that they were not backed by gold.

24 Q And in the course of your investigation, did you
25 learn what happened to the money investors, ultimately, sent

1 to Mr.Crater?

2 A The money that was invested with Mr.Crater was
3 spent.

4 Q Before we kind of *tk 7 @ 6:56* further, can you
5 just explain very briefly, when you refer to a
6 cryptocurrency, is it fair to say that's the same as a
7 virtual currency?

8 A It's similar to a virtual currency that has a
9 crypto, meaning an encrypted aspect to the currency, the
10 online currency.

11 Q And a cryptocurrency or a virtual currency can be,
12 fair to say, can be traded on a virtual currency forum or a
13 digital exchange?

14 A Yes.

15 Q As part of the scheme, what types of
16 misrepresentations were made to investors and potential
17 investors in My Big Coin?

18 A That the coin, again, was backed by gold and that
19 the market for these coins was liquid.

20 Q How did Mr.Crater and others, how did they
21 contact potential investors and solicit victims for this
22 scheme?

23 A This would be done face-to-face talking, email
24 communications, text, in addition to the use of social media
25 and the Internet.

1 Q Did Mr.Crater and his affiliates, did they have a
2 website affiliated with My Big Coin?

3 A Yes.

4 Q In the course of your investigation, did you
5 review screenshots and captures of that website over time?

6 A Yes.

7 Q And did you review Twitter and Facebook accounts,
8 again, over time?

9 A Yes.

10 Q And on the My Big Coin website, did it contain the
11 misrepresentations you were just talking about, --

12 A Yes.

13 Q -- about the coins being backed by gold?

14 A Yes.

15 Q Were those representations about coins being
16 backed by gold, were they repeated on Twitter?

17 A Yes.

18 Q And repeated in email directly to victims and
19 potential victims?

20 A Yes.

21 Q Agent Cirilli, can you just walk briefly through
22 the logistics of how the scheme worked? Once an investor
23 expressed interest buying the coins, what happened next?

24 A They would be directed to wire funds to an
25 account, the account name was Greyshore Advertiset was the

1 naming convention on it. This would be provided to them,
2 often from Mark Gillespie, via email, with the wiring
3 instructions, and that's how it would come about, initially.

4 Q And you mentioned a bank account in the name of
5 Greyshore Advertiset. What was the bank's name?

6 A Wells Fargo.

7 Q And in the course of your investigation, you
8 mentioned that you spoke with investors. Did investors
9 explain to you who had given them wiring information to send
10 money to this account?

11 A Based on what we were hearing from witnesses,
12 including what we saw on email representations, Mark
13 Gillespie and/or Michael Kruger would often be sending these
14 instructions.

15 Q As part of your investigation, did you come to
16 learn who actually controlled the Wells Fargo account in the
17 name of Greyshore Advertiset?

18 A Yes.

19 Q Who controlled that account?

20 A Randall Crater.

21 Q And when these investors wired money to the Wells
22 Fargo account, did they believe they were getting coins that
23 were backed by gold in exchange?

24 A Yes.

25 Q Did you have a chance to speak with investors

1 about the fact that the price of coins was based on trading
2 or value in the coins?

3 A Yes.

4 Q And was there a price, a current value that was
5 published about the coins on the My Big Coin website?

6 A There was.

7 Q And in addition to the Wells Fargo account, Agent
8 Cirilli, did you also have opportunity to review bank
9 accounts from Bank of America?

10 A Yes.

11 Q In particular, did you review Bank of America
12 accounts in Randall Crater's name?

13 A Yes.

14 Q And did you conclude that Crater had caused money
15 to be transferred from the Wells Fargo account in the name
16 of Greyshore Advertiset, to the Bank of America account in
17 his name?

18 A Yes.

19 Q And I should take a step back.

20 As part of your investigation, did the FBI do a
21 financial analysis of the investor funds that were wired?

22 A Yes.

23 Q And approximately, how much was wired?

24 A Approximately, \$6-million.

25 Q Of that \$6-million, approximately, how much of it

1 was transferred or spent out of the Greyshore account?

2 A Pretty close to all of it.

3 MS. COTTINGHAM: I think we can actually turn to
4 the Indictment if you all want to follow along?

5 COURT REPORTER: Do you have an extra copy?

6 MS. COTTINGHAM: Yes, I do.

7 Does everybody have one?

8 GRAND JURY: Yes.

9 BY MS. COTTINGHAM:

10 Q Agent Cirilli, first, have you had the opportunity
11 to review the Indictment before we walk through it today?

12 A I have.

13 Q And the general allegations, Paragraphs One
14 through Four, do these accurately describe Randall Crater,
15 My Big Coin, and Individuals One and Two?

16 A Yes.

17 Q And turning to Paragraphs Five and Six. Do these
18 paragraphs accurately describe your understanding of what a
19 virtual currency is?

20 A Yes.

21 Q Now turning to Paragraph Seven. We've walked
22 through the scheme at a high-level and we'll walk through it
23 in a little more detail, but does Paragraph Seven accurately
24 describe the scheme that you're testifying about here today?

25 A Yes.

1 Q And with respect to Paragraph Eight, the
2 objectives of the scheme. Does Paragraph Eight accurately
3 describe the objectives of the scheme based on your
4 understanding, based on your investigation?

5. A Yes.

6 Q And Paragraph Nine, which describes the manner and
7 means of the scheme -- and again, we'll walk through
8 specific examples in a moment -- but does Paragraph Nine,
9 which includes making multiple misrepresentations to
10 investors, creating websites and social media accounts,
11 soliciting investors and directing them to wire, does
12 Paragraph Nine accurately describe the manner and means of
13 the scheme you're testifying about here today?

14 A Yes.

15 Q If I can ask you to turn to Exhibit 1?

16 A (Complies.)

17 MS. COTTINGHAM: And for the record, Exhibit 1 is
18 a March 5, 2014 email.

19 (Grand Jury Exhibit No. 1 was
20 marked.)

21 BY MS. COTTINGHAM:

22 Q Agent Cirilli, first, the gmark39@gmail.com. Are
23 you familiar with this email address?

24 A I am.

25 Q And who is associated with this email address?

1 A Mark Gillespie.

2 Q And the email account, randallross715. Who is
3 Mr.Ross?

4 A He's a victim that we interviewed.

5 Q And are you familiar with the representation that
6 Mr.Gillespie made in this email, in Exhibit 1, that each
7 coin is now backed with gold?

8 A Yes.

9 Q And based on your investigation, was this claim
10 true?

11 A No.

12 Q And does this email, does Exhibit 1 correspond to
13 the -- is it accurately described in Paragraph Eleven of the
14 Indictment?

15 A Yes.

16 MS. COTTINGHAM: And now turning to Exhibit 2.

17 (Grand Jury Exhibit No. 2 was
18 marked.)

19 COURT REPORTER: Was that a 3/3 email or a 3/5
20 email?

21 MS. COTTINGHAM: The top email in the chain is a
22 3/5 email. The email before, is 3/3. So, let's use the top
23 email in the chain.

24 COURT REPORTER: Okay.

25 MS. COTTINGHAM: We'll go to Exhibit 2.

1 BY MS. COTTINGHAM:

2 Q Agent Cirilli, you earlier testified about
3 reviewing social media accounts. Did those include Twitter?

4 A Yes.

5 Q And the @ mybigcoin Twitter handle, is that
6 associated with the email address, mybigcoin@gmail.com?

7 A It is.

8 Q And was John Roche the person who primarily used
9 that email address?

10 A It appeared to be.

11 Q And are you familiar with the representation in
12 this tweet, that coins will be backed 100-percent by gold?

13 A Yes.

14 Q Based on your investigation, at the time this
15 tweet was circulated, and this was March 6, 2014, were My
16 Big Coins or coins, were they backed by gold?

17 A They were not.

18 Q And is this tweet accurately described in
19 Paragraph Twelve of the Indictment?

20 A Yes.

21 MS. COTTINGHAM: We'll turn to Exhibit 3, which is
22 a January 28, 2015 email -- oh wait -- let me jump back a
23 little bit.

24 (Grand Jury Exhibit No. 3 was
25 marked.)

1 BY MS. COTTINGHAM:

2 Q Agent Cirilli, with respect to -- this is from
3 almost five years ago. Have you had the opportunity to
4 recently go back and review this Twitter handle @ mybigcoin?

5 A I have.

6 Q And has this statement been removed?

7 A It has not.

8 Q Has it been corrected?

9 A It has not.

10 Q And in the course of your investigation, have you
11 uncovered anything to suggest that coins were in fact backed
12 by gold?

13 A No.

14 Q So Exhibit 3, Agent Cirilli, the from email there,
15 Greyshore@ *tk 7 @ 18:12*, are you familiar with this email
16 address?

17 A Yes.

18 Q Who is this email address associated with?

19 A Randall Crater.

20 Q And the email address jlynch@ldnllp.com, who is
21 that email address affiliated with?

22 A John Lynch.

23 Q Who is John Lynch?

24 A He's a victim in this investment fraud.

25 Q And on the cc line, the email address

Page 18

1 kruger3687@gmail.com, who is affiliated with that? Whose
2 email address is that?

3 A Michael Kruger.

4 Q Are you familiar with the claim in this email that
5 Mr.Crater makes to the victim, that we have 300-million in
6 gold backing us?

7 A Yes.

8 Q Was that claim accurate?

9 A No.

10 Q And does Paragraph Thirteen of the Indictment
11 accurately describe this email?

12 A Yes.

13 Q We can actually skip ahead briefly, and we want to
14 look at Count Four. Does Court Four, also, accurately
15 describe this email? And this is on the bottom of page 6
16 for everyone.

17 A Count Four, yes, accurately represents.

18 (Grand Jury Exhibit No. 4 was
19 marked.)

20 BY MS. COTTINGHAM:

21 Q And turning to Exhibit 4, and this is a screenshot
22 of the My Big Coin website, and this is from November 9,
23 2015.

24 I've just described it but, Agent Cirilli, --

25 A Yes.

1 Q -- is this a historic capture of the My Big Coin
2 website?

3 A Yes, it is.

4 Q And what was the website address that My Big Coin
5 used?

6 A www.mybigcoin.com

7 Q Where did you obtain this screenshot?

8 A This came over in documents from the CFTC which
9 had documents from FINRA.

10 Q Agent Cirilli, does this exhibit, does Exhibit 4
11 contain the representation that My Big Coin was backed by
12 gold bullion?

13 A It does.

14 Q And I don't know if folks can see it. We can zoom
15 in if you like, but does this -- if we take a look over at
16 the left-hand side of the exhibit. Does this also list a
17 current value for My Big Coin?

18 A It does.

19 Q And this is as of November 9, 2015. What does My
20 Big Coin website list as the current value of My Big Coin?

21 A \$547.34

22 Q And in the course of your investigation, did you
23 review additional screenshots from other dates throughout
24 the scheme?

25 A Yes.

1 Q And did you have the opportunity to -- taking a
2 look at Paragraph Sixteen -- to compare the current value
3 that the My Big Coin website listed over time?

4 A Yes.

5 Q And does Paragraph Sixteen, does it accurately
6 describe the current value that was listed on August 16,
7 2014?

8 A Yes.

9 Q And does it accurately list the current value that
10 was listed on the My Big Coin website as of August 1, 2015?

11 A Yes.

12 Q If we turn to -- I'll, first, ask you -- Agent
13 Cirilli, in the course of your investigation, with respect
14 to this current value, did you come to learn that this was
15 manually set and not actually based on trading in My Big
16 Coins?

17 A Yes.

18 Q Can you briefly explain how you came to learn
19 that?

20 A One investor witness claimed that Mark Gillespie
21 told him that the price on there was actually whatever
22 Randall Crater felt at the time, that was said directly to
23 one of the witnesses.

24 MS. COTTINGHAM: I'm going to show you what's been
25 marked as Grand Jury Exhibit 5. And this is a December 10,

1 2015 text message.

2 (Grand Jury Exhibit No. 5 was
3 marked.)

4 BY MS. COTTINGHAM:

5 Q Agent Cirilli, we spoke briefly, a moment ago,
6 about John Lynch. As part of your investigation, did you
7 obtain text messages that Mr. Lynch had saved between
8 himself and members of the -- is this a text message --
9 sorry. I'll let you answer that one?

10 A I have.

11 Q Is Exhibit 5 a text message between Mark Gillespie
12 and John Lynch?

13 A Yes.

14 Q And in this text message -- can you just actually
15 read it?

16 A Yes. So, it says it's from the number represented
17 there, Mark Gillespie. And the message is, sum of calculus
18 for, quote/unquote, "current value," I believe is up to,
19 quote/unquote, "us," and not 100-percent math and algorithm.

20 Q In addition to this text message, Agent Cirilli,
21 you testified a moment ago that there were also
22 conversations that individuals had about the fact that the
23 My Big Coin current value could be manually set. Did you
24 have opportunity to also understand who was directing
25 individuals to look at the My Big Coin website for current

1 value?

2 A (No reply.)

3 Q We'll go ahead and take a look at Exhibit 6.

4 A Okay.

5 (Grand Jury Exhibit No. 6 was
6 marked.)

7 BY MS. COTTINGHAM:

8 Q Exhibit 6 is an October 14, 2015 email. In
9 addition to posting the current value of the coin on the My
10 Big Coin website, did Crater, Gillespie and others also
11 direct potential investors to the website to get that,
12 quote/unquote, current value information?

13 A Mm-hmm. Correct.

14 Q And if we look down there at that last highlighted
15 portion, does Mr. Gillespie indicate that the only place you
16 can monitor the value of the coin is on the My Big Coin
17 page?

18 A Yes.

19 Q And does this correspond to the screenshot we were
20 just looking at, --

21 A Yes.

22 Q -- the price of \$547.34?

23 A Yes.

24 Q Based on our review of the last several exhibits,
25 does Paragraph Fourteen accurately describe claims that were

1 published on the My Big Coin website?

2 A Yes.

3 Q And does Paragraph Fifteen accurately describe
4 claims that were published on the My Big Coin website?

5 A Yes.

6 Q And we talked about two parts of Sixteen, but does
7 all of Paragraph Sixteen accurately describe claims on the
8 My Big Coin website and individuals directing investors to
9 go to the My Big Coin website for this false trading
10 information?

11 A Yes.

12 Q Agent Cirilli, did you also come to learn, in your
13 investigation, that Crater and others marketed a My Big Coin
14 Mastercard to investors and potential investors?

15 A Yes.

16 Q Did they claim that the Mastercard could be linked
17 to coins in a user's account and used to make purchases?

18 A Yes.

19 Q And if we actually, if we can go back to Exhibit
20 4?

21 A (Complies.)

22 Q Up in the upper left-hand, is that a screenshot
23 that bears the Mastercard logo?

24 A Yes.

25 Q Did you learn that these claims about the My Big

1 Coin Mastercard were false?

2 A Yes.

3 Q In particular, did you learn from Mastercard that
4 they did not authorize and would not have authorized, per
5 their terms of service and rules, cryptocurrencies to be
6 linked to a Mastercard?

7 A Yes.

8 Q And if you take a look at Paragraph Seventeen of
9 the Indictment, does this accurately describe the
10 misstatements about the My Big Coin Mastercard that Crater
11 and others made to investors?

12 A Yes.

13 Q We spoke earlier about the FBI doing a financial
14 analysis. And as part of that financial analysis, how much
15 money was misappropriated from investors?

16 A Approximately, 6-million.

17 MS. COTTINGHAM: And if we turn to Exhibit 7, and
18 these don't have a date on them but they are Wells Fargo
19 account records.

20 (Grand Jury Exhibit No. 7 was
21 marked.)

22 BY MS. COTTINGHAM:

23 Q Agent Cirilli, is the Wells Fargo account that you
24 spoke about earlier?

25 A It is.

1 Q And was this the primary account that investors
2 were directed to wire money to?

3 A It was.

4 MS. COTTINGHAM: I'm not going to ask you to
5 review the whole thing right now. Don't worry. But let me
6 ask you, let's turn next to Exhibit 9.

7 (Grand Jury Exhibit No. 9 was
8 marked.)

9 BY MS. COTTINGHAM:

10 Q Exhibit 9, are these receipts and sales invoices
11 from the Southampton Jewelry Exchange?

12 A Yes.

13 Q And there's a couple of documents in here, but is
14 the first one dated -- can you guys see -- is the first one
15 dated July 9, 2014?

16 A Yes.

17 Q And what's the total on this purchase?

18 A \$60,611.66.

19 Q And is this for a variety of jewelry items?

20 A Yes.

21 Q And is Randall Crater the purchaser listed on this
22 sales invoice?

23 A He is.

24 Q Have you had the opportunity to review the Wells
25 Fargo account we were just discussing, to see if there's a

1 corresponding wire out of the Wells Fargo account?

2 A I have.

3 Q Is there?

4 A Yes.

5 Q Based on your review of the Wells Fargo records
6 and the receipt, does Paragraph Nineteen accurately describe
7 a July 9th purchase of \$60,611?

8 A One second.

9 Q Just that first sentence there, and then we'll do
10 the second one.

11 A I'm sorry. First sentence where?

12 Q Yes, the first sentence. The \$60,611 purchase?

13 A Yes.

14 Q And now if we look at the next receipt that's part
15 of Exhibit 9, this is over here on the right, too. What is
16 this document?

17 A It's a sales slip from Southampton Jewelry
18 Exchange.

19 Q And at the top, does this list a check number?

20 A Yes, Check No. 1319.

21 Q And does it list the account number that the check
22 came out of?

23 A (No reply.)

24 Q The Greyshore Advertiset?

25 A It says the name, Greyshore Advertiset.

Page 27

1 Q Agent Cirilli, have you had the chance to compare
2 this second receipt for August 4, 2014 to checks that
3 cleared out of the Greyshore account?

4 A Yes.

5 Q And if you want to take a look on page 87 of
6 Exhibit 7?

7 A (Complies.)

8 Q Is there a corresponding check debit for \$56,376?

9 A Yes.

10 Q As part of your investigation, did you review the
11 financial analysis that was conducted?

12 A Yes.

13 Q As part of that financial analysis, were there
14 totals attributed to how much money was spent at certain
15 establishments?

16 A Yes.

17 Q Based on that review, did Crater spend over
18 \$330,000 at the Southampton Jewelry Exchange during the
19 course of the scheme?

20 A Yes.

21 Q So does Paragraph Nineteen accurately describe
22 results of financial analysis in your investigation?

23 A Yes.

24 (Grand Jury Exhibit No. 10 was
25 marked.)

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1 BY MS. COTTINGHAM:

2 Q Turning to Exhibit 10 -- and I don't know if
3 everyone can see this -- but is Lord and Guy an auction
4 house in Southampton, New York?

5 A Yes.

6 Q And if we look first at the portion of the exhibit
7 on the right, what is the total on this receipt?

8 A On the right, \$98,994.31.

9 Q Can you just briefly describe some of the items,
10 or just read off some of the items that were purchased?

11 A Sure. What tab, again?

12 Q We're at tab ten.

13 A Thank you.

14 A Pablo Picasso etching. A Shipwreck Coin.

15 Ancient Islamic Gold Coin.

16 Q Would it be fair to say, antiques, art, jewelry,
17 are a general description of some of these items?

18 A Yes.

19 Q Who's listed as the purchaser on these items?

20 A Randall Crater.

21 Q And when you look up there and you take a look at
22 the driver's license number, have you had the opportunity to
23 compare that driver's license number to identifications
24 Mr. Crater had?

25 A Yes.

1 Q And do they match?

2 A Yes.

3 Q Have you had the opportunity to take a look at the
4 Wells Fargo account to see if there is a corresponding
5 transaction?

6 A Yes.

7 Q And is there a corresponding transaction on page
8 90 of Exhibit 7?

9 A Yes.

10 MS. COTTINGHAM: Turning to the receipt on the
11 right-hand side, which is the fourth page of Exhibit 10.

12 BY MS. COTTINGHAM:

13 Q Can you just read the total from that receipt?

14 A \$87,008.65.

15 Q And the driver's license number up at the top.
16 Does that also match the driver's license number that
17 Mr. Crater had at the time?

18 A It does.

19 Q Have you had the opportunity to compare this
20 receipt for this \$87,000 to the Wells Fargo account records?

21 A Yes.

22 Q And in particular, if you look at page 97?

23 A (Complies.)

24 Q Was Lord and Guy another institution or another
25 establishment as part of the financial analysis the FBI

1 totaled up the amount of money spent there?

2 A Yes.

3 Q Was that amount of money over \$500,000?

4 A It was.

5 Q So does Paragraph Twenty accurately describe
6 expenditures at Lord and Guy?

7 A It does.

8 MS. COTTINGHAM: So, with that, we've walked you
9 guys through -- that's the scheme. We'll briefly walk you
10 through the counts of the Indictment. We've walked you
11 through one already. So, there are four wire fraud charges.
12 These are actual financial wire transfers and the fourth is
13 that email. Go to the next side.

14 BY MS. COTTINHAM:

15 Q Agent Cirilli, have you had the opportunity to
16 review Counts One through Four in the Indictment?

17 A I have.

18 Q And with respect to Counts One through Three, do
19 these all refer to the Wells Fargo account that we've been
20 discussing here today?

21 A Yes.

22 Q Have you had the opportunity to review the Wells
23 Fargo account to see incoming transfers on April 8, 2014?

24 A Yes.

25 Q May 1, 2014?

1 A Yes.

2 Q August 13, 2014?

3 A Yes.

4 Q And have you confirmed that Counts One through
5 Three in the Indictment, they accurately describe the wires
6 from victims?

7 A Yes.

8 Q And with respect to Count Four. Does Count Four
9 in the Indictment accurately describe the email in Exhibit
10 3?

11 A It does.

12 MS. COTTINGHAM: Turning to the unlawful monetary
13 transaction counts. There are three counts here.

14 (Grand Jury Exhibit No. 8 was
15 marked.)

16 BY MS. COTTINGHAM:

17 Q Agent Cirilli, I'm going to ask you to turn to
18 Grand Jury Exhibit 8 -- and again, I won't ask you to review
19 it all -- but have you had the opportunity, before today, to
20 review these bank records?

21 A I have.

22 Q And are these Bank of America account statements?

23 A They are.

24 Q Whose name is on this account?

25 A Randall Crater.

1 Q And when we turn to Counts Five through Seven, is
2 the Bank of America account, the account you are looking at,
3 is that the account described as Crater's Bank of America
4 Account ending in 6356?

5 A Yes.

6 Q Have you had the opportunity to look at Exhibit 7,
7 which is the Wells Fargo account, and Exhibit 8, which is
8 the Bank of America account?

9 A I have.

10 Q And have you confirmed that the description of the
11 wires from the Wells Fargo account to Crater's account, are
12 accurate in Counts Five through Seven of the Indictment?

13 A I have.

14 MS. COTTINGHAM: With that, I think we'll let
15 Agent Cirilli be excused briefly, and see if there are any
16 questions?

17 GRAND JUROR: You're excused.

18 THE WITNESS: Thank you.

19 (Whereupon, at 1:20 p.m., the witness left the
20 Grand Jury room.)

21 (Whereupon, at 1:24 p.m., the witness returns to
22 the Grand Jury room.)

23 MS. COTTINGHAM: Are we ready?

24 BY MS. COTTINGHAM:

25 Q Agent Cirilli, first question is about Exhibit 7,

1 the Greyshore Advertiset account. Who is Kimberly Renee
2 Benge?

3 A That's Randall Crater's sister.

4 Q In connection with the CFTC's civil litigation,
5 has Ms.Benge provided a declaration that stated that
6 Mr.Crater had full control over the Greyshore Wells Fargo
7 account?

8 A She did.

9 Q And have you, in the course of reviewing the Wells
10 Fargo Gretyshore account, seen additional expenditures that
11 are attributed to Mr.Crater?

12 A Yes.

13 Q With respect to the My Big Coin website, how many
14 investors tried to sell coins based on whether the price
15 went up or down?

16 A I don't have an exact number. Investors were
17 complaining that they were unable to sell their coins.

18 Q With respect to Paragraph Fourteen of the
19 Indictment, the question was with respect to Crater's
20 control over the website. Have you reviewed email
21 correspondence, including from Mark Gillespie and others,
22 indicating that Randall Crater was in charge of the content
23 for the website?

24 A We've seen the messaging that comes across in the
25 website, and in Twitter and in Facebook. That messaging

1 also comes across in emails from Mark Gillespie and Michael
2 Kruger. Mark Gillespie has an email where he explains that
3 all the information he is giving out, is coming from Randall
4 Crater, John Roche, and Michael Kruger. I've spoken to
5 Michael Kruger, and all the information that he was giving
6 out was coming from John Roche and Randall Crater.

7 MS. COTTINGHAM: Any additional questions?

8 (No reply.)

9 MR. DE LLANO: May the witness be excused?

10 GRAND JUROR: Yes.

11 (Whereupon, at 1:26 p.m., the witness was
12 excused.)

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1 CERTIFICATE OF REPORTER

2 This is to certify that the attached proceeding

3 before: A FEDERAL GRAND JURY

4 in the Matter of:

5

6 UNITED STATES OF AMERICA

7 VS.

8 JOHN DOE

9

10

11

12 Place: Boston, Massachusetts

13 Date: February 26, 2019

14

15 were held as herein appears, and that this is the original

16 transcript thereof.

17

18

19 Carol Summers

20 OFFICIAL REPORTER

21

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Appendix J.35