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Opinion Amended and Superseded on Denial of Rehearing en banc by
United States v. Johnson, 9th Cir.(Mont.), August 22, 2017

854 F.3d 1098

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellant,

v.

Donald Mitchell JOHNSON, AKA
Ski Johnson, Defendant–Appellee.

No. 15-30350

Argued and Submitted February
7, 2017 Seattle, Washington

Filed April 21, 2017

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Montana, No. 2:14-cr-00028-DLC-1, Dana L. Christensen, Chief Judge, of wire fraud, and government appealed from the court's restitutionary order.

[Holding:] The Court of Appeals, Callahan, Circuit Judge, held that district court was not confined only to harm caused by particular offenses of which defendant was convicted when ordering restitution under the Mandatory Victim Restitution Act (MVRA).

Vacated and remanded.

West Headnotes (4)

[1] Criminal Law

⚙ Review De Novo

On appeal in criminal case, the Court of Appeals would consider de novo defendant's contention that the Court lacked jurisdiction to consider government's challenge to district court's restitution order.

1 Cases that cite this headnote

[2] Criminal Law

⚙ Requisites and sufficiency of judgment or sentence

Sentence that imposed restitution was “final judgment,” from which appeal would lie. 18 U.S.C.A. § 3664(o); 28 U.S.C.A. § 1291.

Cases that cite this headnote

[3] Criminal Law

⚙ Nature or grade of offense and extent of penalty

Government's failure to appeal district court's evidentiary ruling, which prevented it from introducing evidence of any wire fraud not specifically charged in indictment, was not waiver of its right to appeal subsequent restitution order, which likewise limited restitution awardable to that for injuries caused by fraudulent conduct charged in indictment; evidentiary ruling was interlocutory order, which government did not have to challenge in order to preserve its right to appeal district court's limitation on its restitution order, even though that limitation flowed from same issue as district court's evidentiary ruling.

Cases that cite this headnote

[4] Sentencing and Punishment

⚙ Other misconduct of offender

In wire fraud case, district court was not confined only to harm caused by particular offenses of which defendant was convicted when ordering restitution under the Mandatory Victim Restitution Act (MVRA); rather, restitution could be ordered for all persons directly harmed by defendant's entire fraudulent scheme, including those harmed by conduct beyond count of conviction. 18 U.S.C.A. §§ 1343, 3663A.

2 Cases that cite this headnote

*1099 Appeal from the United States District Court for the District of Montana, Dana L. Christensen, Chief Judge, Presiding, D.C. No. 2:14-cr-00028-DLC-1

Attorneys and Law Firms

Chad Spraker (argued), Assistant United States Attorney; Michael W. Cotter, United States Attorney; United States Attorney's Office, Helena, Montana; for Plaintiff-Appellant.

Michael Donahoe (argued), Senior Litigator; Anthony R. Gallagher, Federal Defender; Federal Defenders of Montana, Helena, Montana; for Defendant-Appellee.

Before: Richard A. Paez and Consuelo M. Callahan, Circuit Judges, and Morrison C. England, Jr., * District Judge.

OPINION

CALLAHAN, Circuit Judge:

A jury convicted Donald “Ski” Johnson of wire fraud in violation of 18 U.S.C. § 1343. The district court sentenced Johnson to five years’ probation and ordered Johnson to pay \$5,648.58 in restitution. On appeal, the government argues that the district court erred by considering only Johnson’s fraudulent conduct that occurred in Montana (the count of conviction) when determining restitution, and thus misinterpreted the Mandatory Victim Restitution Act (“MVRA”). *See* 18 U.S.C. § 3663A. We vacate the district court’s restitution order and remand for determination of whether Johnson’s conduct outside of Montana was related to his scheme to defraud.¹

BACKGROUND

In 2011, Johnson, using the alias Larry Toye, promoted a black-tie gala in Seattle, Washington. The event was intended to benefit the American Cancer Society and Johnson’s charity, the Jazz For Life Foundation. While on the phone with a promoter, Johnson, acting as Toye, falsely described himself as a Grammy-nominated musician. Johnson also promised the attendance of

celebrities such as James Earl Jones and Michael Douglas. Neither Jones nor Douglas had any knowledge of the event, nor were they inclined to attend. *1100 The event was eventually cancelled, but, by the time Johnson’s fraud was discovered, Johnson’s foundation had collected over \$13,000 in ticket sales, \$9,300 of which had been transferred to Johnson’s personal account.

Later in 2011, Johnson—this time under the alias Kevin Wright—contacted the Hospice of Palm Beach County in Florida to inquire about participating in the organization’s celebrity golf event. Johnson offered Grammy tickets to be auctioned at the event, with the proceeds split between the hospice and Johnson’s foundation. The tickets were auctioned for \$12,000 (\$5,500 of which was sent to Johnson’s foundation), but the tickets were never produced, and the purchaser did not attend the Grammys.

In May 2012, Johnson called Barb Rooney, Vice President of the Big Sky Resort in Montana. Johnson, again using the alias Kevin Wright, identified himself as a representative of both Sony and Johnson, a Grammy-nominated musician. In a similar fashion to his encounter with the Hospice of Palm Beach County, Johnson offered Grammy tickets to be auctioned off at a fundraiser organized by Big Brothers and Big Sisters (“BBBS”). The tickets were auctioned for \$6,000. Johnson attempted to collect his share of the proceeds, but, after BBBS learned of Johnson’s misrepresentations, it returned the proceeds to the bidder.

Johnson was indicted in 2014 for one count of wire fraud in violation of 18 U.S.C. § 1343. The indictment alleged Johnson’s scheme to defraud extended from 2011 to 2014 and occurred “in the District of Montana and elsewhere.” However, the indictment specifically identified only a single Virginia-Montana wire transmission relating to the BBBS event. Johnson thus moved to limit the government’s trial evidence to that one event. The government argued in opposition that evidence of other fraud was admissible to prove Johnson’s scheme to defraud. The district court concluded that evidence of wire fraud not specifically charged in the indictment was inadmissible as improper propensity evidence under Federal Rule of Evidence 404(b)(2).² Ultimately, the court restricted the government’s trial evidence to the BBBS event, stating in its pretrial ruling that “the government will not be permitted to prove the scheme

underlying the Montana fraud by putting on evidence that Johnson employed the same scheme in another fraud outside of Montana.”

A jury convicted Johnson, and the government sought restitution for Johnson's entire scheme, contending that he owed over \$70,000. The district court considered additional evidence of Johnson's scheme for sentencing enhancement purposes, but it refused to consider evidence beyond the BBBS event (the count of conviction) for restitution purposes and limited restitution to \$5,648.58. The government appealed.

DISCUSSION

A. Jurisdiction and Standard of Review

[1] We review de novo Johnson's contention that we lack jurisdiction to consider the government's challenge to the district court's restitution order. *United States v. Decinces*, 808 F.3d 785, 789 (9th Cir. 2015) (“We have jurisdiction to determine our own jurisdiction. We review this *1101 question de novo.” (internal citations omitted)).

[2] This court has jurisdiction “of appeals from all final decisions.” 28 U.S.C. § 1291. “A sentence that imposes an order of restitution is a final judgment.” 18 U.S.C. § 3664(o); see also *United States v. Brock-Davis*, 504 F.3d 991, 993 (9th Cir. 2007) (finding court had jurisdiction under § 1291 to review restitution order). We therefore have jurisdiction to review the government's appeal from a district court's restitution order.

[3] Johnson argues, however, that the government's challenge to the restitution order here is instead an attempt at an impermissible end-run around its failure to appeal the district court's pretrial evidentiary ruling, which limited the government's trial evidence to fraud relating to the BBBS event. According to Johnson, the government was required to appeal immediately, and, by failing to do so, it waived review of this issue in its entirety.

Although the government could have appealed the district court's evidentiary ruling, see *United States v. Loftis*, 843 F.3d 1173, 1175–76 (9th Cir. 2016), it was not required to do so. The evidentiary ruling was an interlocutory order, and “we have never held that failure to appeal an interlocutory order barred raising the decided issue after entry of a final judgment.” *In re Frontier Props.*,

Inc., 979 F.2d 1358, 1364 (9th Cir. 1992); see *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976) (“[A]n interlocutory appeal is permissive, not mandatory[.]” and, “[w]hen an appeal is not taken, the interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment.”). The government is therefore not foreclosed from challenging the district court's limitation on the restitution order even though it flows from the same issue as the district court's evidentiary ruling. We therefore have jurisdiction to review the district court's restitution order, and we review that order for an abuse of discretion. *Brock-Davis*, 504 F.3d at 996.

B. Restitution Order

[4] The district court relied on *United States v. Hughey*, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990), in concluding that it could not consider fraud beyond the BBBS event for the purposes of restitution. In *Hughey*, the Supreme Court held that a restitution award under the 1982 Victim and Witness Protection Act (“VWPA”) was limited to “the loss caused by the specific conduct that is the basis of the offense of conviction.” 495 U.S. at 413, 110 S.Ct. 1979; 18 U.S.C. § 3579 (1982), amended by, 18 U.S.C. § 3663 (1990).

In response, Congress amended the VWPA in 1990 to partly overrule *Hughey*. See 18 U.S.C. § 3663; see also *United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999) (“Congress amended the VWPA's definition of victim to partially overrule *Hughey*.”). The current iteration of the VWPA authorizes restitution for “any victim” of certain enumerated offenses. 18 U.S.C. § 3663(a)(1)(A). The act defines a “victim” as “any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.” *Id.* § 3663(a)(2).

Following the 1990 amendments, we have recognized that the VWPA allows district courts to order restitution for crimes involving a scheme to defraud to “include acts of related conduct for which the defendant was not convicted.” *Lawrence*, 189 F.3d at 846; see also *United States v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir. 1997) (“After the amendment [to the VWPA], restitution may be ordered for losses to persons harmed in the course of the defendant's scheme even beyond the counts of conviction.” (emphasis added)). We have since applied the same approach *1102 to the MVRA. See *Brock-Davis*, 504 F.3d at 996 (“Because of similarities between

the MVRA and the [VWPA], we may look to cases decided under the VWPA for guidance in interpreting the MVRA.” (internal citations omitted)); *United States v. Grice*, 319 F.3d 1174, 1177–78 (9th Cir. 2003) (“The MVRA’s definition of victim is identical [to the VWPA’s], and we interpret it as we have the definition under the VWPA.” (internal citations omitted)). Wire fraud involves a scheme to defraud. *See* 18 U.S.C. § 1343.³ Accordingly, under the MVRA, “restitution may be ordered for all persons directly harmed by the entire scheme” and “is thus not confined to harm caused by the particular offenses for which [the defendant] was convicted.” *United States v. Booth*, 309 F.3d 566, 576 (9th Cir. 2002).

Here, the district court, believing it was bound by *Hughey*, only considered loss related to Johnson’s fraudulent conduct while organizing the BBBS event. Specifically, prior to the start of witness testimony at the sentencing hearing, the district court concluded that it could not award restitution beyond the count of conviction “under the law, the law of this case, and the law under the United States Supreme Court decision of [*United States*

v. Hughey].”⁴ This constituted an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (“A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law....”). Under 18 U.S.C. § 3663A and Ninth Circuit precedent, the district court could properly order restitution for all victims harmed by Johnson’s scheme, including those harmed by conduct beyond the count of conviction. Accordingly, we vacate the district court’s restitution order and remand for the court to make factual findings to determine whether Johnson’s activities beyond the BBBS event are sufficiently related to be included for restitution purposes in Johnson’s overall scheme to defraud.⁵

The restitution order is **VACATED**, and the issue is **REMANDED** to the district court.

All Citations

854 F.3d 1098, 17 Cal. Daily Op. Serv. 3864, 17 Cal. Daily Op. Serv. 8109, 2017 Daily Journal D.A.R. 3882

Footnotes

- * The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.
- 1 Johnson also filed a cross-appeal of his conviction, *United States v. Johnson*, No. 15-30356, arguing insufficiency of the evidence. We dispose of his appeal in a separate memorandum disposition.
- 2 When the district court invoked Rule 404(b) to exclude evidence of wire fraud not specifically charged in the indictment, it did not have the benefit of our opinion in *United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016). There, we held that evidence of uncharged transactions to prove a scheme to defraud was not inadmissible as improper propensity evidence under Rule 404(b). Because the government did not pursue an appeal under 18 U.S.C. § 3731, however, the issue is not before us.
- 3 The wire fraud statute in part states:
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purposes of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.
18 U.S.C. § 1343.
- 4 It appears that the relevant Ninth Circuit precedent recognizing abrogation of this holding of *Hughey* was not brought to the district court’s attention.
- 5 The government contends that Johnson’s scheme to defraud should be defined broadly to include his misrepresentations as a Grammy-nominated musician with a charitable purpose. We do not decide this issue, but note that much of Johnson’s conduct may be sufficiently related to his scheme to be included in a restitution order. Our cases have embraced a broad definition of scheme to defraud. *See, e.g., United States v. Morse*, 785 F.2d 771, 774 (9th Cir. 1986) (recognizing that, in the mail fraud context, the Ninth Circuit “takes a broad view of a single scheme”); *see also United States v. Shipsey*, 363 F.3d 962, 971 n.10 (9th Cir. 2004) (“It is well settled that cases construing the mail fraud and wire fraud statutes are applicable to either.”).

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2017 WL 4018078

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United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellant,

v.

Donald Mitchell JOHNSON, AKA
Ski Johnson, Defendant-Appellee.

No. 15-30350

|

Argued and Submitted February
7, 2017 Seattle, Washington

|

Filed April 21, 2017

|

Amended August 22, 2017

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Montana, No. 2:14-cr-00028-DLC-1, Dana L. Christensen, Chief Judge, of wire fraud, and government appealed from the court's restitutionary order.

Holdings: On denial of rehearing, the Court of Appeals, Callahan, Circuit Judge, held that:

[1] government's failure to appeal district court's evidentiary ruling did not waive its right to appeal subsequent restitution order, and

[2] district court was not confined only to harm caused by particular offenses of which defendant was convicted when ordering restitution under the Mandatory Victim Restitution Act (MVRA).

Vacated and remanded.

Opinion, 854 F.3d 1098, superseded.

West Headnotes (4)

[1] Criminal Law

⚡ Review De Novo

On appeal in criminal case, the Court of Appeals would consider de novo defendant's contention that the Court lacked jurisdiction to consider government's challenge to district court's restitution order.

Cases that cite this headnote

[2] Criminal Law

⚡ Requisites and sufficiency of judgment or sentence

Sentence that imposed restitution was "final judgment," from which appeal would lie. 18 U.S.C.A. § 3664(o); 28 U.S.C.A. § 1291.

Cases that cite this headnote

[3] Criminal Law

⚡ Requisites and sufficiency of judgment or sentence

Government's failure to appeal district court's evidentiary ruling, which prevented it from introducing evidence of any wire fraud not specifically charged in indictment, was not waiver of its right to appeal subsequent restitution order, which likewise limited restitution awardable to that for injuries caused by fraudulent conduct charged in indictment, even though limitation flowed from same issue as court's evidentiary ruling. 18 U.S.C.A. § 3742(b)(1).

Cases that cite this headnote

[4] Sentencing and Punishment

⚡ Other misconduct of offender

In wire fraud case, district court was not confined only to harm caused by particular offenses of which defendant was convicted when ordering restitution under the Mandatory Victim Restitution Act (MVRA); rather, restitution could be ordered for all

persons directly harmed by defendant's entire fraudulent scheme, including those harmed by conduct beyond count of conviction. 18 U.S.C.A. §§ 1343, 3663A.

Cases that cite this headnote

Appeal from the United States District Court for the District of Montana, Dana L. Christensen, Chief Judge, Presiding, D.C. No. 2:14-cr-00028-DLC-1

Attorneys and Law Firms

Chad Spraker (argued), Assistant United States Attorney; Michael W. Cotter, United States Attorney; United States Attorney's Office, Helena, Montana; for Plaintiff-Appellant.

Michael Donahoe (argued), Senior Litigator; Anthony R. Gallagher, Federal Defender; Federal Defenders of Montana, Helena, Montana; for Defendant-Appellee.

Before: Richard A. Paez and Consuelo M. Callahan, Circuit Judges, and Morrison C. England, Jr.,* District Judge.

OPINION

CALLAHAN, Circuit Judge:

A jury convicted Donald “Ski” Johnson of wire fraud in violation of 18 U.S.C. § 1343. The district court sentenced Johnson to five years’ probation and ordered Johnson to pay \$5,648.58 in restitution. On appeal, the government argues that the district court erred by considering only Johnson’s fraudulent conduct that occurred in Montana (the count of conviction) when determining restitution, and thus misinterpreted the Mandatory Victim Restitution Act (“MVRA”). *See* 18 U.S.C. § 3663A. We vacate the district court’s restitution order and remand for determination of whether Johnson’s conduct outside of Montana was related to his scheme to defraud.¹

BACKGROUND

In 2011, Johnson, using the alias Larry Toye, promoted a black-tie gala in Seattle, Washington. The event was intended to benefit the American Cancer Society and Johnson’s charity, the Jazz For Life Foundation. While on the phone with a promoter, Johnson, acting as Toye, falsely described himself as a Grammy-nominated musician. Johnson also promised the attendance of celebrities such as James Earl Jones and Michael Douglas. Neither Jones nor Douglas had any knowledge of the event, nor were they inclined to attend. The event was eventually cancelled, but, by the time Johnson’s fraud was discovered, Johnson’s foundation had collected over \$13,000 in ticket sales, \$9,300 of which had been transferred to Johnson’s personal account.

Later in 2011, Johnson—this time under the alias Kevin Wright—contacted the Hospice of Palm Beach County in Florida to inquire about participating in the organization’s celebrity golf event. Johnson offered Grammy tickets to be auctioned at the event, with the proceeds split between the hospice and Johnson’s foundation. The tickets were auctioned for \$12,000 (\$5,500 of which was sent to Johnson’s foundation), but the tickets were never produced, and the purchaser did not attend the Grammys.

*2 In May 2012, Johnson called Barb Rooney, Vice President of the Big Sky Resort in Montana. Johnson, again using the alias Kevin Wright, identified himself as a representative of both Sony and Johnson, a Grammy-nominated musician. In a similar fashion to his encounter with the Hospice of Palm Beach County, Johnson offered Grammy tickets to be auctioned off at a fundraiser organized by Big Brothers and Big Sisters (“BBBS”). The tickets were auctioned for \$6,000. Johnson attempted to collect his share of the proceeds, but, after BBBS learned of Johnson’s misrepresentations, it returned the proceeds to the bidder.

Johnson was indicted in 2014 for one count of wire fraud in violation of 18 U.S.C. § 1343. The indictment alleged Johnson’s scheme to defraud extended from 2011 to 2014 and occurred “in the District of Montana and elsewhere.” However, the indictment specifically identified only a single Virginia-Montana wire transmission relating to the BBBS event. Johnson thus moved to limit the

government's trial evidence to that one event. The government argued in opposition that evidence of other fraud was admissible to prove Johnson's scheme to defraud. The district court concluded that evidence of wire fraud not specifically charged in the indictment was inadmissible as improper propensity evidence under Federal Rule of Evidence 404(b)(2).² Ultimately, the court restricted the government's trial evidence to the BBBS event, stating in its pretrial ruling that "the government will not be permitted to prove the scheme underlying the Montana fraud by putting on evidence that Johnson employed the same scheme in another fraud outside of Montana."

A jury convicted Johnson, and the government sought restitution for Johnson's entire scheme, contending that he owed over \$70,000. The district court considered additional evidence of Johnson's scheme for sentencing enhancement purposes, but it refused to consider evidence beyond the BBBS event (the count of conviction) for restitution purposes and limited restitution to \$5,648.58. The government appealed.

DISCUSSION

A. Jurisdiction and Standard of Review

[1] We review de novo Johnson's contention that we lack jurisdiction to consider the government's challenge to the district court's restitution order. *United States v. Decinces*, 808 F.3d 785, 789 (9th Cir. 2015) ("We have jurisdiction to determine our own jurisdiction. We review this question de novo." (internal citations omitted)).

[2] This court has jurisdiction "of appeals from all final decisions," 28 U.S.C. § 1291, and the government may appeal any "final sentence" of a district court "if the sentence was imposed in violation of law[.]" 18 U.S.C. § 3742(b)(1). "A sentence that imposes an order of restitution is a final judgment." 18 U.S.C. § 3664(o); see also *United States v. Brock-Davis*, 504 F.3d 991, 993 (9th Cir. 2007) (finding court had jurisdiction under § 1291 to review restitution order). We therefore have jurisdiction to review the government's appeal from a district court's restitution order.

[3] Johnson argues, however, that the government's challenge to the restitution order here is instead an attempt at an impermissible end-run around its failure

to appeal the district court's pretrial evidentiary ruling, which limited the government's trial evidence to fraud relating to the BBBS event. According to Johnson, the government was required to appeal immediately, and, by failing to do so, it waived review of this issue in its entirety.

*3 Although the government could have appealed the district court's evidentiary ruling, see *United States v. Loftis*, 843 F.3d 1173, 1175–76 (9th Cir. 2016), its decision not to do so does not bar our review of its appeal from the district court's restitution order under § 3742(b)(1). See *United States v. Kovall*, 857 F.3d 1060, 1069 (9th Cir. 2017) (stating that § 3664(o) permits the government to appeal an order of restitution, so long as the appeal is made pursuant to § 3742). The government is therefore not foreclosed from challenging the district court's limitation on the restitution order even though it flows from the same issue as the district court's evidentiary ruling. We therefore have jurisdiction to review the district court's restitution order, and we review that order for an abuse of discretion. *Brock-Davis*, 504 F.3d at 996.

B. Restitution Order

[4] The district court relied on *Hughey v. United States*, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990), in concluding that it could not consider fraud beyond the BBBS event for the purposes of restitution. In *Hughey*, the Supreme Court held that a restitution award under the 1982 Victim and Witness Protection Act ("VWPA") was limited to "the loss caused by the specific conduct that is the basis of the offense of conviction." 495 U.S. at 413, 110 S.Ct. 1979; 18 U.S.C. § 3579 (1982), amended by, 18 U.S.C. § 3663 (1990)).

In response, Congress amended the VWPA in 1990 to partly overrule *Hughey*. See 18 U.S.C. § 3663; see also *United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999) ("Congress amended the VWPA's definition of victim to partially overrule *Hughey*"). The current iteration of the VWPA authorizes restitution for "any victim" of certain enumerated offenses. 18 U.S.C. § 3663(a)(1)(A). The act defines a "victim" as "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." *Id.* § 3663(a)(2).

Following the 1990 amendments, we have recognized that the VWPA allows district courts to order restitution for crimes involving a scheme to defraud to "include

acts of related conduct for which the defendant was not convicted.” *Lawrence*, 189 F.3d at 846; *see also United States v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir. 1997) (“After the amendment [to the VWPA], restitution may be ordered for losses to persons harmed in the course of the defendant’s scheme *even beyond the counts of conviction*.” (emphasis added)). We have since applied the same approach to the MVRA. *See Brock-Davis*, 504 F.3d at 996 (“Because of similarities between the MVRA and the [VWPA], we may look to cases decided under the VWPA for guidance in interpreting the MVRA.”) (internal citations omitted); *United States v. Grice*, 319 F.3d 1174, 1177–78 (9th Cir. 2003) (“The MVRA’s definition of victim is identical [to the VWPA’s], and we interpret it as we have the definition under the VWPA.” (internal citations omitted)). Wire fraud involves a scheme to defraud. *See* 18 U.S.C. § 1343. ³ Accordingly, under the MVRA, “restitution may be ordered for all persons directly harmed by the entire scheme” and “is thus not confined to harm caused by the particular offenses for which [the defendant] was convicted.” *United States v. Booth*, 309 F.3d 566, 576 (9th Cir. 2002).

*⁴ Here, the district court, believing it was bound by *Hughey*, only considered loss related to Johnson’s fraudulent conduct while organizing the BBBS event.

Specifically, prior to the start of witness testimony at the sentencing hearing, the district court concluded that it could not award restitution beyond the count of conviction “under the law, the law of this case, and the law under the United States Supreme Court decision of [*United States v. Hughey*].”⁴ This constituted an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (“A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law”). Under 18 U.S.C. § 3663A and Ninth Circuit precedent, the district court could properly order restitution for all victims harmed by Johnson’s scheme, including those harmed by conduct beyond the count of conviction. Accordingly, we vacate the district court’s restitution order and remand for the court to make factual findings to determine whether Johnson’s activities beyond the BBBS event are sufficiently related to be included for restitution purposes in Johnson’s overall scheme to defraud.⁵

The restitution order is **VACATED**, and the issue is **REMANDED** to the district court.

All Citations

--- F.3d ----, 2017 WL 4018078

Footnotes

- * The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.
- 1 Johnson also filed a cross-appeal of his conviction, *United States v. Johnson*, No. 15-30356, arguing insufficiency of the evidence. We dispose of his appeal in a separate memorandum disposition.
- 2 When the district court invoked Rule 404(b) to exclude evidence of wire fraud not specifically charged in the indictment, it did not have the benefit of our opinion in *United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016). There, we held that evidence of uncharged transactions to prove a scheme to defraud was not inadmissible as improper propensity evidence under Rule 404(b). Because the government did not pursue an appeal under 18 U.S.C. § 3731, however, the issue is not before us.
- 3 The wire fraud statute in part states:
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purposes of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.
18 U.S.C. § 1343.
- 4 It appears that the relevant Ninth Circuit precedent recognizing abrogation of this holding of *Hughey* was not brought to the district court’s attention.
- 5 The government contends that Johnson’s scheme to defraud should be defined broadly to include his misrepresentations as a Grammy-nominated musician with a charitable purpose. We do not decide this issue, but note that much of Johnson’s conduct may be sufficiently related to his scheme to be included in a restitution order. Our cases have embraced a broad

definition of scheme to defraud. See, e.g., *United States v. Morse*, 785 F.2d 771, 774 (9th Cir. 1986) (recognizing that, in the mail fraud context, the Ninth Circuit "takes a broad view of a single scheme"); see also *United States v. Shipsey*, 363 F.3d 962, 971 n.10 (9th Cir. 2004) ("It is well settled that cases construing the mail fraud and wire fraud statutes are applicable to either.").

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691 Fed.Appx. 305 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Donald Mitchell JOHNSON, AKA
Ski Johnson, Defendant-Appellant.

No. 15-30356

|
Argued and Submitted February
7, 2017 Seattle, Washington

|
Filed April 21, 2017

Appeal from the United States District Court for the District of Montana, Dana L. Christensen, Chief Judge, Presiding, D.C. No. 2:14-cr-00028-DLC-1

Attorneys and Law Firms

Leif Johnson, Assistant U.S. Attorney, Office of the US Attorney, Billings, MT, Chad Spraker, Assistant U.S. Attorney, USHE—Office of the US Attorney, Helena, MT, for Plaintiff-Appellee

Michael Donahoe, Esquire, Assistant Federal Public Defender, FDMT-Federal Defenders of Montana (Helena), Helena, MT, for Defendant-Appellant

Before: PAEZ and CALLAHAN, Circuit Judges, and ENGLAND, * District Judge.

MEMORANDUM **

In 2015, Donald Johnson was found guilty of wire fraud pursuant to 18 U.S.C. § 1343. Johnson falsely represented himself as a Grammy-nominated musician

while defrauding a charitable organization of thousands of dollars. Johnson moved for acquittal under Federal Rule of Criminal Procedure 29 at the close of the Government's case, at the close of all evidence, and post-trial. On appeal, Johnson argues that the government failed to produce sufficient evidence to sustain a conviction. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

1. We review sufficiency of the evidence de novo. *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008). “There is sufficient evidence to support a conviction if, ‘viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)) (emphasis in original).

2. The government's indictment alleged that fraud occurred “in Montana and elsewhere.” At trial, the court limited evidence to fraud within Montana. Johnson argues that the government failed to prove the acts it alleged in the indictment because it did not prove fraud “elsewhere,” and thus his conviction should be overturned. This argument is inconsistent with Supreme Court precedent. See *United States v. Miller*, 471 U.S. 130, 136, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (“[T]he right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime”).

3. Finally, Johnson argues that the government's evidence of Montana-related fraud was insufficient to support his conviction. However, the government presented ample evidence that Johnson (1) falsely claimed to a charity that he was a Grammy-nominated musician; (2) falsely claimed *306 that his foundation was a children's charity; and (3) never donated Grammy tickets to the charity as promised. Thus, a rational jury could have concluded that Johnson was guilty of wire fraud. See 18 U.S.C. § 1343.

4. Johnson's conviction is **AFFIRMED**.

All Citations

691 Fed.Appx. 305 (Mem)

Footnotes

- * The Honorable Morrison C. England, Jr., United States District Judge for the Eastern District of California, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD MITCHELL JOHNSON
aka Ski Johnson,

Defendant.

CR 14-28-BU-DLC

ORDER

Before the Court is Defendant Donald Mitchell Johnson's motion to dismiss the Indictment in this case. Pursuant to the Court's order vacating the February 17, 2015 trial, Defendant's motion to dismiss will be construed as seeking dismissal of the Superseding Indictment. In the alternative, Johnson moves to restrict the evidence at trial to acts committed in the state of Montana; the Court will construe this alternative as a motion in limine. For the reasons stated below, the Court denies Johnson's motion to dismiss and grants, in part, his alternative motion in limine.

BACKGROUND

For purposes of Johnson's motion to dismiss, the Court accepts the facts as

recited in the Superseding Indictment as true. *United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014) (the Court is “bound by the four corners of the indictment”).

Johnson is charged with a single count of wire fraud in violation of 18 U.S.C. § 1343. Johnson is a successful jazz artist and member of the Recording Academy. The government alleges that, from 2011 to 2014, Johnson represented himself as a charity known as the Jazz for Life Foundation, and fraudulently collected money under the guise of children’s cancer research. While the government alleges that Johnson devised the scheme to defraud “in the District of Montana and elsewhere,” the Superseding Indictment lists a single instance of use of interstate wires between Dulles, Virginia and Montana (“Virginia-Montana transmission”) as the execution of that scheme. (Doc. 21 at 4.)

DISCUSSION

I. Sufficiency of the Indictment.

Johnson contends that the government fails to sufficiently allege any instances of wire fraud other than the Virginia-Montana transmission in the Superseding Indictment. The government responds that the Superseding Indictment adequately sets forth an instance of wire fraud occurring in Montana, and that it may allege a *scheme* extending beyond a single locale. Both parties are correct, but the Court notes Johnson’s concern with the scope of the conduct

potentially swept up in the government's single-count Superseding Indictment.

Wire fraud under 18 U.S.C. § 1343 consists of three elements: “(1) a scheme to defraud, (2) use of the wires in furtherance of the scheme and (3) a specific intent to deceive or defraud.” *United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001) (citations omitted). “[E]ach use of the wires constitutes a separate violation of the wire fraud statute” *Id.* at 793. Because “it is the use of the [wires] for the purpose of executing the scheme which gives the federal courts jurisdiction over the offense,” § 1343 naturally focuses “upon the misuse of the instrumentality of communication” rather than upon “the underlying scheme or a particular fraud victim.” *Id.* at 792-793 (citations omitted); *see also United States v. Jinian*, 725 F.3d 954, 961 (9th Cir. 2013) (“the relevant question at all times is whether a wire is part of the execution of the scheme as conceived by the perpetrator at the time, not whether the defendant, prior to the wiring, had obtained all the money he expected to get”) (citations and internal quotation marks omitted). Relative to wire fraud, “venue is established in those locations where the wire transmission at issue originated, passed through, or was received, or from which it was orchestrated.” *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002). Again, when reviewing a motion to dismiss, the Court is “bound by the four corners of the Indictment.” *Lyle*, 742 F.3d at 436.

The Superseding Indictment in this case alleges that Johnson “devised and intended to devise a scheme to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises.” (Doc. 21 at 2.) Furthermore, the Superseding Indictment alleges that Johnson, by emailing a representative of a charity in Montana through a computer server located in Virginia, made use of the wires in furtherance of the scheme. These assertions are sufficient to contour a charge of wire fraud in violation of 18 U.S.C. § 1343, and are sufficient to establish venue in Montana as to the single Virginia-Montana transmission described in the Superseding Indictment.

Johnson urges the Court to hold that the Superseding Indictment is deficient because, based on the discovery produced in this case, the government appears to be including multiple uses of the wires – each separate offenses pursuant to the cases outlined above – in a single count. This is a more expansive reading of the charging document than the Court is permitted to engage in while reviewing this motion, but Johnson’s point is well-taken. Though on its face the Superseding Indictment alleges one count of wire fraud supported by one use of the wires, the references to an alleged three-year-long scheme carried out in Montana and “elsewhere” justifiably raise concerns for Johnson. However, the government indicates in its response brief that any evidence of “elsewhere” acts would be

presented at trial as evidence of the existence of a scheme, not as evidence of multiple uses of the wires that could each have been charged separately. So long as any evidence of “elsewhere” acts is confined to proof of the first element of wire fraud, the single count in the Superseding Indictment stands for a single use of the wires. The Court is cognizant of the nuance and, as explained in more detail below, will guide the evidence at trial accordingly. Therefore, Johnson’s motion to dismiss is denied on sufficiency grounds.

II. Attempted versus completed wire fraud.

Johnson next claims that the Superseding Indictment, by referencing his alleged execution of the scheme and his “attempt[s] to do so,” conflates attempted and completed wire fraud to the extent he is unable to adequately tailor his defense. Johnson contends that the government’s inclusion of attempt in the Superseding Indictment could be read to support attempt as to the Montana transmission, attempt as to the “elsewhere” acts, or some other theory of culpability. The government counters, correctly, that a scheme to defraud through use of the wires need not succeed to be actionable under 18 U.S.C. § 1343. *United States v. Dischner*, 974 F.2d 1502, 1521 (9th Cir.1992), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031, 1035 n. 1 (9th Cir.1997) (en banc); *see Pace*, 314 F.3d at 349-350 (because use of the wires is operative under

§ 1343, success of a defendant's scheme is not); *see also* 9th Cir. Model Crim. Jury Instr. § 8.124 (2010) ("the government must prove . . . [that] the defendant used, or caused to be used, a wire communication to carry out *or attempt to carry out* an essential part of the scheme") (emphasis added).

Nevertheless, the government indicates in its response to Johnson's motion that it intends to put on proof at trial that Johnson successfully carried out the alleged scheme. As noted in Section I above, the only operative use of the wires in this case is the Virginia-Montana transmission referenced in the Superseding Indictment, and the government is free to put on evidence that the referenced transmission resulted in either an attempted or completed fraud. The distinction is unimportant and does not complicate the defense relative to the single Virginia-Montana transmission. Johnson's motion to dismiss is denied as to these grounds.

III. Duplicity.

Dovetailing with his sufficiency argument, Johnson contends that the Superseding Indictment is duplicitous because it "involves grafting into the government's single count . . . all the 'elsewhere' wire fraud offenses that allegedly occurred before and after July, 2012." (Doc. 16 at 8.)

"Duplicity is the joining in a single count of two or more distinct and separate offenses." *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir.

1976). “In reviewing an indictment for duplicity, [the Court’s] task is not to review the evidence presented at trial to determine whether it would support charging several crimes rather than one, but rather solely to assess whether the indictment itself can be read to charge only one violation in each count.” *United States v Mancuso*, 718 F.3d 780, 792 (9th Cir. 2013) (citations omitted).

Purely on review of the motion to dismiss and within the four corners of the charging document, the Superseding Indictment can fairly be read to charge one count of wire fraud for the single use of the wires between Virginia and Montana in July 2012. The Superseding Indictment consists of one count and one transmission. Based on the Superseding Indictment and the nature of wire fraud under 18 U.S.C. § 1343, the government may only present a case at trial as to the single Virginia-Montana transmission, meaning the Superseding Indictment is necessarily non-duplicitous. Johnson’s motion to dismiss is denied on duplicity grounds.

IV. Motion in limine as to the “elsewhere” acts.

Finally, Johnson moves to restrict presentation of evidence of the “elsewhere” acts at trial in order to “preserve [his] Sixth Amendment venue rights.” (Doc. 16 at 9). Again, the Court views this motion as a motion in limine.

The manner in which the issues discussed in Sections I through III will play

out at trial hinges on how the government intends to introduce and employ any evidence of the “elsewhere” acts. The “elsewhere” acts, according to the parties’ characterization of the discovery in this case, appear to be alleged other wire frauds, and thus fall squarely within the scope of Rule 404(b) of the Federal Rules of Evidence. Rule 404(b)(1) precludes the use of “evidence of a crime, wrong, or other act . . . to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” However, such evidence may be used to prove something other than propensity, such as “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b)(2). In a criminal case, the government must provide notice of the nature of such evidence if requested by the defendant, preferably before trial. *Id.* at 404(b)(2)(A)-(B).

“Evidence should not be treated as ‘other crimes’ evidence when the evidence concerning the ‘other’ act and the evidence concerning the crime charged are inextricably intertwined.” *United States v. Soliman*, 813 F.2d 277, 279 (9th Cir. 1987). “Two general categories of other act evidence may be ‘inextricably intertwined’ with a charged crime and thus exempted from the requirements of Rule 404(b).” *United States v. Dorsey*, 677 F.3d 944, 951 (9th Cir. 2013) (citations omitted). “First, other act evidence may constitute a part of the

transaction that serves as the basis for the criminal charge.” *Id.* (citations and internal quotation marks omitted). “Second, admission of other act evidence may be necessary to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime.” *Id.* (citations and internal quotation marks omitted).

The Court makes a distinction here between inadmissible other acts evidence and potentially admissible other acts evidence. As to the former, neither of the two common conceptions of inextricably intertwined other acts apply to any other uses of the wires, to the extent the government intends to offer those other uses as evidence of the existence of Johnson’s scheme in this case. “Each use of the wires constitutes a separate violation of the wire fraud statute,” *Garlick*, 240 F.3d at 793, meaning that other acts tending to prove the existence of a scheme in a wire fraud *do not* include other uses of the wires – other uses of the wires are other separate wire frauds. The government cannot use other uses of the wires to prove the existence of the scheme which Johnson’s Virginia-Montana transmission allegedly furthered, and Johnson’s motion in limine is granted in this regard.

As to the latter, evidence of the schemes surrounding other uses of the wires – indisputably not charged in the Superseding Indictment – may be admissible if

offered as proof of the scheme underlying Johnson's Virginia-Montana transmission, and for one of the permissible uses enumerated in Rule 404(b)(2). Such other acts, though perhaps initially undertaken to support a fraudulent use of the wires prior to the Virginia-Montana transmission, may be inextricably intertwined with the Virginia-Montana transmission if Johnson employed the same scheme in more than one fraudulent use of the wires. Activities might include taking steps to make a non-existent business entity appear real, or setting up a bank account to accept the funds obtained from a prior use of the wires as well as the Virginia-Montana transmission. The Court is best positioned to rule on these questions in the context of the government's proffer at trial, and so the Court reserves ruling on this aspect of Johnson's motion in limine until that time.

CONCLUSION

The Superseding Indictment charges one count of wire fraud based on one use of the wires between Virginia and Montana. The allegation is sufficient to survive Johnson's motion to dismiss and sufficient to venue the proceedings in Montana. The Court is aware of the government's references to other acts in the Superseding Indictment, and is aware that the government's purpose in offering evidence of those other acts may or may not be permissible. The Court will not permit the government to charge Johnson with one count, yet attempt to try him in

Montana on multiple counts more appropriately venued elsewhere.

Accordingly, IT IS ORDERED that Defendant Johnson's motion to dismiss (Doc. 18) is DENIED.

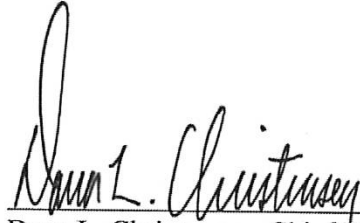
IT IS FURTHER ORDERED that Johnson's alternative motion in limine is GRANTED IN PART. Johnson's motion is GRANTED to the extent that the government may not present any evidence of use of the wires in this case other than the Virginia-Montana transmission referenced in the Superseding Indictment. The Court reserves ruling as to evidence that may be admissible if offered as proof of the scheme underlying Johnson's Virginia-Montana transmission, and for one of the permissible uses enumerated in Rule 404(b)(2).

IT IS FURTHER ORDERED that the dates and deadlines in the Court's December 31, 2014 scheduling order (Doc. 12) are VACATED. The following dates shall govern further proceedings in this case:

- Trial Date: **March 16, 2015; 9:00 a.m.**
Mike Mansfield Federal Courthouse
Butte, Montana
- Plea agreement deadline: March 5, 2015
- JERS deadline: March 9, 2015
- Jury instructions and
trial briefs deadline: March 12, 2015

The Court's scheduling order shall remain in full force and effect otherwise.

DATED this 13th day of February, 2015.

A handwritten signature in black ink, reading "Dana L. Christensen". The signature is written in a cursive style with a large, looped initial "D".

Dana L. Christensen, Chief District Judge
United States District Court

2015 WL 13309316

Only the Westlaw citation is currently available.

United States District Court,
D. Montana,
Butte Division.

UNITED STATES of America, Plaintiff,

v.

Donald Mitchell JOHNSON
aka Ski Johnson, Defendant.

CR 14-28-BU-DLC

|

Signed March 4, 2015

Attorneys and Law Firms

Chad C. Spraker, Office of the U.S. Attorney, Helena,
MT, for Plaintiff.

ORDER

Dana L. Christensen, Chief Judge

*1 Before the Court is the government's motion to clarify its February 13, 2015 ruling on Defendant Ski Johnson's motion to dismiss. In the alternative, the government moves for reconsideration of the ruling.

The government's motion requests clarification that: (1) "evidence of other wires is admissible to prove Johnson's scheme to defraud and intent, although inadmissible to prove the 'wiring in furtherance,' " and (2) "it may introduce evidence of the scheme alleged in the Superseding Indictment, further described by the manner and means, and evidence inextricably intertwined with the scheme." (Doc. 34 at 5-6.) In essence, the government wishes to rely to some degree on evidence of wire transmissions, other than the Virginia-Montana transmission alleged in the Superseding Indictment, to prove the "scheme to defraud" element of wire fraud under 18 U.S.C. § 1343. *See United States v. Garlick*, 240 F.3d 789, 792 (9th Cir. 2001) (wire fraud consists of three

elements: "(1) a scheme to defraud, (2) use of the wires in furtherance of the scheme and (3) a specific intent to deceive or defraud") (citations omitted).

As to the first point, the Court agrees that evidence of other wires may be admissible to support the first, but not the second, element of wire fraud. As to the second point, the government may introduce evidence of the scheme alleged in the Superseding Indictment, but the manner in which the Court treats that evidence will depend upon whether the government can prove that the evidence is in fact inextricably intertwined with the scheme Johnson employed in Montana. If the government can prove that the proffered evidence is inextricably intertwined with the scheme underlying the Montana fraud, then that evidence is not subject to scrutiny under Rule 404(b) of the Federal Rules of Evidence. *See United States v. Dorsey*, 677 F.3d 944, 951 (9th Cir. 2013). If the government cannot prove that the proffered evidence is inextricably intertwined, then the Court must view the evidence through the lens of Rule 404(b). *See United States v. Beckman*, 298 F.3d 788, 794 (9th Cir. 2002) ("[o]ther acts evidence is admissible under Rule 404(b) if it (1) tends to prove a material point in issue; (2) is not too remote in time; (3) is proven with evidence sufficient to show that the act was committed; and (4) if admitted to prove intent, is similar to the offense charged" and, if admitted, "[t]he court must then assess the evidence under" Rule 403) (citations omitted). The Court takes a narrow view of the universe of inextricably intertwined evidence in this case.

Accordingly, IT IS ORDERED that the government's motion for clarification (Doc. 33) is GRANTED IN PART, to the extent the Court provides the above clarification as requested. The government's alternative motion for reconsideration is DENIED. Pursuant to Rule 47.2(e) of the Local Rules of Criminal Procedure, the Court finds that oral argument on the government's motion is unnecessary.

All Citations

Slip Copy, 2015 WL 13309316

2015 WL 4092759

Only the Westlaw citation is currently available.

United States District Court, D. Montana,
Butte Division.

UNITED STATES of America, Plaintiff,

v.

Donald Mitchell JOHNSON
aka Ski Johnson, Defendant.

No. CR 14-28-BU-DLC.

|

Signed July 6, 2015.

Attorneys and Law Firms

Chad C. Spraker, Office of the U.S. Attorney, Helena,
MT, for Plaintiff.

Michael Donahoe, Federal Defenders of Montana,
Helena, MT, for Defendant.

ORDER

DANA L. CHRISTENSEN, Chief Judge.

*1 Before the Court are the government's motions to dismiss the Superseding Information and for a continuance of the trial in this case. Defendant Ski Johnson opposes both motions.

As to first motion, the government has thus far filed an Indictment, a Superseding Indictment, and the aforementioned Superseding Information in this case. The former two pleadings are essentially identical, while the latter pleading significantly limits the extent of the scheme which the government alleges Johnson carried out through his use of the wires between Virginia and Montana. This alleged scheme has been the source of much consternation for the parties, the undersigned, and United States Magistrate Judge Jeremiah C. Lynch, who has twice found it impossible to accept Johnson's proposed plea change.

Rule 48(a) of the Federal Rules of Criminal Procedure provides that "the government may, with leave of court, dismiss an indictment, information, or complaint." In a criminal case involving successive charging documents,

the government may proceed on any pending indictment not formally dismissed, so long as jeopardy has not attached relative to that pleading. *United States v. Hickey*, 580 F.3d 922, 929-930 (9th Cir.2009). "If the district court finds that the prosecutor is acting in good faith in making its Rule 48(a) motion, it should grant the motion; conversely, Rule 48(a) empowers the district court to exercise its discretion in denying the motion when it specifically determines that the government is operating in bad faith." *United States v. Hayden*, 860 F.2d 1483, 1487 (9th Cir.1988).

The Court will grant the motion to dismiss the Superseding Information because the pleading remains pending and the motion appears not to be motivated by bad faith. That said, the government's pleadings in this case have done little to advance the ball, and the Court has grown tired of hedging its views on the universe of admissible trial evidence. The Superseding Information is the clearest, most concise statement of the government's view of this case. With it now off the table, Johnson's concerns with the scope of the scheme alleged against him are rightly at the fore once again. The Court shares these concerns, particularly in light of the government's statement that "[t]he defendant's fraud took place in several states including Washington, Florida, New Jersey, Texas, and Montana." (Doc. 62 at 4.)

This case is about a single fraud evidenced by a single use of the wires between Virginia and Montana in July 2012. No evidence of other frauds executed by other, separate uses of the wires will come in at trial. The government may believe that the scheme Johnson employed in the Montana fraud stretched over a longer period of time and a larger geographic area, but the government will not be permitted to present evidence of any aspect of that scheme consisting of other uses of the wires. Stated another way, the government will not be permitted to prove the scheme underlying the Montana fraud by putting on evidence that Johnson employed the same scheme in another fraud outside of Montana. Furthermore, should the government obtain a conviction in this case, the extent of the Montana fraud will dictate the loss amount for which Johnson will ultimately be held responsible. The Court will not permit an end-run around these limits under the guise of evidence pertaining to Johnson's alleged scheme. The Court cannot make its position on the scope of the trial of this case and associated evidentiary issues any more clear, and to the extent previous orders have served to confuse

the government, or caused the government to engage in wishful thinking, it is hoped that the above statement clears up this confusion.

*2 As to the second motion, the government seeks a six week continuance, but acknowledges that it will need less time to prepare for trial if the Court views the case as limited to "Johnson's scheme to defraud as it occurred only in Montana." (Doc. 65 at 7.) Given the above, the Court finds that six additional weeks is excessive. Nevertheless, on June 11, 2015, the parties advised the Court that thirty days remained on Johnson's speedy trial clock. The government filed the instant motions, which tolled the clock pursuant to 18 U.S.C. § 3161(h)(1)(D), on June 15, 2015. Three weeks have passed since the government filed its motion, and the Court intends to set this matter for trial three weeks from the date of this order. As the combined time periods equals six weeks, there is no need for a separate continuance here.

Accordingly, IT IS ORDERED that the government's motion to dismiss the Superseding Information (Doc. 59) is GRANTED. The Superseding Information (Doc. 44) is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the government's motion for continuance (Doc. 61) is DENIED.

IT IS FURTHER ORDERED that the trial in this matter is set for **Monday, July 27, 2015 at 9:00 a.m.** at the Mike Mansfield Federal Courthouse in Butte, Montana. The JERS deadline is set for July 20, 2015, and the jury instructions and trial briefs deadline is set for July 22, 2015.

All Citations

Not Reported in F.Supp.3d, 2015 WL 4092759

FILED

NOV 20 2014

Clerk, U.S. District Court
District Of Montana
Billings

CHAD C. SPRAKER
Assistant U.S. Attorney
U.S. Attorney's Office
901 Front Street, Suite 1100
Helena, MT 59626
Phone: (406) 457-5120
FAX: (406) 457-5130
Email: chad.spraker@usdoj.gov

**ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA**

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

UNITED STATES OF AMERICA,	CR 14- 28-BU-DLC
Plaintiff,	<u>INDICTMENT</u>
vs.	WIRE FRAUD
DONALD MITCHELL JOHNSON	Title 18 U.S.C. § 1343
<i>aka Ski Johnson,</i>	(Penalty: 20 years imprisonment, \$250,000
Defendant.	fine, and three years supervised release)
	FORFEITURE
	Title 18 U.S.C. § 981(a)(1)(C)
	Title 28 U.S.C. § 2461(c)

THE GRAND JURY CHARGES:

At all times relevant to this Indictment:

Background

1. DONALD MITCHELL JOHNSON was a saxophone player from Silver Spring, Maryland.

2. In or about 2009, DONALD MITCHELL JOHNSON released an album, "New Beginnings," which debuted at #11 and peaked to #4 in the Billboard "Jazz Albums" category.
3. In or about 2012, DONALD MITCHELL JOHNSON released an album, "Underdogs on Top," which debuted at #16 and peaked to #7 in the Billboard "Jazz Albums" category.
4. Beginning in or about 2009, DONALD MITCHELL JOHNSON became a member of the Recording Academy and submitted content to the Recording Academy; however, he was not nominated for a Grammy award.
5. In or about 2011 through 2014, DONALD MITCHELL JOHNSON did business as the Jazz for Life Foundation, which DONALD MITCHELL JOHNSON represented to be a charity raising money for children with cancer and children's cancer research.

Scheme to Defraud

6. From in or about 2011 through in or about 2014, the defendant, DONALD MITCHELL JOHNSON, in the District of Montana and elsewhere, devised and intended to devise a scheme to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises.

Manner and Means

It was part of the scheme that:

7. DONALD MITCHELL JOHNSON would and did represent the he was a Grammy nominated musician when in fact he was not a Grammy nominated musician.
8. DONALD MITCHELL JOHNSON would and did represent that he was a #1 Billboard Jazz Artist when in fact he was not a #1 Billboard Jazz Artist.
9. DONALD MITCHELL JOHNSON would and did represent that he was a representative of Sony when in fact he was not a representative of Sony.
10. DONALD MITCHELL JOHNSON would and did represent that he was authorized to use the American Cancer Society's non-profit status when in fact he was not authorized to use the American Cancer Society's non-profit status.
11. DONALD MITCHELL JOHNSON would and did contact charity events using an alias of a manager for DONALD MITCHELL JOHNSON seeking to arrange a celebrity appearance of DONALD MITCHELL JOHNSON.
12. DONALD MITCHELL JOHNSON would and did contact charity events under the auspice that he was the manager for a celebrity when in fact he was not the celebrity's manager.
13. DONALD MITCHELL JOHNSON would and did use a fictitious status as a Grammy nominated musician to obtain an invitation to a charity event and cause

the charity to expend funds on DONALD MITCHELL JOHNSON and his associates.

14. DONALD MITCHELL JOHNSON would and did solicit money for the Jazz for Life Foundation as a children's cancer charity when in fact DONALD MITCHELL JOHNSON used the money for his personal benefit.

15. DONALD MITCHELL JOHNSON would and did auction Grammy tickets at a charity event when DONALD MITCHELL JOHNSON was not authorized to sell the Grammy tickets and was unable to provide the Grammy tickets to the auction winner.

16. DONALD MITCHELL JOHNSON would and did organize an ostensible charity event based on his representation that a celebrity would attend the event when in fact DONALD MITCHELL JOHNSON knew he had not secured the celebrity's attendance.

17. DONALD MITCHELL JOHNSON would use a fictitious status as a Grammy nominated musician and a false charitable purpose causing others to organize events for DONALD MITCHELL JOHNSON's financial benefit.

Execution of the Scheme

18. On or about July 17, 2012, in the District of Montana and elsewhere, DONALD MITCHELL JOHNSON for the purpose of executing the scheme

described above, and attempting to do so, caused to be transmitted by means of wire communication in interstate commerce the signals described below:

Nature of signal	Origin Location	Recipient Location
Email communication between DONALD MITCHELL JOHNSON and A.R.	AOL server in Dulles, Virginia	Montana

All in violation of Title 18, United States Code, Section 1343.

FORFEITURE ALLEGATION

19. The allegations contained in paragraphs 1 through 18 of this Indictment are hereby re-alleged and incorporated by reference for the purpose of alleging forfeitures pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

20. Upon conviction of the offense in violation of 18 U.S.C. § 1343 set forth in this Indictment, the defendant, DONALD MITCHELL JOHNSON, shall forfeit to the United States of America, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), any property, real or personal, which constitutes or is derived from proceeds traceable to the offense.

21. If any of the property, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided
without difficulty,

the United States of America shall be entitled to forfeiture of substitute property
pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c).

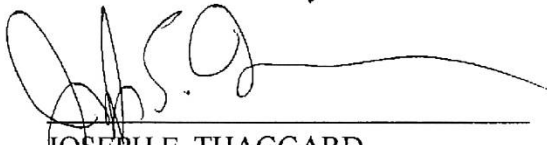
All pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

A TRUE BILL.

Foreperson signature redacted. Original document filed under seal.



MICHAEL W. COTTER
United States Attorney



JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

12-17-14 @ 1:30 p.m.
before JCL in mla

Crim. Summons ☒

Warrant: _____

Bail: _____

FILED

FEB 05 2015

Clerk, U.S. District Court
District Of Montana
Great Falls

CHAD C. SPRAKER
Assistant U.S. Attorney
U.S. Attorney's Office
901 Front Street, Suite 1100
Helena, MT 59626
Phone: (406) 457-5120
FAX: (406) 457-5130
Email: chad.spraker@usdoj.gov

**ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA**

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

UNITED STATES OF AMERICA,	CR 14-28-BU-DLC
Plaintiff,	<u>SUPERSEDING INDICTMENT</u>
vs.	WIRE FRAUD
DONALD MITCHELL JOHNSON	Title 18 U.S.C. § 1343
<i>aka Ski Johnson,</i>	(Penalty: 20 years imprisonment, \$250,000
Defendant.	fine, and three years supervised release)
	FORFEITURE
	Title 18 U.S.C. § 981(a)(1)(C)
	Title 28 U.S.C. § 2461(c)

THE GRAND JURY CHARGES:

At all times relevant to this Indictment:

Background

1. DONALD MITCHELL JOHNSON was a saxophone player from Silver Spring, Maryland.

2. Beginning in or about 2009, DONALD MITCHELL JOHNSON became a member of the Recording Academy and submitted content to the Recording Academy; however, he was not nominated for a Grammy award.

3. In or about 2011 through 2014, DONALD MITCHELL JOHNSON did business as the Jazz for Life Foundation, which DONALD MITCHELL JOHNSON represented to be a charity raising money for children with cancer and children's cancer research.

Scheme to Defraud

4. From in or about 2011 through in or about 2014, the defendant, DONALD MITCHELL JOHNSON, in the District of Montana and elsewhere, devised and intended to devise a scheme to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises.

Manner and Means

It was part of the scheme that:

5. DONALD MITCHELL JOHNSON would and did represent the he was a Grammy nominated musician when in fact he was not a Grammy nominated musician.

6. DONALD MITCHELL JOHNSON would and did represent that he was a representative of Sony when in fact he was not a representative of Sony.

7. DONALD MITCHELL JOHNSON would and did represent that he was authorized to use the American Cancer Society's non-profit status when in fact he was not authorized to use the American Cancer Society's non-profit status.

8. DONALD MITCHELL JOHNSON would and did contact charity events using an alias of a manager for DONALD MITCHELL JOHNSON seeking to arrange a celebrity appearance of DONALD MITCHELL JOHNSON.

9. DONALD MITCHELL JOHNSON would and did contact charity events under the auspice that he was the manager for a celebrity when in fact he was not the celebrity's manager.

10. DONALD MITCHELL JOHNSON would and did use a fictitious status as a Grammy nominated musician to obtain an invitation to a charity event and cause the charity to expend funds on DONALD MITCHELL JOHNSON and his associates.

11. DONALD MITCHELL JOHNSON would and did solicit money for the Jazz for Life Foundation as a children's cancer charity when in fact DONALD MITCHELL JOHNSON used the money for his personal benefit.

12. DONALD MITCHELL JOHNSON would and did auction Grammy tickets at a charity event when DONALD MITCHELL JOHNSON was not authorized to sell the Grammy tickets and was unable to provide the Grammy tickets to the auction winner.

13. DONALD MITCHELL JOHNSON would and did organize an ostensible charity event based on his representation that a celebrity would attend the event when in fact DONALD MITCHELL JOHNSON knew he had not secured the celebrity's attendance.

14. DONALD MITCHELL JOHNSON would use a fictitious status as a Grammy nominated musician and a false charitable purpose causing others to organize events for DONALD MITCHELL JOHNSON's financial benefit.

Execution of the Scheme

15. On or about July 17, 2012, in the District of Montana and elsewhere, DONALD MITCHELL JOHNSON for the purpose of executing the scheme described above, and attempting to do so, caused to be transmitted by means of wire communication in interstate commerce the signals described below:

Nature of signal	Origin Location	Recipient Location
Email communication between DONALD MITCHELL JOHNSON and A.R.	AOL server in Dulles, Virginia	Montana

All in violation of Title 18, United States Code, Section 1343.

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18. If any of the property, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to 21 U.S.C. § 853(p), as incorporated by 28 U.S.C. § 2461(c).

All pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c).

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Foreperson signature redacted. Original document filed under seal.

A TRUE BILL.



MICHAEL W. COTTER
United States Attorney


for

JOSEPH E. THAGGARD
Criminal Chief Assistant U.S. Attorney

Crim. Summons ☒
Warrant ☐
Bail ☐

CHAD C. SPRAKER
Assistant U.S. Attorney
U.S. Attorney's Office
901 Front Street, Suite 1100
Helena, MT 59626
Phone: (406) 457-5120
FAX: (406) 457-5130
Email: chad.spraker@usdoj.gov

FILED

APR 20 2015

Clerk, U.S. District Court
District Of Montana
Helena

**ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA**

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

UNITED STATES OF AMERICA,	CR 14-28-BU-DLC
Plaintiff,	<u>SUPERSEDING INFORMATION</u>
vs.	WIRE FRAUD
DONALD MITCHELL JOHNSON	Title 18 U.S.C. § 1343
<i>aka Ski Johnson,</i>	(Penalty: 20 years imprisonment, \$250,000
Defendant.	fine, and three years supervised release)

At all times relevant to this Information:

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1. DONALD MITCHELL JOHNSON was a saxophone player from Silver Spring, Maryland.

2. Beginning in or about 2009, DONALD MITCHELL JOHNSON became a member of the Recording Academy and submitted content to the Recording Academy. He, however, was not nominated for a Grammy award.
3. DONALD MITCHELL JOHNSON did business as the Jazz for Life Foundation, which DONALD MITCHELL JOHNSON represented to be a charity assisting children with cancer.

Scheme to Defraud

3. In or about 2012, the defendant, DONALD MITCHELL JOHNSON, in the District of Montana and Virginia, devised and intended to devise a scheme to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises.

Manner and Means

It was part of the scheme that:

4. DONALD MITCHELL JOHNSON would and did represent he was a Grammy nominated musician when in fact he was not a Grammy nominated musician.
5. DONALD MITCHELL JOHNSON would and did represent that he was a representative of Sony when in fact he was not a representative of Sony.

6. DONALD MITCHELL JOHNSON would and did contact charity events using an alias of a manager for DONALD MITCHELL JOHNSON seeking to arrange a celebrity appearance of DONALD MITCHELL JOHNSON.

7. DONALD MITCHELL JOHNSON would and did use a fictitious status as a Grammy nominated musician to obtain an invitation to a charity event and cause the charity to expend funds on DONALD MITCHELL JOHNSON and his associates.

8. DONALD MITCHELL JOHNSON would and did auction Grammy tickets at a charity event when DONALD MITCHELL JOHNSON was not authorized to sell the Grammy tickets.

Execution of the Scheme

9. On or about July 17, 2012, in the District of Montana and elsewhere, DONALD MITCHELL JOHNSON for the purpose of executing the scheme described above, and attempting to do so, caused to be transmitted by means of wire communication in interstate commerce the signals described below:

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All in violation of Title 18, United States Code, Section 1343.

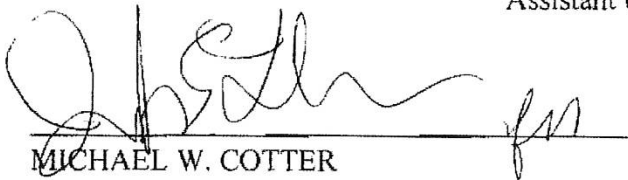
MICHAEL W. COTTER

United States Attorney



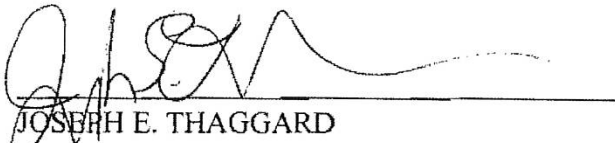
CHAD C. SPRAKER

Assistant U.S. Attorney



MICHAEL W. COTTER

United States Attorney



JOSEPH E. THAGGARD

Criminal Chief Assistant U.S. Attorney

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

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Criminal Docket
No. 14-28-BU-DLC

DONALD MITCHELL JOHNSON,
aka Ski Johnson,

Defendant.

TRANSCRIPT OF CHANGE OF PLEA PROCEEDINGS

Heard in the Magistrate Courtroom
Russell Smith Federal Courthouse
201 East Broadway
Missoula, Montana
April 14, 2015
2:36 p.m.

BEFORE THE HONORABLE JEREMIAH C. LYNCH

UNITED STATES MAGISTRATE JUDGE

TINA C. BRILZ, RPR, FCRR
Official Court Reporter
United States District Court
James F. Battin United States Courthouse
2601 Second Avenue North, Room 4209
Billings, Montana 59101

Proceedings recorded by FTR Gold recording, transcript produced
by mechanical stenography and computer.

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

PRESENT ON BEHALF OF THE PLAINTIFF, THE UNITED STATES OF AMERICA:

MR. CHAD C. SPRAKER
Assistant U.S. Attorney
OFFICE OF THE U.S. ATTORNEY
Paul G. Hatfield United States Courthouse
901 Front Street, Suite 1100
Helena, Montana 59626

PRESENT ON BEHALF OF THE DEFENDANT, DONALD MITCHELL JOHNSON aka Ski Johnson:

MR. MICHAEL DONAHOE
Assistant Federal Defender
FEDERAL DEFENDERS OF MONTANA
Great Northern Town Center
50 West 14th Street, Suite 300
P.O. Box 250
Helena, Montana 59601-0250

1 The following proceedings were had:

2

3 THE COURT: Now, the next matter before the court is
4 the time set for a hearing upon a motion for change of plea in
5 United States of America versus Donald Mitchell Johnson,
6 Criminal Cause 14-28 Butte.

7 Now, Mr. Spraker, I take it you're prepared to proceed on
8 behalf of the government?

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

10 THE COURT: And Mr. Donahoe, Mr. Johnson, good
11 afternoon. Both of you are prepared to proceed here today?

12 THE DEFENDANT: Yes.

13 MR. DONAHOE: Your Honor, I do have a matter I'd like
14 to take up just for a moment --

15 THE COURT: Sure.

16 MR. DONAHOE: -- if we could.

17 I don't want this to be a repeat performance of something
18 we went through several months ago, but it looks like it may
19 have the same trappings.

20 We're pleading here today without a plea agreement. There
21 was some extensive pretrial papers that went back and forth
22 before Judge Christensen. And some rulings were reserved by
23 His Honor in the case for trial. In a nutshell, what it
24 involves is a venue contention, that the scheme allegedly
25 occurs between 2011 and 2014.

1 On the back end of the alleged scheme, there are very
2 specific Montana events. I made an argument and a suggestion
3 to Judge Christensen -- to Chief Judge Christensen, that the
4 other matters were not one continuous scheme, but even if
5 assumed to be true, for those in their own right, they occurred
6 in other jurisdictions and should be litigated there. That was
7 the basic contention.

8 We filed, after the pretrial papers were completed and
9 Judge Christensen reserved his ruling, the notice to plead
10 guilty to the Montana fraud. And I was pretty explicit in the
11 motion that we were pleading to the Montana fraud. And I got
12 from the government that they had no objection to that. And we
13 were pleading without a plea agreement.

14 At five o'clock last night, which was some two weeks after
15 I had filed the motion to change the plea, the proof offer says
16 that the scheme extends from 2011 to 2014. And before --
17 because I know Your Honor's time is valuable -- we go through
18 this whole exercise, I guess I wanted some clarification on
19 what the government thinks we're pleading guilty to here today.

20 THE COURT: Let me give you my understanding, when I
21 read the Offer of Proof and then, of course, Mr. Spraker, I'm
22 going to give you an opportunity to make a record here. My
23 understanding is that the plea of guilty being made here today
24 was being made in relation to the two so-called donated Grammy
25 tickets to the Big Brothers and Sisters and the event which

1 occurred at the Big Sky Resort.

2 MR. DONAHOE: Right. That's it.

3 THE COURT: That's my understanding. But
4 Mr. Spraker, I give you an opportunity to enlighten me further.

5 MR. SPRAKER: Your Honor, the plea in this case
6 necessarily has to be to a sole count alleged in the
7 indictment, which is a scheme that extends from 2011 to 2014.
8 The defendant, of course, will be free to make arguments as to
9 relevant conduct in this case. The count that was determined
10 by the grand jury was to 2011 to 2014. And if the defendant
11 chooses to make arguments that certain acts are not part of
12 relevant conduct, he's certainly free to. But the --

13 THE COURT: Well, my problem is this: Before I
14 accept this plea, I need to know exactly what is being pled to,
15 as we all understand. What causes me concern is that the Offer
16 of Proof pertains to events which occurred in the State of
17 Montana solely. Is that fair to say? As to the Offer of
18 Proof? Other than a vague -- well, it doesn't even say --
19 first of all, the elements that are set forth, normally, I
20 require that those be set forth in terms of time and place.
21 Okay? This doesn't say anything about time and place, the
22 Offer of Proof. And so what I'm left with is a statement in
23 the first paragraph of the anticipated evidence that says "from
24 2011 to 2014, Johnson devised a scheme to defraud by
25 misrepresenting that he's a Grammy-nominated artist soliciting

1 funds for cancer."

2 Then everything which goes to support the findings of fact
3 that would make my conclusion whether the plea is voluntary and
4 informed, pertain only to events which occurred in Montana. Is
5 that accurate?

6 MR. SPRAKER: I disagree, Your Honor.

7 THE COURT: All right.

8 Then tell me why you disagree.

9 MR. SPRAKER: That was the count determined by the
10 grand jury that found that the defendant committed the scheme
11 to defraud from 2011 to 2014. There was certainly required to
12 be a wiring in furtherance in Montana, and that is required for
13 venue, which we do have in this case.

14 THE COURT: Well, now -- let me back up. Maybe I
15 didn't articulate what I'm saying here: For me to find that
16 this plea is being made voluntarily and on an informed basis, I
17 need to be satisfied that, first of all, Mr. Johnson
18 understands what he's pleading to, but I also need to be
19 convinced that the United States could, in fact, prove the
20 charge against him. What I have before me is solely facts
21 related to what occurred in Montana.

22 MR. SPRAKER: Correct.

23 THE COURT: So how can I make the determination that
24 he's pleading to something broader than that?

25 MR. SPRAKER: Well, the timeframe determined by the

1 grand jury was 2011 to 2014.

2 THE COURT: I understand that.

3 MR. SPRAKER: And that is the language that is
4 contained in the Offer of Proof. It doesn't talk -- and there
5 is case law to the effect that the government doesn't have to
6 state every single fact in its Offer of Proof to the court when
7 a defendant is --

8 THE COURT: I'm quite aware of that. But for me to
9 accept the plea, again, I need to be satisfied that the
10 government could, in fact, prove a conspir- -- or a wire fraud
11 that existed from 2011 to 2014.

12 MR. SPRAKER: Correct.

13 THE COURT: Right? That's the purpose of the Offer
14 of Proof.

15 MR. SPRAKER: Yes, Your Honor.

16 THE COURT: What I have before me in the Offer of
17 Proof are merely -- you have the broad statement, which I agree
18 with, "from 2011 to 2014." But the specific facts which would
19 support an informed plea, are those -- or my conclusion that
20 the government could prove this, are limited specifically to
21 the events which occurred in Montana. That's the problem I'm
22 having.

23 MR. SPRAKER: And if the court needs further facts to
24 support a scheme that was determined by the grand jury, we can
25 certainly do that. The one point of law I think would be

1 relevant in this case was, I believe, U.S. versus Miller, where
2 the Supreme Court -- and this is 471 U.S. 130 --

3 Excuse me, Your Honor.

4 Okay.

5 Excuse me. It's Griffin versus United States, 502 U.S.
6 46, 1991 from the Supreme Court, where the court said, citing
7 Miller, that when a jury returns a guilty verdict on an
8 indictment charging several acts in the conjunctive, as the
9 defendant in that indictment -- that case's indictment did, the
10 verdict stands if the evidence is sufficient with respect to
11 any one of the acts charged.

12 THE COURT: But I'm -- Mr. Spraker, I'm not dealing
13 here with a jury verdict.

14 MR. SPRAKER: I understand.

15 THE COURT: I'm dealing here with a determination I
16 have to make today in my conversation with Mr. Johnson whether
17 he's pleading on a voluntary and informed basis. Therefore, he
18 needs to understand what he exactly is pleading to.

19 Secondly, and perhaps more importantly, I have to be
20 convinced that the government could, in fact, prove all of the
21 facts necessary to convict Mr. Johnson of what he's intending
22 to plead guilty here to. What I have before me, is simply an
23 Offer of Proof which references a timeframe, granted, but then
24 the only -- the only specific facts that the government tells
25 me that they could prove in this Offer of Proof are facts

1 related to what occurred in Montana.

2 MR. SPRAKER: And if the court needs an amended Offer
3 of Proof to describe the scheme to defraud from 2011 to 2014,
4 we're certainly willing to do that.

5 THE COURT: Well, why am I here today, then?

6 MR. SPRAKER: Well, I don't think it's necessary. I
7 think the --

8 THE COURT: I do. Because I'm the one that has to
9 make the decision. Maybe we're not communicating well. I have
10 to make a decision that in my mind, Mr. Johnson -- I'm
11 repeating myself, but it's important, that he understands
12 exactly what he's pleading to. And also that he understands
13 what the government could prove. All right? My function is to
14 assure myself that I understand what the government could
15 precisely prove. So, if the government wants to say he's
16 pleading to something that's much broader than what occurred in
17 -- in relation to the May 2012 episode at Big Sky in Montana,
18 then it's got to tell me what that is. Right?

19 MR. SPRAKER: Well, I agree, Your Honor. And I think
20 what partially may be going on here is to accommodate
21 Mr. Donahoe's concern that he can challenge any relevant
22 conduct at sentencing, he's free to do so. And I imagine his
23 client may not want to admit to any particular scheme or any
24 acts that occurred in other states, but that doesn't take away
25 from the fact that the scheme to defraud did extend into

1 Montana, and that Mr. Johnson does desire to plead to that
2 particular act in furtherance of the scheme today. And so,
3 maybe this can't be worked out. Maybe he is not willing to
4 plead guilty to a scheme that occurred outside of Montana,
5 but --

6 THE COURT: Well, let's just be clear here, and then
7 I'm going to hear from you, Mr. Donahoe. You're telling me
8 that he's pleading guilty to just what happened in Montana, but
9 that there may be relevant conduct --

10 MR. SPRAKER: Correct.

11 THE COURT: -- that should be considered in
12 sentencing?

13 MR. SPRAKER: Yes, Your Honor.

14 THE COURT: But he's not pleading to that other
15 relevant conduct.

16 MR. SPRAKER: I don't think he has to. Because I
17 think that the particular acts that he engaged in in Montana
18 constitute part of the scheme to defraud in the indictment.
19 And that's sufficient for this case.

20 THE COURT: That's perhaps where you disagree,
21 Mr. Donahoe?

22 MR. DONAHOE: I do. And I think over the course of
23 30 years of practice, I think that we're getting to the point,
24 and I know Your Honor understands this very well, that we're no
25 longer in the days of pleading to one thing and getting

1 sentenced for another. That has substantially narrowed in the
2 past 25 years.

3 And I was just very express, especially in light of -- I
4 don't want to attribute any bad motives to Mr. Spraker.

5 THE COURT: No. Nor do I.

6 MR. DONAHOE: He's a fine lawyer, and he does good,
7 conscientious work. But frankly, this is the whole controversy
8 that arises out of the pretrial papers that Judge Christensen
9 really didn't rule on. And I saw this as a way to resolve the
10 case to everybody's satisfaction. But I was quite explicit in
11 telling Mr. Spraker that we were just on the table for the
12 Montana stuff. And I was actually quite surprised last night
13 at 4:48, or whatever, when I got the Offer of Proof, and saw
14 that it just tries to build in this alleged scheme, you know,
15 from 2011, which Judge Christensen was not willing to rule on
16 pretrial. He wanted to see how the proof was going to develop.
17 And I think that that's what we're resolving by the plea
18 agreement. We're here today to plead guilty to the Montana
19 stuff. The one wire fraud alleged in the superseding paper is
20 from Dulles, Virginia, to Montana and back. So . . .

21 THE COURT: Well, my -- of course, you understand,
22 I'm sure, my problem, if you will, is that there is no plea
23 agreement. There's a -- Mr. Johnson wants to plead guilty and
24 that's, of course, what Mr. Spraker is saying -- or his
25 position is that he's pleading guilty to what's set forth in

1 the superseding indictment. That's his position; that's not
2 your position.

3 MR. DONAHOE: Correct.

4 THE COURT: And without an agreement, how can I go
5 forward here today?

6 MR. DONAHOE: Well, that's why I wanted to raise it
7 at the top of hearing rather than --

8 THE COURT: That was a good idea.

9 MR. DONAHOE: Because I really didn't want to waste
10 your time.

11 THE COURT: So Mr. Spraker, it's the government's
12 intention that it would argue to Judge Christensen at the time
13 of sentencing that Mr. Johnson, if I were to accept his plea
14 today, would have pled to a much larger, if you will, wire
15 fraud than what he -- what is involved solely with the Montana
16 episode?

17 MR. SPRAKER: I'm sorry, Your Honor. I didn't
18 understand the first part of your question.

19 THE COURT: Well, what I'm saying is: You would go
20 to sentencing and you would say that Mr. Johnson pled to a wire
21 fraud which existed from 2011 to 2014, and involved perhaps a
22 multitude of victims versus just the Big Brothers and Sisters
23 in Big Sky, Montana?

24 MR. SPRAKER: Yes. And I think that, procedurally, a
25 defendant pleads guilty to an indictment and not to an Offer of

1 Proof.

2 THE COURT: I understand that. But you understand
3 when you submit this Offer of Proof, there's no way in hell
4 that I can accept his plea.

5 MR. SPRAKER: I disagree, Your Honor.

6 THE COURT: Well, tell me why you disagree when I
7 have to be convinced that the government could prove the facts
8 necessary to establish a wire fraud extending from 2011 to
9 2014. Tell me how I'm to do that.

10 MR. SPRAKER: Because I believe the acts that he
11 committed in Montana prove that scheme. And if he doesn't want
12 to get into the specific misrepresentations in other
13 jurisdictions, I don't think that's necessary. I think the --

14 THE COURT: Well, I do. I do. You have -- you're
15 just not listening, and that's your prerogative.

16 I cannot possibly accept a plea here today.

17 Mr. Donahoe, I take it your client does not want to go
18 forward and plead to a fraud extending from 2011 to 2014, and
19 multiple victims, unrelated victims, arguably?

20 THE DEFENDANT: No, Your Honor.

21 THE COURT: All right.

22 Then I'm not going to proceed here today.

23 The court stands in recess.

24 (The proceedings in this matter were adjourned at
25 2:52 p.m.)

C E R T I F I C A T E

I, court-approved transcriber, certify that the foregoing
is a correct transcript from the official electronic sound
recording of the proceedings in the above-entitled matter.

/s/ Tina C. Brilz, RPR, FCRR

Dated this 28th day of April, 2015.

UNITED STATES DISTRICT COURT

Butte Division, District of Montana

UNITED STATES OF AMERICA

v.

DONALD MITCHELL JOHNSON

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 14-28-BU-DLC

USM Number: 13670-046

Michael Donahoe

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.
- ☒ was found guilty on count(s) 1 of the single-count Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1343	Wire Fraud	11/20/2014	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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

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

FILED

NOV 13 2015

Clerk, U.S. District Court
District Of Montana
Missoula

11/12/2015

Date of Imposition of Judgment

Signature of Judge

Dana L. Christensen

Name and Title of Judge

Chief District Judge

11/13/2015

Date

DEFENDANT: DONALD MITCHELL JOHNSON
CASE NUMBER: CR 14-28-BU-DLC

PROBATION

The defendant is hereby sentenced to probation for a term of :

5 years.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DONALD MITCHELL JOHNSON
CASE NUMBER: CR 14-28-BU-DLC

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall be monitored by location monitoring technology at the discretion of the United States Probation Officer for a period of 6 months, and shall abide by all technology requirements. The defendant shall pay all or part of the costs of participation in the location monitoring program as directed by the Court and United States Probation Officer. This form of location monitoring technology shall be utilized to monitor the following restriction on the defendant's movement in the community as well as other court-imposed conditions of release:

You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved in writing by the United States Probation Officer.

2. The defendant shall participate in a program for mental health treatment, to address criminal thinking and cognitive restructuring, as deemed necessary by the United States Probation Officer, until such time as the defendant is released from the program by the probation officer. The defendant is to pay part or all of the cost of this treatment, as determined by the United States Probation Officer.

3. The defendant will provide the United States Probation Officer with any requested financial information and shall incur no new lines of credit without prior written approval of the United States Probation Officer.

4. The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.

5. All employment must be approved in advance in writing by the United States Probation Office. The defendant shall consent to third-party disclosure to any employer or potential employer.

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

DEFENDANT: DONALD MITCHELL JOHNSON
 CASE NUMBER: CR 14-28-BU-DLC

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$ 5,648.58

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

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

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Big Sky Resort / Barb Rooney		\$852.80	
Anna Reardon / Neely Burman Big Brothers Big Sisters of Montana		\$4,795.78	

TOTALS	\$	0.00	\$	5,648.58
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

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

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

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

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

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

DEFENDANT: DONALD MITCHELL JOHNSON
CASE NUMBER: CR 14-28-BU-DLC

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall pay restitution in the total amount of \$5,648.58 at a rate of not less than \$100 per month or as otherwise directed by U.S. Probation. Restitution payments shall be made to the Clerk, United States District Court, P.O. Box 8537, Missoula, MT 59807. Restitution shall be disbursed to the victims listed in the payee table above.

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

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

☐ Joint and Several

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

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

CHAD C. SPRAKER
Assistant U.S. Attorney
U.S. Attorney's Office
901 Front Street, Suite 1100
Helena, MT 59626
Phone: (406) 457-5120
FAX: (406) 457-5130
Email: Chad.Spraker@usdoj.gov

ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

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

UNITED STATES OF AMERICA,	CR 14-28-BU-DLC
Plaintiff,	
vs.	<u>NOTICE OF APPEAL</u>
DONALD MITCHELL JOHNSON,	
Defendant.	

NOTICE IS HEREBY GIVEN that the United States of America, by and through Chad C. Spraker, Assistant United States Attorney, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment imposed in open court on November 12, 2015, and entered on the Court's docket on November 13, 2015.

Respectfully submitted this 19th day of November, 2015.

MICHAEL W. COTTER
United States Attorney

/s/ Chad C. Spraker
Assistant U.S. Attorney
Attorney for Plaintiff

MICHAEL DONAHOE
Senior Litigator
Federal Defenders of Montana
Helena Branch Office
50 West 14th Street, Suite 300
Helena, Montana 59601
(406) 449-8381
(406) 449-5651 (Facsimile)

Counsel for Defendant Donald Mitchell Johnson

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

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DONALD MITCHELL JOHNSON,
Defendant.

D.C. Docket No. CR 14-28-BU-DLC

**NOTICE OF APPEAL OF
CONVICTION BY JURY
AND NOTICE OF CROSS-
APPEAL ON SENTENCE**

**DANA L. CHRISTENSEN
CHIEF UNITED STATES
DISTRICT COURT JUDGE**

Notice is hereby given that Donald Mitchell Johnson appeals to the United States Court of Appeals for the Ninth Circuit from his conviction. Mr. Johnson was convicted by a jury on July 28, 2015 (District Court ECF Nos. 94 and 95) and Judgment was entered on the district court docket on November 13, 2015.

Notice is also given that defendant cross-appeals from the government's appeal of the sentence imposed in open court on November 12, 2015, and entered on the Court's docket on November 13, 2015. The government's Notice of Appeal having been filed on November 19, 2015.

Respectfully Submitted November 25, 2015.

/s/ Michael Donahoe
MICHAEL DONAHOE
Senior Litigator

Counsel for Defendant

CERTIFICATE OF SERVICE
L.R. 5.2(b)

I hereby certify that on November 25, 2015, a copy of the foregoing document was served on the following persons by the following means:

 1 CM-ECF

 Hand Delivery

 Mail

 Overnight Delivery Service

 Fax

 E-Mail

1. CLERK, UNITED STATES DISTRICT COURT

1. Chad C. Spraker
 Assistant United States Attorney
 901 Front Street, Suite 300
 Helena, MT 59626
 Counsel for the United States of America

 /s/ Michael Donahoe
MICHAEL DONAHOE
Senior Litigator
Counsel for Defendant