
No.

in the
Supreme Court
of the
United States

KELLY HARRIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a criminal defendant's constitutional rights guaranteed by the Sixth and Fourteenth Amendment to testify in her own defense are violated during sentencing by the application of a two-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice when the enhancement is applied by the District Court simply because the jury did not believe a defendant's testimony.

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is provided below:

Kelly Harris

United States of America

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits these cases which are directly related to this Petition:

United States of America v. Neal Harris, No. 24-5627, Sixth Circuit Court of Appeals, consolidated with *United States of America v. Kelly Harris*, No. 24-5622 for purposes of decision and oral argument. Opinion entered December 17, 2025.

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The Petitioner, Kelly Harris, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on December 17, 2025.

OPINION BELOW

The Sixth Circuit's unpublished opinion is attached as Appendix 1. The Transcript of Sentencing is attached as Appendix 2. The District Court's Statement of Reasons is attached as Appendix 3.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on December 17, 2025. No petition for rehearing was filed. This petition is timely filed. The Court's jurisdiction is invoked pursuant 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sentencing Guidelines, at U.S.S.G. § 3C1.1, provide:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by **2** levels.

STATEMENT OF THE CASE'

Petitioner Kelly Harris ("Mrs. Harris") and her husband Neal Harris ("Mr. Harris") have resided in Lexington, Kentucky for thirty years. During this time, they have operated multiple charities and church organizations, and have endeavored to give back to their community through acts of service.

In the first quarter of 2020, the federal government announced that a deadly virus had invaded the United States and was making its way around the world. The virus was named COVID-19. The federal government took action to mitigate the spread of COVID-19. The action resulted in essentially shutting down the economy not only in the United States, but globally. This act caused tremendous hardships on people and businesses.

On March 25, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which was signed into law on March 17, 2020, to address issues related to the onset of the COVID-19 pandemic. In accordance with the CARES ACT, the government made grants and loans available to people and businesses. The government authorized the Small Business Association ("SBA") to increase eligibility for small businesses to receive grants and/or loans under the Economic Injury Disaster Loan programs ("EIDL").

The SBA, as the organization responsible for administering the EIDL loans, published detailed eligibility requirements to obtain the loan, use of the loan, and other requirements. Applicants for EIDL loans applied through the SBA via an online portal and application. In applying for EIDLs, applicants electronically

certified that the information provided was accurate.

The Indictment alleges that from on or about May 5, 2020, and continuing through on or about July 25, 2020, in the Eastern District of Kentucky, Mrs. Harris and Mr. Harris devised and intended to devise a scheme to defraud the United States, various financial institutions, and individuals, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises on EIDL applications.

The Indictment alleges that Mrs. Harris submitted EIDL loan applications on behalf of Ruby Bailey, Northside Market, and Turtle Dove that included false information about revenue, lost rents, and number of employees. The Indictment further alleges that three of the loan applications were approved and that Mrs. Harris received interstate wires constituting the loan proceeds. The indictment makes similar allegations against Mr. Harris relative to EIDL loan applications and proceeds for Grace Christian Fellowship Church (“Grace Christian”), and American Workhorse LLC (“American Workhorse”).

At trial, Mrs. Harris testified on her own behalf. Mrs. Harris testified that Ruby Bailey had been operating since 1997, but was incorporated in 2000. Mrs. Harris also testified that Turtle Dove started in 2018 or 2019. R. 173, Transcript, Day 3 PageID#1557 at PageID#1616. Mrs. Harris testified that Ruby Bailey was about providing a variety of services that were needed by a community, and that Turtle Dove was to teach minority kids how to farm. Mrs. Harris testified that Turtle Dove also performed services as a vendor. Mrs. Harris testified that Turtle

Dove did open in the 880 E. Main Street location, and that she “had certificates showing we were there.” Id. at PageID#1616-1620.

Mrs. Harris testified that she had cash flow problems in 2020 and that her businesses were greatly impacted by the pandemic. Id. at PageID# 1620. Mrs. Harris testified that she filed the loan applications at issue in good faith and that she was unable to find resources to assist her with the application process. Mrs. Harris acknowledged that she put a sign up at the Ruby Bailey location on Short Street stating the location was closed in March of 2020 because the government had ordered business owners to shut down. Id. at PageID#1622.

Mrs. Harris testified that in entering in the various figures on the loan applications concerning gross revenue and cost of goods, etcetera, she was acting in good faith with no intent to deceive. Id. at PageID#1625. Mrs. Harris was asked about the loan applications. She stated that the applications introduced into evidence at trial did not look like the applications she submitted, which had been submitted on her phone thereby making them difficult to read or review. Id. at PageID#1628-1629; PageID#1629-1630. Mrs. Harris testified that the duplicate applications were caused by system errors during the submission process that lead her to believe the applications had either been rejected or not fully submitted. PageID# 1631-1633. Mrs. Harris testified that she created the accounts at Central Bank, and that Mr. Harris went into the bank with her, and signed the signature card for Ruby Bailey at her request. Id. at PageID#1632-1633.

Mrs. Harris acknowledged that she had been through a training on how to

obtain SBA loans, but claimed that no one knew anything about how to actually do it because the program kept changing. Id. at PageID#1641-1642. She testified that the first application she filed was for Ruby Bailey Family Service Center, and that it reflected revenues of \$378,000 in 2019. She testified that this income was reflected on the tax return filed for that year. She denied that the tax return was only filed in October 2020, after the SBA funds had been returned to the SBA. Mrs. Harris testified that the return was sent out in the mail prior to that. Id. at PageID#1642. When asked whether she had business records to substantiate this, other than the tax return, she stated that she did have business records. Id. at PageID# 1644. Then Mrs. Harris went on to state, and “I do believe...” But she was interrupted by the counsel for the Government, who said “just a minute ma’am.” And then the Court stated: “Yeah, just wait for the next question.” Id. at PageID# 1644-1645. This exchange prevented Mrs. Harris from fully explaining her answer, as she should have been entitled to do.

When asked about the employees for Ruby Bailey, (which she listed as having ten employees on the application) Mrs. Harris stated that Ruby Bailey had “a lot of employees, little kids.” She stated that she was known for employing kids, and had been given grant money to do so in the past by Lexington Fayette Urban County Government. Id. at PageID#1643-1644. Mrs. Harris testified that the only employees of Ruby Bailey were children, who she paid to perform work. Id. at PageID#1660.

When asked about the second application filed for Ruby Bailey, Mrs. Harris

testified that as far as she was aware the first one never went through. She stated: “I have documents right over there showing that SBA loan never went through.” Id. at PageID#1644. Mrs. Harris’s attorney failed to introduce these documents into evidence during Mrs. Harris’s direct testimony.

Mrs. Harris testified that Turtle Dove did in fact operate at 800 E. Main. Mrs. Harris explained there had been a conflict with the landlord, and stated that Turtle Dove did in fact pay rent for 800 E. Main – a check that was held by the landlord pursuant to the parties’ agreement. Id. at PageID#1646. Mrs. Harris testified that Turtle Dove did work on the 800 Main Street location, and had four walk-throughs with the Department of Agriculture and black farmers. Mrs. Harris testified that she applied for a permit from the Health Department, and that Turtle Dove set up produce stands and sold from the lot at 800 E. Main. Id. at PageID#1646-1650.

Mrs. Harris testified at length about how Turtle Dove was locked out of 800 E. Main Street by the landlord. She acknowledged that despite this, she still put 800 E. Main Street as the address for the entity when she completed a tax return for that entity in July 2020 and sent a screenshot of the return to the SBA. The IRS search for records returned no records for Turtle Dove, but Mrs. Harris testified that she mailed it. She also testified that she had been told in SBA training that since Turtle Dove had more than one location, she should just pick one to put on the application. Id. at PageID#1652.

Mrs. Harris confirmed that she stated Northside Market made \$288,000 the

prior year, and that Turtle Dove has \$200,000 the prior year, stating: “I don’t know the exact numbers on it, but I do know we made money, yes.” Id. at PageID#1664.

After the close of the case, during the charge conference, the Court ruled that the good faith instruction should be given. Id. at PageID#1765. The jury found Mrs. Harris guilty on all Counts.

During sentencing, the Government presented a chart to the Court regarding the obstruction adjustment. The chart includes in one column Mrs. Harris’s testimony and in the other the evidence that contradicted her testimony. R. 182, Sentencing Transcript, at PageID#1966. The chart included 16 statements made by Mrs. Harris on the stand, and included reference to facts that the Government argued undermined or established the falsity of Mrs. Harris’s testimony. Id. at PageID#1965-1968.

In Response, counsel for Mrs. Harris argued that Mrs. Harris had an absolute right to testify at trial, and that her testimony was not false, but rather reflected the fact that she was an unsophisticated business person who answered questions to the best of her ability and did not understand the technical aspects of the various loan applications. Counsel for Mrs. Harris noted that the testimony throughout the trial was that the entities at issue did in fact exist, and did work in the community over the years. He pointed out that the evidence addressed by the Government did not directly contradict Mrs. Harris’s testimony, but rather undermined its credibility. Thus, he argued that the obstruction of justice enhancements should not apply. Id. at PageID# 1968-

1972.

The District Court found that the enhancement for obstruction of justice applied. *Id.* at PageID#1993. The Court imposed a sentence of 46 months' imprisonment. R. 130, Judgment, PageID#780. The Court included an explanation of the basis for the sentence in the case in its Statement of Reasons, but did not make any specific findings relating to the allegations of perjury in connection with the obstruction of justice enhancement. R. 142-1, Statement of Reasons, at PageID#882-883, Appendix at 3.

Mrs. Harris appealed her conviction to the Sixth Circuit Court of Appeals, arguing that her conviction and sentence must be set aside because insufficient evidence exists to support the jury's guilty verdict in this case. In addition, Mrs. Harris argued that the sentence imposed by the District Court was unreasonable due to the application of the two-level obstruction of justice enhancement and a two-level enhancement for the use of sophisticated means. Mrs. Harris also argued that she received ineffective assistance of counsel.

After hearing oral arguments, the Sixth Circuit denied this appeal on December 17, 2025. As to Mrs. Harris's argument on the application of the obstruction of justice enhancement under U.S.S.G. § 3C1.1, the Sixth Circuit determined:

We have explained the steps a district court should follow when applying a perjury-based obstruction enhancement. The district court should first "identify those particular portions of the defendant's testimony that it considers to be perjurious." *United*

States v. Castro, 960 F.3d 857, 870 (6th Cir. 2020) (quotation omitted). Then it “must either make specific findings for each element of perjury or at least make a finding that encompasses all of the factual predicates for a finding of perjury.” *Id.* (quotation omitted). These predicates “are that (1) the defendant gave false testimony (2) concerning a material matter and (3) with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” *Id.*

The district court found that Kelly perjured herself at least four times. Those four times included when Kelly testified that: (1) Ruby Bailey had \$378,000 in revenue; (2) Turtle Doves was an operating entity at 800 Main Street; (3) she paid rent on the Turtle Doves property; and (4) Ruby Bailey had three employees. Regarding all four statements, the district court’s factual findings were not against the weight of the evidence. And its three-part analysis of each statement’s falsity, willfulness, and materiality was not clearly erroneous. Careful not to “penalize the defendant for the decision to take the stand,” R. 182, PageID 1975, the district court addressed Kelly’s false statements one-by-one and made specific findings that each satisfied the elements of perjury.

Take Kelly’s testimony about Ruby Bailey’s income. At trial, the government asked Kelly, “It’s your testimony that Ruby Bailey had \$378,000 in revenue in 2019?” R. 173, PageID 1642. Kelly replied, “Yes, and we did file a tax return showing that.” *Id.* The district court concluded that this figure was false because the jury found Kelly guilty on Count 5, which charged that she “falsely claim[ed] [Ruby Bailey] had gross receipts of \$378,000.” R. 1, PageID 5. The district court also correctly found that this statement was material because the SBA calculated her loan amount based on that same false revenue figure. Finally, the district court correctly considered this statement to be intentionally false because, again, in convicting Kelly on Count 5, the jury found an intent to defraud with respect to the Ruby Bailey application.

Kelly argues that, even if these statements were false,

they were the result of “confusion, mistake, or faulty memory” and thus fail to satisfy the element of willfulness. D. 37 at p.52 (quotation omitted). For example, she insists that the false employee counts cannot support a perjury finding because she was confused about whether the SBA considered volunteers and children to be employees. But that does nothing to explain Kelly’s unequivocal testimony about Ruby Bailey’s revenue amount for 2019. Kelly offers no plausible argument that her testimony of Ruby Bailey’s revenue—which was very specific and remained consistent across the EIDL application, the post-hoc tax return, and her testimony—resulted from confusion or mistake. And there need be only one instance of perjury to justify an obstruction enhancement. Kelly’s testimony about Ruby Bailey’s income was perjurious, so we need not analyze the other statements.

(Appendix 1, pp.11-12)

REASONS FOR GRANTING THE PETITION

A. The Right To Testify In One’s Own Defense Must Be Zealously Guarded.

A criminal defendant has a fundamental constitutional right to testify in their own defense. That right arises from the Sixth Amendment’s guarantees of compulsory process and the right to present a defense and the Fourteenth Amendment’s Due Process Clause, which ensures a meaningful opportunity to be heard. In *Rock v. Arkansas*, the Supreme Court held that “the right to testify on one’s own behalf at a criminal trial has sources in several provisions of the Constitution” and is a “necessary corollary” to the rights guaranteed by the Sixth Amendment. 44, 51–53 (1987). The Court further emphasized that the right is personal to the defendant, and that restrictions on a defendant’s own testimony

“may not be arbitrary or disproportionate to the purposes they are designed to serve.” *Id.* at 55–56.

This constitutional protection is also grounded in the Fourteenth Amendment, which prohibits procedures that deprive a defendant of a full and fair opportunity to present their version of events. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). When a defendant chooses to testify, the Due Process Clause requires that their testimony be evaluated under established trial procedures and credibility determinations—not punished simply because the factfinder disbelieved them. Because of the central role this right plays in the adversarial system, courts have repeatedly warned against turning a defendant’s exercise of the right to testify into an automatic basis for enhanced punishment. In *United States v. Dunnigan*, the Supreme Court held that an obstruction-of-justice enhancement based on alleged perjury is permissible only if the court makes independent findings identifying (1) the specific testimony alleged to be false, and (2) evidence establishing each element of perjury. 507 U.S. 87, 95 (1993). This requirement protects the constitutional right to testify by ensuring that a defendant is not penalized merely for presenting their defense or for offering testimony the jury declines to credit.

When a sentencing court imposes an obstruction enhancement without making the findings *Dunnigan* requires—or when it treats the jury’s adverse verdict as sufficient proof of perjury—the constitutional right to testify is effectively

abrogated. See *United States v. Sassanelli*, 118 F.3d 495, 501 (6th Cir. 1997) (reversing enhancement where findings were inadequate because courts must do more than point to a jury's disbelief). Such reasoning collapses the defendant's right to take the stand into a risk that any unsuccessful defense theory will be punished as obstruction. The Supreme Court has cautioned that constitutional rights cannot be penalized, and that a defendant cannot be deterred from testifying by the threat that adverse inferences alone will trigger enhanced punishment. *Griffin v. California*, 380 U.S. 609, 614 (1965).

Thus, when a court treats a defendant's testimony as perjurious simply because the jury found guilt, or without citing affirmative evidence establishing falsity and willfulness, the defendant is punished for exercising their Sixth and Fourteenth Amendment right to tell their story. That result is incompatible with *Rock*, inconsistent with *Dunnigan*, and erodes the core protections the Constitution affords a defendant who chooses to testify in their own defense.

B. The Two-Level Enhancement For Obstruction Of Justice Was Improper.

The Sentencing Guidelines recommend a two-level enhancement for a defendant who has willfully obstructed or attempted to obstruct the administration of justice with respect to the prosecution of the offense of conviction. See U.S.S.G. § 3C1.1. It is well-established that the enhancement applies to a defendant who "testified falsely concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion,

mistake, or faulty memory." *United States v. Chance*, 306 F.3d 356, 390(6th Cir. 2002) (citations and quotations omitted).

"[C]ommitting, suborning, or attempting to suborn perjury" constitutes obstruction of justice for the purposes of the enhancement. *Id.* cmt. n. 4(b). To ensure that the sentences of defendants who testify and are subsequently found guilty are not automatically enhanced under section 3C1.1, in the event the defendant objects to this enhancement, this Court is required to make independent findings to support the enhancement. *United States v. Dunnigan*, 507 U.S. 87, 95 (1993); *United States v. Zajac*, 62 F.3d 145, 149 (6th Cir. 1995). Those findings must (1) identify particular portions of the defendant's testimony that it considers to be perjurious, and (2) make specific findings for each element of perjury. *United States v. Sierra-Villegas*, 774 F.3d 1093, 1102-03 (6th Cir. 2014).

In ruling that the obstruction enhancement should apply, the District Court relied on two categories of statements by Mrs. Harris: 1.) Mrs. Harris's testimony regarding the number of employees and revenue of Ruby Bailey, which the court found were proved perjurious by state tax records and worker's compensation records that show zero identified employees for any of the entities; 2.) Mrs. Harris's testimony that she paid rent and operated Turtle Dove at 800 E. Main Street, which the court found was disproved by the fact that rent was not actually paid and photos introduced by the Government showed no business operations at 800 E. Main St. R. 182, Sentencing Transcript, at PageID#1978-1980.

The problem with these findings is that they ignore the actual testimony of Mrs. Harris. First, with regard to Ruby Bailey's revenue, Mrs. Harris testified that believed the number on the application to be accurate – tax returns for the entity that were introduced into evidence at trial reflect the same number for Ruby Bailey's revenue as was stated on the loan application. R. 173, Transcript, Day 3, PageID#1642, 1644. With regard to the issue of employees, Mrs. Harris testified that she employed children, whom she paid cash for work. Id. at PageID#1643. This testimony was in fact supported by the testimony of multiple witnesses presented by the defense.

With regard to Turtle Dove, Mrs. Harris specifically testified that she paid rent to her landlord but that the rent was abated due to code violations and then the landlord cancelled the lease and evicted her from 800 E. Main Street. Id. at PageID#1646-1650. She further testified that she did in fact conduct operations out of the 800 E. Main location, but was closed due to government orders during COVID. The photo taken of this location shows a Turtle Dove sign. Id.

There was no concrete evidence introduced at trial by the Government that demonstrated Mrs. Harris's testimony was false. The District Court's discussion and supposed findings do not rise to the required level of specificity. The District Court noted the allegedly "false" testimony, and then also discussed Mrs. Harris' explanation of these facts and the reason she believed them to be true. The District Court did not cite to any evidence supporting a conclusion that these statements

were perjury.

The Sixth Circuit opinion upholding this analysis likewise fails to point to any evidence supporting a conclusion that these statements were perjury. Instead, the Sixth Circuit concludes: “ The district court concluded that this figure was false because the jury found Kelly guilty on Count 5, which charged that she ‘falsely claim[ed] [Ruby Bailey] had gross receipts of \$378,000.’” Opinion, Appx. 1, at p. 12. Both the Sixth Circuit and the District Court concluded that because the jury did not believe Mrs. Harris, she committed perjury – both courts reference the fact that the jury rejected Mrs. Harris’s good faith defense and found fraud to exist. PageID #1976-1981.

A finding of perjury requires the trial court to identify the testimony that is alleged to be false, and also the specific evidence that proves it to be so. Neither the district court’s findings in support of the obstruction of justice enhancement nor the Sixth Circuit’s opinion identify evidence presented at trial that establishes the falsity of any part of Mrs. Harris’s testimony.

The facts in *United States v. Iossifov*, 45 F.4th 899, 923 (6th Cir. 2022) demonstrate the level of proof needed to support application of the enhancement – proof that is simply not present in this case. In *Iossifov*, the Court pointed to two pieces of the defendant’s testimony that were directly contradicted and proven to be false by documentary evidence and testimony at trial. In this case, the enhancement

was applied based on a determination that Mrs. Harris must have been committing perjury because the jury evidently did not find her testimony to be credible. Neither the District Court nor the Sixth Circuit has pointed to any evidence directly contradicting Mrs. Harris's testimony or proving it to be false. "The government bears the burden of proving by a preponderance of the evidence that the enhancement applies." *Iossifov*, 45 F.4th at 923. Here, the preponderance of the evidence does not support application of the enhancement, and Mrs. Harris's sentence must be vacated with remand for sentencing.

Finally, it should be considered that if Mrs. Harris's testimony constituted perjury based on the evidence presented, then no doubt the good faith jury instruction would have been inappropriate. *See, e.g. United States v. Tarwater*, 308 F.3d 494, 510 (6th Cir.2002) ("Generally, a defendant is entitled to an instruction on defense theories that are supported by law and raised by the evidence presented." (citing *United States v. Duncan*, 850 F.2d 1104, 1118 (6th Cir.1988))).

The obstruction of justice enhancement should be reserved for deliberate and material conduct. It should not punish a defendant for exercising their right to testify or explaining why they are entitled to a good faith defense.

In sum, the Sixth Circuit's analysis of the effect of this constitutional violation was lacking and did not follow this Court's precedents. This Court should grant certiorari, and reverse the Sixth Circuit's determination.

CONCLUSION

Harris requests that this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for a new trial.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Jessica K. Winters". The signature is written in dark ink and is positioned above the typed name and contact information.

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Appendix

Tab 1 – Sixth Circuit Opinion

Tab 2- Sentencing Transcript

Tab 3 – Statement of Reasons

NOT RECOMMENDED FOR PUBLICATION

File Name: 25a0584n.06

Case Nos. 24-5622/5627

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED Dec 17, 2025 KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KELLY HARRIS; NEAL HARRIS, Defendants-Appellants. ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY OPINION

Before: GRIFFIN, THAPAR, and MATHIS, Circuit Judges.

MATHIS, Circuit Judge. Kelly and Neal Harris submitted fraudulent applications to the federal government’s COVID-19 relief program. They received over \$300,000 in business loans as a result. A jury convicted Kelly and Neal¹ of multiple counts of wire fraud. On appeal, the HARRISES challenge their convictions and the reasonableness of their sentences. Kelly also claims she received ineffective assistance of counsel at trial. We affirm.

I.

In March 2020, Congress appropriated funds for the COVID-19 Economic Injury Disaster Loan (“EIDL”) program to address economic hardship to businesses across the United States. Administered by the Small Business Association (“SBA”), the EIDL program provided loans and grants to help small businesses meet operating costs during the pandemic.

¹ Because the defendants share a last name, we refer to them by their first names.

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Business owners submitted EIDL applications online to the SBA. Applicants provided basic information about their business, including gross revenues, which the SBA used to calculate the business's working capital needs for six months. Businesses were also eligible to receive grants of \$1,000 per employee, up to \$10,000 per business. Given the urgency and magnitude of the pandemic, the SBA did not independently verify the information provided by applicants.

Between May 5, 2020, and July 25, 2020, Kelly and Neal Harris, who are married, submitted numerous EIDL applications for businesses they purportedly operated. These businesses, however, were largely a sham, each with little-to-no revenue, employees, or physical presence.

Kelly submitted applications for three entities: Ruby E. Bailey Family Service Center, Inc. ("Ruby Bailey"), Turtle Doves LLC, and North Side Market. Neal submitted applications for two entities: Grace Christian Fellowship Church ("Grace Christian") and American Workhorse LLC. Their strategy was to submit multiple applications for the same entity, tweaking the number of employees and other metrics until they were approved. For example, the initial applications for Ruby Bailey and Grace Christian were declined until the Harrises changed the industry sector from "faith-based" to "agricultural." This is notable because, at the time, the SBA approved EIDL funds only for agricultural enterprises.

The SBA approved relief for three entities and deposited the funds into the Harrises' joint accounts at Central Bank: \$102,200 for Turtle Doves, \$152,900 for Ruby Bailey, and \$99,200 for Grace Christian.² According to the information provided on the approved applications, Ruby Bailey had annual revenues of \$378,000 and three employees, Turtle Doves had annual revenues

² These totals reflect the combined amounts each entity received in loans and advances. Although American Workhorse did not receive an EIDL loan, it did receive a \$3,000 advance.

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of \$247,926 and five employees, and Grace Christian had annual revenues of \$198,459 and three employees. Again, the Harrises described each business as “agricultural,” despite referring to Ruby Bailey and Grace Christian on prior, declined applications as “faith-based organizations.”

In the summer of 2020, Central Bank noticed that the Harrises were making large cash withdrawals of their EIDL funds. After reporting these transactions to federal authorities, the bank returned the unspent EIDL funds—\$186,503.37—to the SBA. The Harrises had withdrawn nearly half of the \$357,300 they received from the SBA.

A grand jury returned a twelve-count indictment against Kelly and Neal alleging wire fraud under 18 U.S.C. § 1343, for obtaining or attempting to obtain “EIDL proceeds under false and misleading pretenses.” R. 1, PageID 3. Specifically, Kelly was charged with four counts of wire fraud for filing false applications for Ruby Bailey, Turtle Doves, and North Side Market and four counts of wire fraud for receiving funds for Ruby Bailey and Turtle Doves. Neal was charged with two counts of wire fraud for filing false applications for Grace Christian and American Workhorse and six counts of wire fraud for receiving funds for Ruby Bailey, Turtle Doves, and Grace Christian.

The Harrises exercised their right to a jury trial. At trial, the government presented evidence showing that much of the information Kelly and Neal provided on their EIDL applications was false. According to federal agents, tax records and state unemployment records showed no evidence of employees at any of the funded entities. And despite the Harrises’ claims of six-figure annual revenues for each entity, Kelly declared no personal or business income in 2019, while Neal declared only \$31,628 in gross business income, all from a barbeque business.

Moreover, investigators found no evidence that the three businesses functioned at the addresses that the Harrises provided. One agent testified that the address Kelly listed for North

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Side Market belonged to a Pizza Hut that had shut down. The government also offered evidence of the Harrises' efforts to make the funded entities appear more legitimate after the fact. For example, after Central Bank returned the funds to the SBA, Kelly completed a 2019 tax return for Ruby Bailey claiming the same revenue figures she provided to the SBA.

How did Kelly and Neal respond to this evidence? Kelly testified that much of the information she provided on the applications was correct and that any false information was the result of good-faith mistakes on her part. She also stated that her understanding of "employees" included children earning cash. Like Kelly, Neal testified that any false or inconsistent information on his applications was the result of mistake, not fraud. The jury convicted the Harrises on all counts.

The case proceeded to sentencing. The district court applied sentencing enhancements to Kelly and Neal for: (1) obstruction of justice, under U.S.S.G. § 3C1.1; and (2) using sophisticated means, under U.S.S.G. § 2B1.1. After applying those enhancements, Kelly's advisory Sentencing Guidelines range was 46 to 57 months' imprisonment. Neal's advisory Guidelines range was 37 to 46 months' imprisonment. The district court sentenced Kelly to 46 months' imprisonment and Neal to 37 months' imprisonment. The Harrises timely appealed.

II.

On appeal, Kelly and Neal both argue that the government presented insufficient evidence to sustain their wire-fraud convictions and that their sentences are substantively unreasonable. Kelly separately argues that her sentence is procedurally unreasonable because the district court improperly applied obstruction-of-justice and sophisticated-means sentencing enhancements. She also claims that she received ineffective assistance of counsel at trial. We address each challenge in turn.

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A. Sufficiency of the Evidence

We begin with the Harrises’ challenges to their wire-fraud convictions. “We review de novo the sufficiency of the evidence to sustain a conviction.” *United States v. Emmons*, 8 F.4th 454, 477 (6th Cir. 2021) (citation modified). We ask “whether, after 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.” *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (quotation omitted). In answering this question, we leave it to the jury “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Id.* (quotation omitted). So we “resolve all issues of credibility in favor of the jury’s verdict,” *United States v. Johnson*, 79 F.4th 684, 711 (6th Cir. 2023) (quotation omitted), and “reverse a judgment for insufficient evidence only if the judgment is not supported by substantial and competent evidence upon the record as a whole,” *United States v. Vichitvongsa*, 819 F.3d 260, 270 (6th Cir. 2016) (quotation omitted). Such evidence must merely be “more than a scintilla.” *United States v. Grubbs*, 506 F.3d 434, 439 (6th Cir. 2007) (quotation omitted).

“Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.” *United States v. LaVictor*, 848 F.3d 428, 456 (6th Cir. 2017) (quotation omitted). Therefore, “a defendant claiming insufficiency of the evidence bears a very heavy burden.” *Emmons*, 8 F.4th at 478 (quotation omitted).

The wire-fraud statute makes it a crime for:

[w]hoever, having devised . . . 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 . . . in interstate or foreign commerce, any writings . . . for the purpose of executing such scheme or artifice[.]

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18 U.S.C. § 1343. The government must prove three elements to sustain a wire-fraud conviction: “(1) a scheme or artifice to defraud; (2) use of interstate wire communications in furtherance of the scheme; and (3) intent to deprive a victim of money or property.” *United States v. Daniel*, 329 F.3d 480, 485 (6th Cir. 2003) (quotation omitted). The Harrises do not contest the use of interstate wire communications.

They argue that the government failed to establish a scheme to defraud and intent to deprive. A scheme to defraud includes “any plan or course of action by which someone intends to . . . deprive another by deception of money or property by means of false or fraudulent pretenses, representations, or promises.” *Id.* at 485 (quotation omitted). To satisfy this element, “the government must prove that the defendant said something materially false,” *id.* at 486 (emphasis omitted), that could have influenced a “person of ordinary prudence and comprehension,” *United States v. Robinson*, 99 F.4th 344, 355 (6th Cir. 2024) (citation modified). For the intent-to-deprive element, the government must prove specific intent—that “the misrepresentation or omission must have the purpose of inducing the victim of the fraud to part with property or undertake some action that he would not otherwise do absent the misrepresentation or omission.” *Daniel*, 329 F.3d at 487 (quotation omitted).

There is sufficient evidence to sustain the wire-fraud convictions for Kelly and Neal. So, for the reasons below, both defendants’ sufficiency-of-the-evidence challenges fail.

1.

Starting with Kelly, there is substantial evidence that she engaged in a scheme to defraud the SBA by making materially false representations on her EIDL applications. The government introduced evidence that Kelly, when she submitted her applications, misrepresented the dates of establishment, gross receipts, lost rents, and number of employees for Turtle Doves and North Side

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Market. She also falsely represented the gross receipts, lost rents, and number of employees for Ruby Bailey. Because of her misrepresentations, Kelly received funds from the SBA into accounts she established at Central Bank for her purported businesses. Kelly's representations were material, given that revenue figures and employee counts were key metrics the SBA used to determine how much money applicants should receive. Faced with gaps and inconsistencies about the revenue history and number of employees for Turtle Doves, North Side Market, and Ruby Bailey, the jury reasonably determined that Kelly made false representations.

Indeed, the false representations influenced the SBA to part with federal funds. Although the SBA relaxed some of its review standards considering the difficult economic conditions during the COVID-19 pandemic, Kelly asserts incorrectly that the agency simply rubberstamped her applications, regardless of their falsity. On the contrary, it was only after Kelly began falsely claiming her businesses were "agricultural" that the SBA began approving her applications.

The jury could infer Kelly's intent to deceive from the circumstantial evidence presented at trial. *See United States v. Davis*, 490 F.3d 541, 549–50 (6th Cir. 2007). For example, the bank accounts for Ruby Bailey and Turtle Doves had no deposits other than EIDL payouts. The Harrises made cash withdrawals from the accounts and used EIDL proceeds for personal use, not business expenses. Investigators visited the listed addresses for each business and found no evidence tying the locations to any business activity by Kelly. For the most part, Kelly established email addresses, business accounts, and tax forms for each entity contemporaneously with, or well after, submitting the EIDL applications for the entity. And Kelly filed a tax return for tax year 2019 for Ruby Bailey—and completed, but never filed, a 2019 return for Turtle Doves—only after Central Bank returned the funds at the SBA's request.

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Kelly maintains that she sought the EIDL loans in good faith with no intent to deceive. She argues that *if* she made falsehoods, they were simply good-faith mistakes, and that she answered the application questions to the best of her knowledge. Kelly applied on her phone, which she says made the applications difficult to read and review. She also claims that many of the questions confused her; for example, she believed that “lost rents” referred to rent she owed, not rent owed to her. R. 173, PageID 1660. And Kelly says she submitted duplicate applications because of system errors that led her to believe the applications had not been fully submitted.

Yet the jury rejected her evidence and arguments. And for the purposes of our review, the evidence “need not exclude every reasonable explanation except that of guilt” for us to conclude that a rational trier of fact could find Kelly guilty beyond a reasonable doubt. *United States v. Gonzalez*, 512 F.3d 285, 294 (6th Cir. 2008). The government offered “substantial” evidence that qualifies as “more than a scintilla.” *Grubbs*, 506 F.3d at 439. Moreover, the government sourced this evidence from authenticated documents and from bank employees and federal agents, who are trained to identify fraud. Thus, the evidence was also “competent.” *Id.* at 438.

2.

There is also sufficient evidence to support Neal’s convictions. The record amply supports the jury’s finding that Neal made false representations. For example, on his applications for Grace Christian and American Workforce, he claimed combined annual revenues of \$487,017. Yet he claimed only \$33,628 in total business revenue on his 2019 tax return, all from a separate, unrelated enterprise.

The evidence also indicates that Neal acted with intent to deceive. He established a bank account for Grace Christian only *after* the SBA approved his application, and he withdrew funds from it for expenses that were non-business related, including fees for his personal bankruptcy

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attorney. He also attempted to obtain cashier's checks drawn on the Grace Christian business account remitted in his own name, not the church's. True, only Kelly's name appeared on the Ruby Bailey and Turtle Doves applications. But Neal jointly owned the bank accounts that received funds for those two entities. He also withdrew money from these accounts, including by signing multiple checks payable to cash.

Neal points the finger at Kelly for any fraudulent conduct, including the EIDL applications in his name. And although Neal withdrew EIDL funds from accounts belonging to all three approved entities, he claims that he often did so at his wife's direction and with no knowledge of how the funds were obtained or used.

We cannot say these alternate theories are impossible. But again, our review is limited to determining whether the evidence supporting the wire-fraud convictions was "substantial," "competent," and "more than a scintilla." *Grubbs*, 506 F.3d at 438–39. It was. Thus, Neal's sufficiency-of-the-evidence challenge also fails.

B. Ineffective Assistance of Counsel

Kelly also seeks to have her convictions set aside because her trial counsel allegedly provided ineffective assistance of counsel at trial. She raises her ineffective-assistance-of-counsel challenge on direct appeal.

"We typically decline to address claims of ineffective assistance on direct appeal and instead require defendants to file a postconviction motion to vacate their sentence pursuant to 28 U.S.C. § 2255." *United States v. Zheng*, 27 F.4th 1239, 1243 (6th Cir. 2022) (quotation omitted). We reason that § 2255 proceedings are the better forum because "the record regarding counsel's performance can be developed in more detail." *United States v. Lopez-Medina*, 461 F.3d 724, 737 (6th Cir. 2006). So unless "the existing record is adequate to assess properly the merits of the

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claim,” we will decline to address it on direct review. *United States v. Hynes*, 467 F.3d 951, 969 (6th Cir. 2006) (quotation omitted).

The record is not developed sufficiently to assess Kelly’s ineffective-assistance-of-counsel challenge on direct appeal. Although the record reflects the various actions and inactions by Kelly’s trial counsel—his repeated use of the word “fraudster,” his failures to object or introduce evidence, and his occasional inability to hear due to technical issues—we do not know why counsel took, or did not take, certain actions. The record merely reflects “the action taken by counsel but not the reasons for it.” *See Massaro v. United States*, 538 U.S. 500, 505 (2003). And we do not know the extent or impact of counsel’s hearing issue. We therefore decline to address Kelly’s ineffective-assistance claim.

C. Procedural Reasonableness

We move next to Kelly’s challenge to the procedural reasonableness of her sentence. A district court imposes a procedurally unreasonable sentence by “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.” *Gall v. United States*, 552 U.S. 38, 51 (2007). Kelly argues that the district court improperly calculated her Guidelines range when it applied: (1) a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1, and (2) a two-level enhancement for sophisticated means under § 2B1.1(b)(10)(C). We disagree.

1.

We begin with the obstruction-of-justice enhancement. The district court applied this enhancement because it found that Kelly committed perjury at trial. We review for clear error both the district court’s factual findings and its application of the perjury-based obstruction-of-

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justice enhancement to Kelly’s conduct. *United States v. Jackson*, 154 F.4th 422, 427–28 (6th Cir. 2025). We review the district court’s legal conclusions de novo. *Id.* at 427.

The Sentencing Guidelines require a two-level enhancement for a defendant who has “willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction.” U.S.S.G. § 3C1.1. The obstructive conduct must also relate to “(A) the defendant’s offense of conviction and any relevant conduct; or (B) a closely related offense.” *Id.* Such conduct includes “the commission of perjury.” *United States v. Maliszewski*, 161 F.3d 992, 1030 (6th Cir. 1998); *see also* U.S.S.G. § 3C1.1 cmt. n.4(F).

We have explained the steps a district court should follow when applying a perjury-based obstruction enhancement. The district court should first “identify those particular portions of the defendant’s testimony that it considers to be perjurious.” *United States v. Castro*, 960 F.3d 857, 870 (6th Cir. 2020) (quotation omitted). Then it “must either make specific findings for each element of perjury or at least make a finding that encompasses all of the factual predicates for a finding of perjury.” *Id.* (quotation omitted). These predicates “are that (1) the defendant gave false testimony (2) concerning a material matter and (3) with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” *Id.*

The district court found that Kelly perjured herself at least four times. Those four times included when Kelly testified that: (1) Ruby Bailey had \$378,000 in revenue; (2) Turtle Doves was an operating entity at 800 Main Street; (3) she paid rent on the Turtle Doves property; and (4) Ruby Bailey had three employees. Regarding all four statements, the district court’s factual findings were not against the weight of the evidence. And its three-part analysis of each statement’s falsity, willfulness, and materiality was not clearly erroneous. Careful not to “penalize

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the defendant for the decision to take the stand,” R. 182, PageID 1975, the district court addressed Kelly’s false statements one-by-one and made specific findings that each satisfied the elements of perjury.

Take Kelly’s testimony about Ruby Bailey’s income. At trial, the government asked Kelly, “It’s your testimony that Ruby Bailey had \$378,000 in revenue in 2019?” R. 173, PageID 1642. Kelly replied, “Yes, and we did file a tax return showing that.” *Id.* The district court concluded that this figure was false because the jury found Kelly guilty on Count 5, which charged that she “falsely claim[ed] [Ruby Bailey] had gross receipts of \$378,000.” R. 1, PageID 5. The district court also correctly found that this statement was material because the SBA calculated her loan amount based on that same false revenue figure. Finally, the district court correctly considered this statement to be intentionally false because, again, in convicting Kelly on Count 5, the jury found an intent to defraud with respect to the Ruby Bailey application.

Kelly argues that, even if these statements were false, they were the result of “confusion, mistake, or faulty memory” and thus fail to satisfy the element of willfulness. D. 37 at p.52 (quotation omitted). For example, she insists that the false employee counts cannot support a perjury finding because she was confused about whether the SBA considered volunteers and children to be employees. But that does nothing to explain Kelly’s unequivocal testimony about Ruby Bailey’s revenue amount for 2019. Kelly offers no plausible argument that her testimony of Ruby Bailey’s revenue—which was very specific and remained consistent across the EIDL application, the post-hoc tax return, and her testimony—resulted from confusion or mistake. And there need be only one instance of perjury to justify an obstruction enhancement. Kelly’s testimony about Ruby Bailey’s income was perjurious, so we need not analyze the other statements.

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2.

We turn now to the sophisticated-means enhancement. We review the district court’s legal conclusions de novo and its factual findings for clear error, but our caselaw remains unsettled whether to review the application of the enhancement to those factual findings for clear error or de novo. *United States v. Rupp*, No. 22-1240, 2023 WL 370908, at *5 (6th Cir. Jan. 24, 2023). We need not wade into the debate because Kelly’s challenge fails under either standard.

The Sentencing Guidelines requires a two-point enhancement when “the offense . . . involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.” U.S.S.G. § 2B1.1(b)(10)(C). The Guidelines commentary describes “sophisticated means” as “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.” *Id.* § 2B1.1 cmt. n.9(B). Such conduct may include “hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts.” *Id.* “We do not look to the individual steps of the scheme, but instead to the totality of the defendant’s conduct.” *United States v. Chappelle*, 78 F.4th 854, 862 (6th Cir. 2023) (citation modified).

The district court’s application of the enhancement is consistent with our precedent and the plain language of the Guideline and its commentary. The evidence supports the district court’s findings that Kelly created false tax documents, email addresses, and bank accounts for her supposed businesses, in a post-hoc effort to make them seem legitimate. She made large cash withdrawals and bank transfers, making it harder to detect her improper use of EIDL funds. And her conduct was repetitive across numerous entities and applications.

False documentation, cash withdrawals, and repetitive conduct are all hallmarks of cases where we have upheld sophisticated-means enhancements. In *United States v. Montgomery*, we

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concluded that the district court properly applied the enhancement to a defendant who created false profit-and-loss statements to substantiate fraudulent property-damage claims. 592 F. App'x 411, 419 (6th Cir. 2014). In *United States v. Middleton*, we cited the defendant's use of cash and non-traceable instruments as a factor supporting a sophisticated-means finding. 246 F.3d 825, 848 (6th Cir. 2001). And in *United States v. Vysniauskas*, we said that "repeated use of false identities in an extensive and repetitive scheme supports [a sophisticated-means] enhancement, even if the information used was not itself unduly complex or difficult to obtain." 593 F. App'x 518, 531–32 (6th Cir. 2015) (citation modified).

Kelly maintains that she is "not a sophisticated business person" and that "the[] allegations [against her] do not describe a sophisticated scheme." D. 37 at p.57. She says she did not try to hide her identity; she even contacted law enforcement herself after the bank returned her funds. Kelly also emphasizes that she did not use offshore accounts, adding, "To the extent there was a scheme to defraud, th[e] scheme was pedestrian." *Id.* at p.56.

These arguments do not negate the application of the sophisticated-means enhancement. We must consider the totality of the scheme, not the sophistication—or lack thereof—of individual acts. *Cf. Chappelle*, 78 F.4th at 862. Moreover, acts that seem unsophisticated in isolation may still constitute "sophisticated means" when considered together. *United States v. Tandon*, 111 F.3d 482, 491 (6th Cir. 1997). Kelly's reference to offshore accounts means little, as there are many ways to use sophisticated means to execute or conceal a financial crime without using offshore accounts.

D. Substantive Reasonableness

Finally, we turn to the Harrises' arguments that their sentences are substantively unreasonable. We review the substantive reasonableness of a sentence under the abuse-of-

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discretion standard. *Gall*, 552 U.S. at 51. We ask “whether the length of the sentence is greater than necessary to achieve the sentencing goals set forth in 18 U.S.C. § 3553(a).” *United States v. Tristan-Madrigal*, 601 F.3d 629, 632–33 (6th Cir. 2010) (citation modified). Relevant factors include the nature and circumstances of the offense; the history and characteristics of the defendant; and the need to provide just punishment, afford adequate deterrence, protect the public from further crimes, and provide correctional treatment. 18 U.S.C. § 3553(a); *United States v. Simmons*, 501 F.3d 620, 625 (6th Cir. 2007). The focus is on whether “the court placed too much weight on some of the § 3553(a) factors and too little on others in sentencing the individual.” *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018).

The defendant bears the burden of showing that a sentence is substantively unreasonable. *United States v. Woodard*, 638 F.3d 506, 510 (6th Cir. 2011). And this burden is particularly heavy when challenging a within-Guidelines sentence, which receives a presumption of reasonableness. *United States v. Vonner*, 516 F.3d 382, 389–90 (6th Cir. 2008) (en banc). “[A] defendant can rebut this presumption if a district court chose a sentence arbitrarily, ignored pertinent § 3553(a) factors, or gave unreasonable weight to any single factor.” *United States v. Xu*, 114 F.4th 829, 846–47 (6th Cir. 2024) (quotation omitted).

1.

Kelly’s substantive-reasonableness challenge fails. In sentencing Kelly to 46 months’ imprisonment, the district court considered all pertinent § 3553(a) factors, including her minimal criminal history and acts of community service. It then weighed these mitigating individual characteristics against numerous aggravating factors, including “no responsibility acceptance, no remorse, blaming others or flat denial.” R. 182, PageID 2021–22. The district court also acknowledged the seriousness of Kelly’s crimes and the importance of deterring others from

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abusing government relief programs. Finally, it cited Judiciary Sentencing Information (JSIN) data, which shows that wire-fraud defendants tend to receive somewhat lower sentences on average. But the district court also found that Kelly’s advisory Guidelines range of 46 to 57 months is by no means aberrant, particularly given aggravating factors like obstructing justice through perjured testimony and using sophisticated means to commit her crimes.

Kelly argues that the district court did not place adequate weight on her minimal criminal history and record of community service. She also argues the district court overemphasized the loss amount. In essence, her argument is a critique of how the district court balanced the relevant factors. But absent evidence of arbitrariness, a mere “assertion that the district court should have balanced the § 3553(a) factors differently . . . is simply beyond the scope of this court’s appellate review.” *United States v. Frei*, 995 F.3d 561, 567–68 (6th Cir. 2021) (citation modified). Thus, we find no abuse of discretion.

2.

Neal’s challenge fails as well. The district court adequately considered the pertinent § 3553(a) factors. It acknowledged that Neal had no prior criminal record and spoke at length about his good deeds and character. But while Neal’s history and personal characteristics weighed in his favor, the district court also emphasized the seriousness of the crimes and the need to deter others from engaging in similar conduct.

Like Kelly, Neal argues that the district court’s consideration of his criminal history and community involvement was insufficient. But he does not stop there. Neal also faults the district court for “conflat[ing] all that Kelly Harris knew and did . . . with what [he] knew and did.” D. 32 at p.28.

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True, the district court stated that Kelly and Neal had “pretty much equivalent culpability.” R. 175, PageID 1894. But Neal points to no evidence showing that this conclusion was arbitrary or unreasonable. Moreover, the district court weighed mitigating and aggravating factors with the same individualized care and detail that it brought to Kelly’s sentencing. For that reason, Neal’s challenge similarly boils down to a mere critique of the district court’s balancing of factors—which, again, is simply “beyond the scope” of our review. *See Frei*, 995 F.3d at 567–68.

III.

For these reasons, we **AFFIRM** the district court’s judgments.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON

- - -

UNITED STATES OF AMERICA, : Docket No. 22-100
 :
Plaintiff, : Lexington, Kentucky
 : Monday, July 1, 2024
 : 10:30 a.m.
v. :
 :
KELLY HARRIS, :
 :
Defendant. :

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TRANSCRIPT OF SENTENCING
BEFORE ROBERT E. WIER
UNITED STATES DISTRICT COURT JUDGE

- - -

APPEARANCES:

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Proceedings recorded by mechanical stenography,
transcript produced by computer.

1 (Proceedings commenced in open court at 10:30 a.m.)

2 THE COURT: Thank you. Good morning to everybody.
3 If the clerk would call the next matter.

4 COURTROOM DEPUTY: Yes, Your Honor.

5 Lexington Criminal Action Number 22-100, the United
6 States of America versus Kelly Harris, called for sentencing.

7 THE COURT: Thank you very much.

8 The Court recognizes Ms. Smith.

9 MS. SMITH: Good morning, Your Honor.

10 THE COURT: Good morning to you.

11 And Mr. Pillarsdorf.

12 MR. PILLARSDORF: I'm here, Judge.

13 THE COURT: Good morning.

14 And I see Ms. Harris is present.

15 Good morning, Ms. Harris.

16 THE DEFENDANT: Good morning, Your Honor.

17 THE COURT: All right. We are here for sentencing
18 today. Let me get my stuff set up here.

19 Ms. Harris, I want you to know I've read carefully the
20 record. I've looked back through the entire docket in your
21 case. I have thought carefully about the issues that I'm
22 going to have to resolve today. I'm coming into the hearing
23 with an open mind on what the result should be.

24 You have a debt to pay society for the wire fraud. The
25 jury decided the case and found you guilty on all the counts,

1 and I'm going to respect and sentence accordingly, but I want
2 to make sure the conclusion today is proper, fair, just,
3 reflects not only the case particulars but your individual
4 history and characteristics as well.

5 So I'll hear from both sides and give you a chance to
6 speak. Then and only then will I make a decision on the
7 appropriate sentence in the case.

8 Do you understand that?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: Both sides ready?

11 Ms. Smith?

12 MS. SMITH: Yes, Your Honor.

13 THE COURT: Mr. Pillarsdorf?

14 MR. PILLARSDORF: Yes, Your Honor.

15 THE COURT: Okay. Officer Cardin is here for
16 Probation. I appreciate her covering. And I appreciate the
17 office's authorship on that report.

18 To get ready, I did again go through all the record that
19 I could, including a review of the trial materials and the
20 exhibits. I did get memos from both sides. I read those
21 carefully. I've read all the support letters that have come
22 in all the way up to today. I think six were filed today, and
23 I read them as well. I appreciate those folks taking the time
24 to weigh in.

25 I also looked at the JCIN comparative sentencing data to

1 have a national touch point on how courts are sentencing in
2 comparable guideline scenarios, so I'm glad to take that into
3 account as well. I have looked at those numbers.

4 The victim in the case is the SBA, correct?

5 MS. SMITH: Yes, Your Honor.

6 THE COURT: Does the SBA intend to participate in the
7 hearing or address the Court at all?

8 MS. SMITH: No, Your Honor.

9 THE COURT: Let me make sure that the presentence
10 report got circulated and that both sides had adequate time
11 with that in preparation for today.

12 Ms. Smith?

13 MS. SMITH: Yes, Your Honor.

14 THE COURT: Mr. Pillarsdorf?

15 MR. PILLARSDORF: Yes, Your Honor.

16 THE COURT: Mr. Pillarsdorf, tell me how you got the
17 report to Ms. Harris and assured her readiness for today.

18 MR. PILLARSDORF: I've gone over it with her,
19 Your Honor, and she's aware of the contents and she's aware of
20 what our position is concerning that.

21 THE COURT: Are you confident she's ready?

22 MR. PILLARSDORF: Yes, Your Honor.

23 THE COURT: Thank you.

24 Ms. Harris, you did get the presentence report?

25 THE DEFENDANT: Yes, Your Honor.

1 THE COURT: Did you have a chance to go through the
2 entire document?

3 THE DEFENDANT: Not the entire, but Mr. Pillarsdorf
4 went over it with me in a room over there.

5 THE COURT: Well, are you saying you've not seen the
6 entire report?

7 THE DEFENDANT: No, Your Honor. He sent it to me,
8 and I thought it was like the other one that Ms. Kendall sent.
9 And then when I talked to him today, he had us go over it over
10 there in the other room.

11 THE COURT: Okay. You have gone through the entire
12 document?

13 THE DEFENDANT: He, I guess, went through and
14 summarized it with me, Your Honor.

15 THE COURT: You received it yourself in the mail?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: Did you read the whole thing?

18 THE DEFENDANT: I told you, I thought it was
19 Ms. Kendall's other report. I thought it was.

20 THE COURT: What do you mean her other report?

21 THE DEFENDANT: The -- I don't know what that report
22 is. The presentencing where you get to look it over of what
23 the other people are thinking. I just looked over it. I
24 thought it was another one of those is what I thought it was.
25 But it's okay.

1 THE COURT: Mr. Pillarsdorf, explain what she's
2 saying.

3 MR. PILLARSDORF: I think, Your Honor, she has seen
4 the original report and -- she has seen the report is all I
5 can say, and I went over it with her before today and again
6 this morning.

7 THE COURT: You sent her the original?

8 MR. PILLARSDORF: Yes, Your Honor.

9 THE COURT: And today, you went over the final report
10 that included Probation's response on the objections?

11 MR. PILLARSDORF: Yes, Your Honor.

12 THE COURT: Okay. Is that accurate, Ms. Harris?

13 THE DEFENDANT: He did summarize that for me, Your
14 Honor.

15 THE COURT: All right. That report is a lengthy
16 document. It's important that the defendant have access to
17 the document and an opportunity to go through the entire
18 thing, because it's a full history of the crime or crimes and
19 a full history of the person before the Court, and it's really
20 the foundation for federal sentencing.

21 So the defendant needs to have the report and have access
22 to counsel to go through that report, to talk about the
23 factual content, the legal content, the guideline calculation,
24 potential objections, how the Court's going to use the report.
25 All that takes time and interaction between the defendant and

1 her lawyer to effectively cover all of that ground.

2 Ms. Harris, does that make sense to you?

3 THE DEFENDANT: Yes, Your Honor, it does, so I can
4 understand what's going on.

5 THE COURT: Okay. Do you feel like you've had
6 adequate time to prepare for today?

7 THE DEFENDANT: No, Your Honor.

8 THE COURT: You don't feel like you've had enough
9 time to prepare?

10 THE DEFENDANT: Well, prepare on my behalf but not
11 what's in the report to know what's coming at me. The only
12 thing I know that he was telling me that they upcharged it or
13 they made it double, or something like that. That it's not
14 in, like, the 12, but it's, like, at 40-something to 57, or
15 something like that, saying that there's a possibility that I
16 can be sentenced today -- sentenced later on. Not today, but
17 saying that you'll go over it and I can be sentenced probably
18 tomorrow or the following day. That's what I took from it,
19 and that I could possibly ask for a bond and be able to have
20 time to appeal the sentence. That's the gist of it.

21 THE COURT: Do you feel like you're ready to be
22 sentenced today? Are you ready for the sentencing?

23 THE DEFENDANT: If I'm able to speak, Your Honor, I
24 probably would be able. I don't know what they have coming or
25 what's going on. I honestly don't know. All I know,

1 Your Honor, is I have evidence that should have been submitted
2 in a long time ago and never have. And I have tons of stuff
3 that could have countered everything that Ms. Smith said,
4 because they went on the theme that I never existed. I have
5 tons of evidence showing I existed. And I have a lot of other
6 things. The people, the witnesses -- for instance, Ms. Puits
7 was back there, and she said she never threatened me with jail
8 time. I have text messages with her threatening me with jail
9 time.

10 THE COURT: Okay. Listen, we had the trial, so the
11 trial has happened. Today is about the sentencing, and my
12 concern is making sure that you've had sufficient access to
13 the report and are ready for the sentencing.

14 So, Mr. Pillarsdorf, I'm willing to break for 30 minutes
15 or an hour or kick the sentencing to this afternoon if you
16 want to and feel like you need to and your client needs to
17 take some time to go through that report. I'm glad to do it.
18 I do want the sentencing to happen today. I've set the time
19 aside. I've prepared for it. The parties have fully briefed
20 the objections.

21 So if she needs a few minutes with you to feel like she's
22 ready, I'm going to be here all day, I'm glad to push it down
23 in the day a little bit.

24 Why don't you confer with her and see what your position
25 is, Mr. Pillarsdorf.

1 (Mr. Pillarsdorf confers with the defendant.)

2 MR. PILLARSDORF: Can we have a brief recess so I can
3 talk to Ms. Harris, Your Honor?

4 THE COURT: How much time do you need?

5 MR. PILLARSDORF: 15 minutes.

6 THE COURT: All right. It's 10:40. I'm going to
7 break until 11:15.

8 Now, what I have to make sure is that the defendant and
9 her attorney have read and discussed the presentence report
10 and any addendum. So I want to be sure that you cover the
11 current status of the report, answer any questions that she
12 has, and at 11:15 we're going to come back in and pick up and
13 move forward with the sentencing. And I am intent on the full
14 sentencing happening today.

15 And, Ms. Harris, I don't break sentencings across
16 multiple days. Today is decision day on the sentencing, so
17 that's all going to happen in the course of the proceeding.
18 So take this time to cover with your lawyer any questions you
19 have, and then we'll pick back up at 11:15.

20 Do you understand that, ma'am?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Okay.

23 Anything to say, Ms. Smith?

24 MS. SMITH: No, Your Honor.

25 THE COURT: All right. We'll break until 11:15.

1 Thank you.

2 (Recess from 10:42 a.m. until 11:15 a.m.)

3 THE COURT: All right. We've reconvened with counsel
4 present and Ms. Harris present as well.

5 Mr. Pillarsdorf, is it true that Ms. Harris has had the
6 report and that you've gone over the report with her?

7 MR. PILLARSDORF: Yes, Your Honor.

8 THE COURT: Do you believe she's ready?

9 MR. PILLARSDORF: Yes.

10 THE COURT: Ms. Harris, do you believe you're ready
11 now?

12 THE DEFENDANT: Yes, Your Honor. And I would like to
13 say, please forgive me, the Court, please forgive me, and to
14 my attorney, my family, my friends that are yet here, forgive
15 me.

16 THE COURT: Well, it's important that you feel and be
17 ready, so glad to take some time to make that happen. We will
18 pick up and proceed on with the sentencing.

19 What I'm going to do with the report, Ms. Harris, I will
20 put it in the record. It will be under seal. So it will be
21 in the docket but not publicly available. People in the
22 system with the need to see it can get to it, I can get to it,
23 the lawyers here can and the appeal court can, but the public
24 cannot get to that report.

25 And I'm sealing it because often that report, because

1 it's so extensive, contains investigative information that's
2 nonpublic. Almost always there's background information about
3 the defendant, her family that's nonpublic, and then sometimes
4 there's victim information that's sensitive and nonpublic.

5 This case doesn't necessarily have strong aspects of any
6 of the three of those, but I think the personal information is
7 enough to lead me to treat the report as I do in all my cases,
8 that is, to seal it in the manner that I've described. So
9 that's going to be the status going forward.

10 Turning then to objections.

11 I think there were none by the government, correct?

12 MS. SMITH: Correct, Your Honor.

13 THE COURT: And then, Mr. Pillarsdorf, you had three.

14 Before we get to those, let me remind everybody the
15 rubric for an objection that calls into question a factual
16 issue under the guidelines or otherwise.

17 We do have a trial record, so the Court is familiar with
18 that. The parties can refer to that freely. The rules of
19 evidence do not apply to a sentencing hearing. And that means
20 really under the statute, I can consider any information at
21 sentencing that pertains. If I'm making a determination on a
22 contested factual topic, I've got to make a determination of
23 what the sufficiently reliable information indicates by a
24 preponderance of that information.

25 That burden normally falls on the party trying to alter

1 the status quo on a guideline calculation. So if it's an
2 aggravating component, it's on the government. If it's a
3 mitigating component, the burden is on the defendant. Nine
4 times out of ten the burden falls on the government for a
5 properly raised objection.

6 The objections here include the loss amount, the
7 obstruction enhancement relating to Ms. Harris's testimony at
8 trial, and application of this sophisticated means enhancement
9 within 2B1.1. So let's take those up in that order.

10 And, Ms. Smith, I assume you're not going to put on
11 additional evidence?

12 MS. SMITH: No, Your Honor. I do have a
13 demonstrative chart for one of the enhancements.

14 THE COURT: Okay. Why don't I hear first -- I
15 believe on all three of these the government would have the
16 burden. Do you agree?

17 MS. SMITH: Yes.

18 THE COURT: Mr. Pillarsdorf, I'll hear first from the
19 government, and then I'll turn to you.

20 Do you anticipate putting on any proof on the objections,
21 Mr. Pillarsdorf?

22 MR. PILLARSDORF: No, Your Honor.

23 THE COURT: Okay. So let's kind of go one at a time
24 on the three issues. Ms. Smith, we'll start with the loss.

25 MS. SMITH: Yes, Your Honor.

1 And I'll note for the record that it's not real clear to
2 me what the objection is based on, but I'll address sort of
3 two points there.

4 The issue is that the Court has to take into account
5 actual or intended loss, whichever is the higher of the two.
6 Really, under either calculation you're still over that
7 \$250,000 threshold. And in the sentencing memo, I walk
8 through how you get to those numbers. But for the Ruby Bailey
9 and Turtle Doves application, there is an actual loss amount,
10 and the actual loss amount is equal to the intended loss
11 amount. And then when you factor in the North Side Market
12 application which was not successful, then that brings the
13 intended loss amount up to the \$450-some thousand figure in
14 the sentencing memo.

15 The very first Ruby Bailey application is not part of
16 that calculation. I do view that as duplicative with the one
17 that was successful, but I'll just note that there is that
18 other application out there.

19 THE COURT: And that one did involve the same claimed
20 gross revenue foundation, correct?

21 MS. SMITH: The same financial figures, yes.

22 THE COURT: The employee number changed?

23 MS. SMITH: Yes.

24 THE COURT: All right. Go ahead.

25 MS. SMITH: And then I'm not sure this is an argument

1 the defendant is making here, but there is no credit against
2 loss scenario here. I know the co-defendant made that
3 argument in a memo that was just filed, so I wanted to address
4 that.

5 Central Bank returned the funds after notifying the
6 victim of suspicious concerns about the funds, and the funds
7 were returned at the SBA at the victim's direction. So I view
8 that timestamp of August 2020 as marking detection of the
9 offense by the victim. It was also when the matter was
10 referred to the government for investigation.

11 So I really view all of the prongs of the comment under
12 (E)(i) in the commentary to the guidelines as being active as
13 of that date so that the funds returned by Central Bank are
14 not credited against the loss amount calculation.

15 THE COURT: All right.

16 MS. SMITH: Unless Your Honor has any questions on
17 the loss amount.

18 THE COURT: Let's see what Mr. Pillarsdorf has, and
19 I'll give you a chance to reply.

20 MR. PILLARSDORF: A few things on the loss amount,
21 Your Honor.

22 What's perplexing is the restitution estimate.
23 Ms. Harris is listed as 110, or 110,785, but yet the
24 enhancement is more than 250. And I think factually the
25 indication about the North Side Market -- I think that's the

1 name of it -- my recollection of the testimony was she really
2 had nothing to do with that operation. That was Mr. Harris.
3 So we don't think that should be merged into this.

4 THE COURT: I think that was her application, was it
5 not?

6 MS. SMITH: Yes, it was.

7 MR. PILLARSDORF: The facts -- we had extensive
8 testimony about all of this. And I think the facts are, while
9 they were husband and wife, they really operated somewhat, I
10 would say, in separate universes. For example, she had
11 nothing really to do with the church. And certainly the North
12 Side Market, that really was -- I didn't hear any testimony
13 really linking her to that. Maybe the Court can remember
14 better than me. I just --

15 THE COURT: I think she submitted the application.
16 Did she not?

17 MS. SMITH: Yes, Your Honor. She's also the only one
18 charged with the North Side Market account.

19 THE COURT: You're thinking American Workhorse, I
20 think.

21 MR. PILLARSDORF: That's our position, Your Honor. I
22 just don't know how they get over the 250,000 that she caused.

23 THE COURT: Well, the entities she was involved with
24 received over 250,000 in proceeds.

25 Do you contest that?

1 MR. PILLARSDORF: The restitution is 110.

2 THE COURT: Well, the restitution is, I would frame
3 it as what did the victim ultimately lose?

4 So here Central Bank paid back -- the SBA clawed back a
5 significant chunk of money across all the entities but not
6 110K. That was not -- that was already spent out of the
7 accounts.

8 And Ms. Smith's point is, on the loss calculation, under
9 2B1.1, you only get a credit for money paid back if the
10 defendant voluntarily initiates that before detection of the
11 offense. So if it's got to be pulled back -- and here,
12 honestly, the defendants were really kicking and screaming
13 about the money being paid back, going so far as to go to the
14 FBI -- there would not be a credit under the loss commentary.

15 So I understand restitution is different, but that's a
16 different prism you're looking through, actual loss as a
17 definition, and that does not credit recouped money that the
18 victim got back through its own devices.

19 MR. PILLARSDORF: I'll respond. Factually, I don't
20 know that she would have had the opportunity to follow the
21 logic you've said to in terms of the recouped losses. I don't
22 know that she would have had the opportunity. We object. We
23 think it's unfair that she should be penalized for what we
24 consider the excessive amount.

25 THE COURT: How do you deal with the intended loss

1 aspect? Because the guidelines say there's actual loss,
2 there's intended loss, and the Court's to use the greater
3 figure.

4 So how do you deal with the intended loss? If those
5 applications -- non-duplicative applications had all gone
6 through, the number there is over 450. How do you deal with
7 that.

8 MR. PILLARSDORF: Well, that really goes to the other
9 guideline objections we have. I mean, intended loss, it's
10 really subjective intent and goes to our good faith defense
11 that we asserted. And that's our issue with that. It really
12 merges in with the other guideline objections we have.

13 THE COURT: Well, I feel like I'm going to say this
14 multiple times today. We had a trial. The jury made the
15 decision in the case. So if the jury made the decision on
16 something, then that's going to rule the day. The jury made
17 decisions beyond a reasonable doubt.

18 So you can argue good faith, you can say all that, you
19 did that in front of the jury, and a properly instructed jury
20 rejected it and found an intent to defraud across the entire
21 scheme. So the notion that the counts did not cover intended
22 loss is just contrary to the jury's verdict. So I would
23 reject that.

24 Do you have any other argument on the loss figure?

25 MR. PILLARSDORF: No, Your Honor.

1 THE COURT: All right.

2 Ms. Smith, anything else you want to say on it?

3 MS. SMITH: No, Your Honor.

4 THE COURT: All right.

5 The guidelines are clear. The loss table applies under
6 2B1.1. Got to make a reasonable estimate of the loss here. I
7 don't have to do much estimating. It's all really tied to the
8 applications that were made, the applications that were
9 funded. Those are summarized in the table at paragraph 16,
10 tracing through the funded Ruby Bailey application, the funded
11 Turtle Doves application, and those result in an actual loss
12 of 255,100. Factoring in the entirety of paragraph 16 as it
13 applies to Kelly Harris, actual loss of 255,100.

14 She does not get credit for the clawed back funds that
15 Central Bank alerted SBA to, not initiated by the defendants.
16 So the actual loss is above 250.

17 But more importantly, or alternatively, the number I'm to
18 use is the higher of actual or intended loss. Intended loss
19 is the pecuniary harm that the defendant purposely sought to
20 inflict. So if you look at all the applications that
21 Ms. Harris submitted and what was intended to be gained from
22 those, the harm that was intended to be inflicted, that's a
23 number that exceeds 450. Both are above the 250 and below the
24 550 threshold in the loss table, so Probation properly
25 calculated loss for guidelines purposes, so I'm going to

1 overrule that objection.

2 So now we will turn to the obstruction enhancement.

3 Ms. Smith.

4 MS. SMITH: Thank you, Your Honor.

5 For this enhancement, I have prepared a chart that I
6 would ask to be made an exhibit to the hearing. I've provided
7 Your Honor a copy and defense counsel prior to the break a
8 copy and can bring it up on the monitor.

9 THE COURT: All right.

10 MS. SMITH: And just to provide an overview, it is a
11 five-page document.

12 The presentence report contains a number of pieces of
13 testimony that Ms. Harris testified to. I think that was
14 prepared before there was an official transcript of the
15 testimony. What's contained in the presentence report is
16 correct as meriting the obstruction enhancement. But what I
17 did here is pulled out the statements referenced in the
18 sentencing memo and then created another column for what the
19 proof is contradicting what Ms. Harris testified to.

20 This enhancement, you know, requires very detailed
21 analysis by the Court in terms of pointing to the testimony
22 alleged to be false and what shows that that is false and
23 can't rely just on the jury verdict to do that. So that's
24 what I'm trying to do here.

25 The testimony sort of ranges from some broad strokes

1 statements that are refuted by the jury's finding here to more
2 detailed statements about the specific entities, and that's
3 really kind of what the case was about, were her statements
4 about these entities true? And there was an enormous amount
5 of proof that they weren't true.

6 So just walking through -- I'm not going to walk through
7 all of the statements unless Your Honor wants me to, but
8 there's 16 statements included in this chart.

9 If you'd go to the second page.

10 And some of these sort of very detailed ones about Turtle
11 Doves, about North Side Market, about Ruby Bailey and then tie
12 out to the corresponding exhibits and testimony that showed
13 that those statements were not true.

14 The sentencing memo really focuses on the testimony
15 Ms. Harris presented and why that was not true and why
16 presenting that false testimony merits the obstruction of
17 justice enhancement. You know, there were some other facts in
18 the record before the Court, including going to the FBI and
19 filing a police report with the Lexington Police Department
20 after Central Bank returned the funds, that I think also are
21 worth noting in the context of this enhancement.

22 I'm not sure how much detail to go into here with the
23 chart.

24 THE COURT: Okay. I'm just looking at it.

25 The Ruby Bailey tax return, that ultimately did get filed

1 with the IRS. It did get filed in October of '20, right?

2 MS. SMITH: That's correct.

3 THE COURT: But it was signed in July?

4 MS. SMITH: Correct, Your Honor.

5 So there are two different tax return items that are
6 really important here.

7 Ruby Bailey was an entity in existence. I'm not
8 disputing that at all. It had been dissolved by the state in
9 2019 and then reinstated by Ms. Harris in March of 2020. You
10 know, Central Bank returns the funds in August of 2020, and
11 the steps taken by Ms. Harris after that are really
12 significant.

13 So in the instance of Ruby Bailey, which was already an
14 existing entity, she did file tax returns for the entity, and
15 the numbers on those tax returns match what was in the
16 application. So I really view that as a step trying to
17 legitimize the underlying wire fraud in submitting that false
18 application.

19 In the instance of Turtle Doves, nothing was ever filed.
20 Instead, it looks from the exhibits that she prepared some tax
21 documents, took photos of those tax documents, and then sent
22 those photos to the SBA to try and legitimize what happened
23 with Turtle Doves. So even that on its own is sort of
24 obstructive. But then the fact that those documents were
25 never filed with the IRS is also relevant to this and the

1 other enhancement.

2 THE COURT: Okay. For the obstruction to apply
3 through the perjury theory, there has to have been false
4 testimony under oath, the defendant has to have acted with
5 willful intent, so not a mistake or memory issue but the
6 intent to give a false statement, and the statement has to
7 have been material to the matter before the Court. Agree?

8 MS. SMITH: Yes, Your Honor.

9 THE COURT: All right. Let me hear from -- I'm
10 sorry. Do you have anything else?

11 MS. SMITH: The only other thing I wanted to mention
12 is, there were a number of statements that are in this chart
13 where it really reads as though Ms. Harris was trying to
14 exonerate her co-defendant and take the blame for the cash
15 withdrawals, for submitting some of the applications, and that
16 that, as evidenced by the jury verdict also finding him
17 guilty, I do believe supports the enhancement.

18 THE COURT: Thank you.

19 Mr. Pillarsdorf.

20 MR. PILLARSDORF: The issue with the obstruction of
21 justice and somebody testifying at trial, that's always been,
22 I guess, a litigated issue. The concern is that Ms. Harris
23 had an absolute right to testify at trial, but if she did, the
24 downside is we get sentenced with this obstruction.

25 The way I see the evidence -- and I think the obstruction

1 argument really merges with the sophisticated -- what's the
2 expression?

3 THE COURT: Means?

4 MR. PILLARSDORF: -- sophisticated means.

5 I would describe what Ms. Harris did as not sophisticated
6 but just the polar opposite. The way she conducted herself
7 and got herself into the situation where we are today, I would
8 suggest it was unsophisticated.

9 Most financial crimes that fall under this, I guess, the
10 umbrella of what she's charged with is somebody tries to get
11 funds for an operation that doesn't exist. Ms. Smith today
12 acknowledged that the Ruby Bailey entity did exist.

13 And what I would argue was, we offered, I think, five or
14 six, maybe seven witnesses who clearly said this operation
15 existed. It wasn't a phantom, it was a mirage. And I think
16 if somebody during this time period was intending to commit a
17 massive fraud, it would be somebody who didn't have an ongoing
18 operation.

19 I think what really happened in this case was the
20 following:

21 It is clear that to get these loans, you can't use them
22 to expand your business when COVID was going to be over. I
23 don't think Ms. Harris understood that. I don't think she
24 still understands that. And I think when she submitted these
25 documents, they were more aspirational. When COVID's over, we

1 want to come back bigger and better than ever. And I don't
2 think she ever understood that you can't get a loan on that
3 basis.

4 And I think it's more of a personality flaw, that she was
5 so competence-wise in over her head. We still contend in
6 mitigation that her operation of Ruby Bailey was a
7 benevolent --

8 THE COURT: Well, we'll get to all that.

9 But looking at Ms. Smith's argument and the listing of
10 testimonial instances she contends were perjurious, what's
11 your reaction on those contentions? Tell me your specific
12 reaction on those.

13 MR. PILLARSDORF: This is an intent crime. This is
14 not whether or not she robbed the bank whether with her or
15 somebody else.

16 What was her intent in all of this?

17 I don't know that she fully understood that when you
18 submit these claims for loans, you must have financial
19 documents and a paper trail to confirm this. I don't think
20 she ever understood that. In that sense, I think this was the
21 most unsophisticated way. The testimony as I recall it was
22 she was frantically updating the applications on her cell
23 phone. I don't think she ever had a very good understanding.

24 Now, you know, we submitted a good faith instruction, and
25 I understand we did not succeed.

1 THE COURT: You got the instruction.

2 MR. PILLARSDORF: We got the instruction. But I do
3 think there's evidence of that that should be considered in
4 terms of mitigation.

5 I don't think anyone is going to suggest Ms. Harris is an
6 extremely competent -- she should not be teaching at some
7 business school how to submit documents to get loans or grants
8 or anything like that. I think she's unsophisticated. I
9 think she had a big heart, aspirations. And I don't think she
10 really understood that, hey, there's going to be a paper trial
11 that when I say I have all these employees but there's no
12 records to back it up. I don't think she ever connected the
13 dots on that. And I think it's more of a personality flaw.

14 And I understand the reasons she was convicted,
15 Your Honor. There's no doubt there was a paper trail that
16 indicated her application was not appropriate, for lack of a
17 better word for the jury. But in terms of her intent, I don't
18 think this was a sophisticated crime. I think it was an
19 unsophisticated crime, and I think the sophisticated
20 enhancement --

21 THE COURT: I'm not to that yet. I'm just talking
22 about perjury.

23 MR. PILLARSDORF: I think it's the same thing.

24 She testified that she was -- she testified as to
25 numerous things, but it was pretty clear from her testimony

1 that she thought she could get all this money, and when COVID
2 was finally over, which, you know, was obviously devastating
3 her operations, that it would be bigger and better, and I
4 think that was really her intent. I don't think it was her
5 intent to deceive anybody. And she did not have particularly
6 good explanations for why the numbers didn't match up. But
7 the idea that if someone testifies and they get convicted they
8 automatically get the obstruction, we disagree with that.

9 THE COURT: I agree. That would not happen in my
10 court. No automatic correlation between a defendant
11 testifying and getting obstruction. It depends on what the
12 person testifies to. So I agree with you to that point.

13 MR. PILLARSDORF: And I would submit -- you know, her
14 testimony, I wish it was more focused, but I don't think she
15 had the evil intent, or whatever those words are, to deceive.
16 It was just her, the way she looks through -- more of a
17 personality, how she looked at her operation, and I think her
18 overriding goal was to keep these non-profits operational.

19 And in that sense, it goes back to that this was not a
20 sophisticated application, it was more of a bumbling operation
21 that easily could cause her problems if anybody did any
22 minimal paper trail. And I think that's probably why she got
23 convicted.

24 THE COURT: Okay. Anything else?

25 MR. PILLARSDORF: No, Your Honor.

1 THE COURT: Ms. Smith.

2 MS. SMITH: Just to address the specifics of what she
3 testified to, because that is what the Court has to find.

4 Just looking at statements 4 through 7 that are just
5 about Turtle Doves. You know, she testified that Turtle Doves
6 started operating in 2018/2019, that it did operate at the
7 address listed, that it had submitted tax documentation. Each
8 of those things was false. Absolutely the core of the case is
9 what she said on the application about Turtle Doves, was it
10 material and was it false? And all of those things were
11 false. And then she testified doubling down on the false
12 representations. That alone would support the enhancement
13 here.

14 Similarly, with Ruby Bailey. She testified several times
15 that Ruby Bailey had \$378,000 in revenue in 2019. That was a
16 material fact this jury had to find was not true. And in
17 support of that, she filed false documentation with the IRS
18 and submitted it to the SBA. That alone could support the
19 enhancement here.

20 There are more statements than just that, but just on
21 those two entities, her testimony was false, it was material
22 to the case, and there is every reason for this Court to
23 conclude that she did that intentionally.

24 THE COURT: All right.

25 Anything else, Mr. Pillarsdorf?

1 MR. PILLARSDORF: Just what I said earlier,
2 Your Honor.

3 THE COURT: Okay. The guidelines 3C1.1, if the
4 defendant willfully obstructed or impeded, or attempted to
5 obstruct or impede, the administration of justice with respect
6 to the investigation, prosecution, or sentencing of the
7 instant offense of conviction, and the conduct that was
8 obstructive related to the offense of conviction and any
9 relevant conduct or closely related offense, increase by two
10 levels.

11 The commentary non-exhaustive list of covered conduct
12 includes committing, suborning, or attempting to suborn
13 perjury.

14 I mentioned the specific parameters of perjury and the
15 findings the Court has got to make in order to apply the two
16 points in this context. Again, it has to be false statement
17 under oath, defendant has to have had willful intent, not a
18 mistake in memory or confusion. So it has to be intent with
19 respect to the false statement and it has to have been
20 material.

21 So I went through the transcript and the parties'
22 briefing on it and the presentence report carefully. I will
23 make the government's chart a sentencing hearing exhibit.

24 So it is important to say that just taking the stand
25 doesn't make you responsible or on the hook for obstruction.

1 I'm very wary and careful about not making that automatic
2 linkage. It comes down to what the defendant testifies to and
3 whether that testimony is perjurious. So I'm careful on the
4 language, I'm careful on the application. I don't want to
5 penalize the defendant for the decision to take the stand.

6 But having the right to testify does not give the
7 testifying defendant the right to commit perjury, and so
8 that's where the line has got to be drawn, and that's what I'm
9 grappling with now.

10 So on the general testimony that the defendant gave about
11 her honesty, she certainly testified that she was honest in
12 her approach, that she had no intent to deceive. More
13 particularly, she testified to being correct on the numbers
14 that she submitted, being exact and in good faith in the
15 efforts that she undertook to secure those loans, and she
16 sought a good faith instruction.

17 So she was putting in front of the jury her testimony. I
18 was in good faith, I acted honestly, I did what I thought was
19 correct, I had no intent to deceive. She said that expressly.
20 And she sought a good faith instruction. So she's putting
21 that directly in front of the jury for a decision.

22 I instructed the jury on it. That instruction, of
23 course, didn't do anything to take away the government's
24 burden. The government had the burden. But the good faith
25 instruction set forth the definition of good faith, that that,

1 you know, includes honesty in dealing, and it said no precise
2 definition but it means a belief or opinion honestly held in
3 the absence of malice or ill will, an intention to avoid
4 taking advantage of another that's unfair.

5 And I told the jury, the burden is not on the defendant
6 to prove good faith, it's the government's burden to prove on
7 the other side that the defendant acted with the intent to
8 defraud.

9 So I expressly told the jury that in assessing the proof,
10 if the jury had any reasonable doubt as to whether the charged
11 defendant acted with intent to defraud or in good faith, you
12 must find the defendant not guilty. So I told the jury, any
13 reasonable doubt on the presence of good faith, then the jury
14 had to acquit, and the jury had to to convict find the intent
15 to deceive under the particular counts.

16 So the jury weighed all the testimony, and that general
17 testimony about good faith, you know, it then sort of got
18 context in more specific examples of conduct by virtue of her
19 testimony, including the Turtle Doves and American Workhorse
20 creation, the account opening post application, the history of
21 the operations, any entities which -- I mean, the only way to
22 say it is the jury rejected it. The jury rejected the notion
23 that those entities had all behaved and operated in the way
24 that Ms. Harris characterized them historically.

25 Certainly, there was proof about Ruby Bailey operating

1 through the years. It was uneven, and the more current
2 operations had very little to back them up, but there was some
3 testimony about the footprint of Ruby Bailey. But the other
4 entities, Turtle Doves, very little on that, North Side
5 Market, really none on that, and American Workhorse, really
6 hard to square the description of that "agricultural" entity
7 with what sounded sort of like a junk refurbishing operation.
8 The jury heard it all and rejected the notion of good faith.

9 That's a more general aspect of false testimony. Many
10 more, though, very specific and concrete examples. And these
11 are the ones that stuck out to me as I contemplated the
12 objection against the transcript.

13 One is the claimed number of employees. It's clear
14 ultimately that the employee census was based on children who
15 were paid in some amounts by some entity to work. No paper
16 trail of that at all, but that ended up being the employees
17 that Ms. Harris was purporting to count.

18 That number, I think the jury, I'm sure, was impacted by
19 the change in the employee total from Ruby Bailey application
20 1, which had ten claimed employees. And that number tied
21 directly to the amount of benefits sought in the advance. So
22 started by ten. That application did not go through, but
23 that's the original application. And then the one that did
24 get submitted dropped to three.

25 And, you know, Ms. Harris testified in support of those

1 figures, and the jury heard the proof and rejected the notion
2 that there were legitimate employees. Why? Because the state
3 entities that track employees across all Kentucky employers
4 for very good reasons, for tax reasons and Workers' Comp
5 reasons, the state records had zero identified employees for
6 any of the entities.

7 So the jury's hearing, I've got a bunch of employees.
8 She called them her worker bees. Ultimately, she's relying on
9 the children being paid, by my recollection of the testimony,
10 being paid in cash. They're comparing that with what the
11 actual records show, the absence of any records of legitimate
12 employment for employees for any of the entities, and the jury
13 just rejected the testimony.

14 You know, in both those first two categories, I
15 specifically find those are instances of false testimony. The
16 defendant clearly is not mistaken. She forcefully was
17 defending her position as a factual and historical matter, so
18 no confusion or mistake in memory, and both material to the
19 counts and issues before the Court.

20 Continuing on. I do agree, Turtle Doves was a real sort
21 of clear set of circumstances that the jury heard about, and
22 lots of the Turtle Doves proof was very problematic and I
23 would find to be false statements under oath.

24 One, the rent payment. Ms. Harris expressly said she
25 paid rent, claimed to have paid rent. Heard from her. Heard

1 from the landlord. I think the way I would characterize it,
2 there was a period when there was a rent abatement in exchange
3 for improvement on the property, which apparently did not
4 happen. When the landlord finally demanded the commencement
5 of monetary rent, a check was tendered but didn't have funds
6 to back it up. The landlord was told not to cash it.

7 Ultimately, over the course of months of delay and no payment,
8 the relationship broke down with, you know, litigation and
9 people going to the county attorney. And my review of the
10 testimony indicates there really was never any rent paid from
11 Ms. Harris to the landlord, no money was paid, and she told
12 the jury that she did pay rent.

13 Why does that matter? Because that commencement on the
14 Main Street property, "commencement," would have happened in
15 late '19 and spilled over into '20. Very important because
16 that would show operation in 2019 before the pandemic, before
17 the EIDL loan process even got spun up for the pandemic. So
18 really important whether there actually was something going on
19 there or not. Rent payment would be corroborative. Lack of
20 rent payment certainly undercut the notion that anything of
21 substance was occurring. Material to the issues before this
22 jury, false, intentionally so, in my view.

23 Continuing on. Ms. Harris directly testified that Turtle
24 Doves was an operating entity at 800 Main Street. She claimed
25 that from the witness stand multiple times. And there just --

1 I mean, the jury saw the pictures. The jury heard the
2 testimony and compared the two and rejected the idea of any
3 operations happening at that site.

4 And, you know, interestingly, looking at the (2)(f)1 and
5 (2)(f)2 tax documents, as late as July of 2020 when one of
6 those documents purportedly was signed -- I think that was the
7 extension document signed, according to the document, in July
8 of '20 -- it's still listing 800 East Main Street as the
9 address, but my recollection of the testimony is that she'd
10 already been evicted from that property by that point.

11 Then the other document filed, the return document not
12 filed but a picture taken of it, you know, again, is
13 purporting to substantiate the operation of an entity. And,
14 you know, Ms. Harris so testified. The jury rejected it.
15 There was nothing to substantiate that that was an operational
16 entity, directly, you know, contrary to the facts set forth in
17 the EIDL application. I would find that also to be false,
18 material and intentionally false.

19 The Ruby Bailey income. I mean, the jury heard the
20 proof. The jury heard that there was a tax return, saw the
21 number, saw the date on it, purportedly filled out, you know,
22 in the summer of '20, not received by the IRS until October of
23 '20. That number matches up with the EIDL application.
24 That's the loan documentation the jury heard about. And the
25 jury just found an intent to defraud with respect to that

1 application, rejected the legitimacy of the income.

2 Certainly, the entity had lapsed in '19, wasn't put back
3 into existence until, you know, the spring of 2020. So just
4 not anything to substantiate or on the balance of the record
5 show the legitimacy of the testimony. Indeed, the jury
6 rejected it. I find it, contrary to the proof in the record,
7 false and certainly material on the Ruby Bailey aspect, and
8 intentionally false.

9 The North Side Market. A lot about that is highly
10 suspicious. I mean, the whole series of applications tainted.
11 But the thing that stuck out in my mind was, Ms. Harris
12 certainly admitting involvement in the American Workhorse
13 application and telling the jury that, you know, the numbers
14 between this unformed North Side Market entity claiming gross
15 revenue from '19 to '20 in the specific figure set forth, the
16 288 or whatever the figure was, North Side Market making an
17 application to that effect, then American Workhorse making an
18 application using the identical gross revenue figure.

19 And Ms. Harris told the jury, Well, that must have
20 auto-filled, because I was doing them all on my phone and that
21 must have auto-filled from that prior application. And, you
22 know, every juror would understand the notion of a form
23 auto-filling, but here you're talking about two applications
24 made on a government website over two months apart.

25 The North Side Market, I believe, was in May. That's

1 Count 3 in the indictment. The American Workhorse, not until
2 July of 2020, two months later. That's Count 12. And, you
3 know, her story was, Well, the numbers are identical because
4 they auto-filled. And the jury found fraud with respect to
5 both of those and rejected that innocent explanation. I think
6 that testimony was false, certainly material as to the
7 culpability on those counts, and the falsity was intentional.

8 So those are the ones that stick out to me. I'm not
9 going to go through and assess all 16 allegations made by the
10 government, but I've certainly set forth the ones that, in my
11 review of the record, emerged as patently false perjurious
12 testimony offered by Ms. Harris, and the obstruction of
13 justice is well warranted.

14 On the argument about her sophistication -- we'll talk
15 about sophisticated means in a moment -- her sophistication
16 and acumen as a businessperson, I would just say you don't
17 have to have an M.B.A. to be honest. You can be simple and
18 not have, you know, deep understanding of business, and all
19 that can matter to how a business operates. But when it comes
20 down to honesty, nobody needs to be trained to be honest.

21 So if you're on the witness stand under oath and you're
22 lying to the Court and jury, that's obstruction if it's
23 material, and that's what happened here. So I am going to
24 apply the two points and overrule that objection.

25 We'll now turn to sophisticated means.

1 Ms. Smith.

2 MS. SMITH: Thank you, Your Honor.

3 You know, no fraud defendant ever claims they are
4 sophisticated, and it really turns on what steps the defendant
5 took in committing the crime. If this had just been a matter
6 of submitting a false application, getting lucky in having it
7 be successful, then I would agree that would not be
8 sophisticated. The issue is the steps that were taken to make
9 this successful. Opening company bank accounts supports that;
10 creating email addresses for the businesses; filing these
11 businesses for the instances where they were not filed, Turtle
12 Doves and -- Turtle Doves in particular.

13 THE COURT: In forming the businesses?

14 MS. SMITH: Forming the businesses with the state is
15 another step. I mean, each individual thing -- I understand
16 the argument that a person could walk into a bank and create a
17 company bank account today, that you don't need an M.B.A. to
18 do that. But each of these things in succession to try and
19 make this scheme successful, to try and make these businesses
20 look like the numbers in the application were true, that the
21 business functioning was true, each of these steps together
22 merit the enhancement.

23 In addition, the tax documentation, I think, is really
24 informative of this application here. Yes, any person can
25 print out a tax form from the internet, but actually doing

1 that here to make this scheme successful, and in one instance
2 filing false tax returns with the United States, in the other
3 instance claiming you filed tax returns with the United States
4 and then not filing them. That all, under the Sixth Circuit
5 case law, supports the application of this enhancement.

6 You know, I'd direct the Court to *United States versus*
7 *Pierce*, which is cited in my sentencing memo. That is an
8 Eastern District of Kentucky case. It was before Judge
9 Reeves. It was a tax fraud scheme with the IRS being the
10 victim. And Pierce, the lead defendant, what he did to merit
11 the enhancement there was he created false W-2s. That was it.
12 It was a form on the internet he could pull off and then
13 create fake jobs. He had to look up an EIN, he had to take a
14 few steps, but that was really the core of what he did to
15 support the enhancement here, and the Sixth Circuit affirmed
16 the enhancement in that instance.

17 And then again, I'd point the Court to *Montgomery*, which
18 was also a government benefit, taking advantage of relief
19 funds and sort of what the defendant did to try and
20 substantiate the false claims, false representations in the
21 applications, including creating false tax documentation.

22 So I think the record before the Court supports the
23 enhancement here.

24 THE COURT: Let me ask you this: The language in
25 (b)(10) says, if (A), (B), or (C), and (A) and (B) both

1 involve some kind of geographic wrinkle or complexity. You
2 know, one is relocating to another jurisdiction to evade;
3 another is substantial part of the scheme occurring outside of
4 the U.S.; and then (C) is the offense otherwise involves
5 sophisticated means that the defendant intentionally engaged
6 in.

7 So the otherwise component there in (C), is that limited
8 at all by (A) and (B), or do you think it's a completely
9 separate category of conduct?

10 MS. SMITH: I think it's a completely separate
11 category.

12 THE COURT: And if you look at the commentary, part
13 of what gives me a little bit of pause on that is, you know,
14 the 15-12 case from last week, which, you're in the fraud
15 world a lot, you probably have read that. That discusses what
16 "otherwise" might mean within a sequence.

17 But the other thing is, one of the examples is, for
18 example, in a telemarketing scheme, locating the main office
19 in one jurisdiction but locating soliciting operations in
20 another ordinarily indicates sophisticated means. It's just
21 interesting that that would have a geographic component in the
22 first example.

23 MS. SMITH: I certainly see what Your Honor is
24 saying. I have never understood the sophisticated means
25 enhancement to hinge on the geographic issue. I know that

1 that does support the application of it, but my reading of the
2 case law and of the guideline is that that third clause is its
3 own separate clause.

4 THE COURT: Have you seen any Sixth Circuit cases
5 rejecting sophisticated means?

6 MS. SMITH: I'm sure I have.

7 THE COURT: I didn't look exhaustively, but it's hard
8 to find anything except approval.

9 MS. SMITH: I don't have it in front of me, but I
10 know -- well, I remember with *Pierce*, because we were very
11 careful -- that was a conspiracy case and we were very careful
12 about who we sought the application for, because I think there
13 was a rejection of it around that time and then the guideline
14 language changed at that time. But I don't have a case in
15 front of me.

16 THE COURT: So would any EIDL fraud get the
17 sophisticated means?

18 MS. SMITH: No, Your Honor. And there was another
19 EIDL fraud case here that went to trial, and I don't think it
20 applied the enhancement. That was *DiyaIi*, D-I-Y-A-L-I. I
21 didn't handle that case, but it's my understanding that the
22 way that the EIDL fraud was committed in that instance did not
23 get that enhancement. And there it was a single application.
24 The individual used his personal bank account, his personal
25 contact information, and made false statements about the

1 nature of his business. So no creation of a corporate entity,
2 no creation of a corporate bank account, no creation of a
3 business email address. So in that instance, that would be an
4 EIDL fraud where I don't think it would merit the enhancement.

5 THE COURT: So if the hypothetical defendant company
6 operating business has existing accounts and just, let's say,
7 doubles the gross revenue, that's the only fraudulent element
8 of the application, that probably would not get it, that
9 alone?

10 MS. SMITH: I would agree with that.

11 THE COURT: So it seems to me there's a tiering going
12 on here. Any fraud case is going to put you in 2B1.1. To get
13 the two points, there has to be intricacy or complexity,
14 right?

15 MS. SMITH: Yes.

16 THE COURT: But that's not enough. You have to have
17 those things, but the added -- the added word in the
18 commentary is "especially." So the complexity has to be
19 special, so especially complex or especially intricate.

20 So how do I segregate what's a garden variety fraud
21 claim -- and by that I mean a case prosecuted in federal
22 court. So a garden variety federal fraud claim, next tier up
23 is one involving complexity or intricacy, that's not enough,
24 and then the next tier up is it's especially complicated or
25 intricate.

1 MS. SMITH: I think *Montgomery* suggests you can look
2 at volume. You know, the Court repeatedly noted that because
3 the defendant had submitted multiple applications for multiple
4 different businesses that that added to the analysis of that.
5 You know, I can only follow the case law and what the
6 guidelines say, and I think under the case law, submitting
7 multiple false applications on behalf of numerous different
8 entities and then taking all these steps to substantiate those
9 false statements to substantiate the entities does trigger
10 that.

11 THE COURT: All right. Thank you.

12 MS. SMITH: Thank you.

13 THE COURT: Mr. Pillarsdorf.

14 MR. PILLARSDORF: Under the logic expresses that any
15 time there's a fraud case, the government, you know, they
16 would have to prove the fraud which has elements, it would
17 automatically implicate the sophisticated means. And as I've
18 indicated before, Your Honor, what Ms. Harris did I think
19 meets the definition of unsophisticated. There's nothing
20 particularly complicated about this.

21 And, you know, what has always been perplexing to me
22 about the testimony, I think one of the first witnesses we
23 called indicated maybe eight or ten years earlier she had like
24 a financial advisor, and then she clearly did not have one
25 when she did what she did in asking for these loans. And to

1 me, that's just -- you know, any financial advisor or
2 competent person would say, Hey, you shouldn't claim you have
3 all these employees when you don't. Once again, it's just her
4 personality, which I would suggest was unsophisticated, and it
5 doesn't meet the levels we've been talking about here.

6 So we continue to think the unsophisticated means
7 shouldn't apply. And I think the logic I've heard from the
8 other side is, it's hard to imagine a fraud case that wouldn't
9 automatically hit the unsophisticated means if you follow
10 their logic, and I don't think this case deserves that
11 two-point enhancement for sophisticated means under these
12 particular facts.

13 THE COURT: All right.

14 Last word, Ms. Smith.

15 MS. SMITH: Nothing further, Your Honor.

16 THE COURT: Okay. So we're in the 2B1.1 world which
17 does govern fraud cases. We've already talked about the loss
18 table. (b)(10), if the offense otherwise involves
19 sophisticated means and the defendant intentionally engaged in
20 or caused the conduct constituting sophisticated means,
21 increase by two levels. So a two-level increase for
22 sophisticated means authored by the defendant him or herself.

23 And I've read a ton of Sixth Circuit cases on it,
24 including the *Tandon* case, which that involved a false return
25 and cash, the use of cash from accounts. That case said,

1 well, you don't necessarily have to find an individual
2 sophisticated or especially sophisticated or complex. It
3 means you can look at the totality of the scheme.

4 I think to some extent that's an expansion beyond the
5 language of the commentary, but that's what the circuit judges
6 have said. In fact, in one case they called it an
7 expansion or a broadening of the analysis. But that's where
8 they have it, that you can judge the whole of the crime for
9 adequate sophistication.

10 I read *Masters*, a multi-prong fraud operation that said
11 the series of behavior, series of conduct can contribute to a
12 finding of sophistication.

13 The *Pierce* case I read as well. I think that's the case
14 that said the view's looked at more broadly in the Sixth
15 Circuit because of the ability to judge the totality of the
16 scheme.

17 The *Rupp* case defines sophisticated to mean highly
18 complex, refined, or developed, and there listed a series of
19 attributes that could be sufficient to trigger the
20 enhancement. That would include the creation of false
21 substantiating or covering documents to help conceal or make
22 appear legitimate the fraudulent conduct, layered
23 transactions, transactions layered in accounts to make tracing
24 more difficult, fictitious or sham entities, multiple account,
25 dormant account usage was an example, and concealment through

1 post hoc documentation.

2 And in the *Rupp* case, the things that were adequate were
3 false insurance certifications, fictitious identifying
4 documentation, dormant account use, and fraudulent bank
5 documents, along with a fictitious website.

6 And then the *Vysniauskas* case I also read had use of cash
7 which is non-traceable once it hits the street as a factor,
8 false documentation, and then a repeat series of acts. So the
9 frequency, intensity, repetition of acts also contributed.

10 I did read *Montgomery* as well. *Montgomery*, a completely
11 fraudulent creation of a BP Horizon claim by somebody in
12 Michigan claiming a business operation in the Gulf. Total
13 fabrication. It involved multiple states, false I.D.
14 documents, false documentation of business performance to
15 substantiate the claim loss. Some of those things certainly
16 echo in this case.

17 Well, what I've wrestled with is this issue of how to put
18 this case at the correct tier. It's a fraud case with
19 aberrant deception, no doubt about that. There were acts
20 undertaken by Ms. Harris that contributed to execution of the
21 scheme, contributed to concealment of the scheme. Were they
22 complex or intricate? Were they especially complex or
23 intricate enough to be labeled sophisticated?

24 You know, I read the Sixth Circuit case law on it and,
25 you know, I've summarized what they say, and it is difficult

1 to find a scenario where somebody has created false
2 documentation, false justification, false cover and not been
3 found to properly receive the two points.

4 Here it is important to note that there's not just one
5 application at issue, there's not just one entity. The scheme
6 it seems discovered this watering hole for money, and the
7 Harrises thought, well, gosh, all we have to do is say we're
8 an entity and say this was our performance and say this is how
9 many employees we had and the money is going to flow. That's
10 what happened.

11 To accomplish that, to facilitate that, there had to be
12 contact emails. Those were created. The documentation shows
13 many of those emails were created at or after the fact. That
14 gives a sheen of legitimacy. But we all know they were really
15 created at that point in time.

16 The new bank accounts. These are supposedly existing
17 entities with financial performance, yet they didn't have bank
18 accounts. So to create a receptacle for the funds, the
19 Harrises go to the bank, create these bank accounts, they
20 receive the wires from SBA. But an existing business, of
21 course, would have representative bank accounts. They, you
22 know, created those to facilitate the fraud. And, you know,
23 that's not one entity. Again, that's multiple entities going
24 through the same MO.

25 The post hoc business formation. Certainly the fact that

1 the Harrises are representing to the government that Turtle
2 Doves and North Side Market are existing but they've never
3 been formed, they're not formed until after the application,
4 that's a way to give an air of legitimacy and give some
5 documentation and validation that otherwise, you know, is kind
6 of a facade, but that's what the Harrises did.

7 The false tax forms, certainly concerning. The illusion
8 that there's money behind the scenes for Ruby Bailey, the
9 illusion that Turtle Doves has a past and a financial
10 performance and the tax return is either delayed or extended
11 or supposedly filed but never actually received by the IRS,
12 that's concealment conduct that has certainly some
13 sophistication to it under the case law.

14 The cash flow. You know, the government -- they're not
15 hidden transactions in that the payee is known. The check is
16 going into a payee account. But from that point, much of the
17 money got taken out in cash. And I went through the accounts.
18 A significant chunk of the money went out as cash withdrawals.
19 And, you know, once funds are traced to the point of becoming
20 cash, then the tracing stops. There's no way to then go and
21 say what happened to these funds. Were they spent on
22 legitimate entity expenses, the point of EIDL, or not, and,
23 you know, we know the answer is not because of the way some of
24 those funds got spent the testimony showed.

25 But in terms of the intricacy, when you take funds and

1 you enter them into the cash realm, then there's no way for
2 anybody to trace them from that point.

3 So all those things go into the mix. I think it's a
4 close call. And I think if I just were deciding it based on
5 the language of the guideline and the language of the
6 commentary, I might be reluctant to find the two points apply.
7 But when I read the cases and what the cases consistently say
8 are adequate to substantiate and carry the government's
9 burden, I mean, I just have to say the number of entities
10 involved, the number of steps taken with respect to each to
11 show validation falsely, and then the post-determination
12 conduct, the circulation of false tax documents and the filing
13 of a false tax document in an effort to justify what the
14 applications show, all those things, looking at it together,
15 which the Sixth Circuit says that the Court really should do,
16 I am going to find that the two points properly apply.

17 Because the number of transactions, the series of
18 conduct, and the steps involved in each, those do show a
19 special level of complexity or intricacy as the case is cast
20 that those terms do show the level that's adequate to warrant
21 the two points applying. So I will overrule that objection as
22 well.

23 Okay. I think that's all of the objections.

24 Is that right, Mr. Pillarsdorf?

25 MR. PILLARSDORF: Yes, sir.

1 THE COURT: I will then adopt the presentence report
2 findings and guideline calculations as accurate.

3 Ms. Harris, the conviction is for the eight counts of
4 wire fraud set forth in the indictment. The jury found you
5 guilty on each. That conduct occurred from May to July 2020
6 here in this district and elsewhere.

7 Let me talk about the boundaries of that sentence.

8 Congress is the lawmaker and defines what a federal crime
9 is and provides a statutory punishment for that crime. For
10 each of those counts, you could receive up to 20 years of
11 imprisonment, a fine of up to \$250,000, or twice the gross
12 gain or loss. The gross gain here I'm figuring at the 255
13 figure, so twice that would be the maximum fine that could
14 apply. And then you could face a total supervised release
15 term of not more than three years.

16 Supervised release is a period of supervision on
17 conditions imposed by the Court and overseen by the U.S.
18 Probation Office. The terms imposed are designed to keep a
19 defendant out of trouble, keep the community safe for that
20 supervision period. So three years would be the maximum
21 supervised release term.

22 Any time of imprisonment you got across the counts, the
23 Court would have to decide whether that would be concurrent,
24 meaning all served at the same time, or consecutive, meaning
25 one after the other. Any supervised release time you get

1 across the counts would be concurrent as a matter of law.

2 You also could -- as opposed to a term of incarceration,
3 you could receive a probation term. Probation is like
4 supervised release. It's supervision on conditions imposed by
5 the Court, but it comes at the beginning in place of
6 incarceration. So instead of going to prison and then being
7 supervised, Probation puts you on supervision to begin with in
8 lieu of a term of incarceration. But the idea is the same.
9 You've got to abide by court-imposed conditions for a period
10 of time. The probation term by statute, should the Court
11 elect that, would be one to five years. That's what the
12 statute says about the potential punishment.

13 Do you understand that?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: The other place I want to turn is to the
16 sentencing guidelines. That's basically what we've done the
17 whole hearing so far is talk about the guidelines. The
18 guidelines have an important role at sentencing. I have to
19 calculate the guidelines correctly. I have to consider them
20 all the way through. But at the end of the day, I'm not bound
21 to do what the guidelines say. They're just a recommendation;
22 they're advisory. So they have a place, they have an
23 influence, but they do not dictate the result, just one of
24 many statutory factors I have to take into account. But I do
25 have the duty to calculate them correctly. That's why we've

1 spent so much time on the guideline issues today.

2 The guidelines operate on two components, Ms. Harris.
3 One is the offense level for the crimes at issue. The offense
4 level is an effort to take everything that matters related to
5 the case, anything aggravating, anything mitigating, dump all
6 those things into a hopper, and one number comes out that is
7 the offense level for this series of crimes.

8 And it let's you -- and this happens in every federal
9 sentencing. It let's you ultimately distill a crime down to a
10 number, and that way you can compare that number across the
11 whole federal spectrum and so you can get insight into how
12 relatively serious this crime is, how it compares to other
13 federal crimes. That's an important understanding when it
14 comes to imposing fair and predictable sentencing.

15 So here a wire fraud starts in this context at a base of
16 7. You get 12 points added for the level of loss, and I made
17 a finding on the loss amount. That takes you to 19. You then
18 get 2 points for the sophisticated means and 2 points for the
19 obstruction. That takes you to a total of 23 points as the
20 offense level.

21 The other component is the individual defendant's
22 criminal history category. There are six categories, and
23 every defendant has got to be measured and put into the
24 correct category. And you go from category to category based
25 on the number of criminal history points that you have. And

1 the points you have depends on your personal record of prior
2 convictions.

3 So a defendant with more convictions, more serious
4 convictions, more recent convictions, time in prison, all
5 those things cause you to accrue points. The more points you
6 have, the higher up that ladder you go, from a I at the
7 bottom, which means no record or a very light record, all the
8 way up to a VI at the top, which is the highest category.
9 That typically means a long repeated record of significant
10 crime.

11 You're a Category I, the lowest category. So when I find
12 those components, I go to the guideline table, and a 23-I
13 carries an imprisonment range of 46 months at the low end to
14 57 months at the upper end. That's what the guidelines say
15 about the incarceration period. The supervised release period
16 would be one to three years under the guidelines, and the fine
17 range under the guidelines starts at 20,000 and goes to
18 200,000. That's the guideline range on the potential fine.
19 That's what the guidelines have to say in your case. Again,
20 nonbinding.

21 Do you understand that?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: Other than the objections I've already
24 dealt with, any additional disagreement with my findings or
25 calculations so far?

1 Ms. Smith?

2 MS. SMITH: No, Your Honor.

3 THE COURT: Mr. Pillarsdorf?

4 MR. PILLARSDORF: No.

5 THE COURT: Any departure issues to take up,

6 Ms. Smith?

7 MS. SMITH: No, Your Honor.

8 THE COURT: Mr. Pillarsdorf?

9 MR. PILLARSDORF: We're going to ask for a departure
10 downward, Your Honor.

11 THE COURT: But any guideline departures?

12 MR. PILLARSDORF: No, Your Honor. Not from the
13 guidelines, no. You've already ruled on those.

14 THE COURT: Well, I haven't ruled on any guideline
15 departures. So do you have any guideline departure issues to
16 raise?

17 MR. PILLARSDORF: No, Your Honor.

18 THE COURT: All right.

19 So now, Ms. Harris, we're going to turn to the sentencing
20 statute. And the guidelines, as I've said, we've given
21 attention to. The guidelines are thought of as a starting
22 point, a benchmark, for appropriate sentencing, they remain a
23 consideration, but the sentencing statute really is the driver
24 on sentencing. It gives me my ultimate task, and that is to
25 impose a sentence sufficient but no greater than necessary to

1 comply with specific purposes Congress has put in that
2 statute. So these are the goals of sentencing I'm told to
3 reach for, and the measure is, what is sufficient but no
4 greater than necessary to serve these goals' purposes to the
5 extent they apply in your case.

6 Here they are. I've got to reflect the seriousness of
7 the offense, promote respect for the law, justly punish you
8 for criminal conduct, deter or discourage additional crime
9 both by you and by the broader community.

10 So deterrence has two audiences. I'm talking to the
11 defendant, trying to discourage the defendant from a return to
12 crime. I'm also talking to the broader community, trying to
13 discourage others from engaging in comparable conduct.

14 I've got to consider the need to protect the public from
15 additional crime and provide the defendant necessary
16 correctional treatment, if any, in the most effective manner.
17 I have to consider the need to meet those purposes. I must as
18 a whole take into account the details of the crime, your
19 background, what the guidelines say, the kinds of sentences
20 available, and, importantly, the avoidance of what we call
21 unwarranted disparities among similar defendants.

22 That concept, Ms. Harris, is one of national fairness in
23 sentencing. And the idea is, if two people in America commit
24 the same crime, and they have comparable backgrounds, then no
25 matter where they might be in the country, they ought to get

1 about the same sentence, all else being equal.

2 So we're in federal court in Lexington, but the federal
3 system blankets all of America, and the idea is, the system
4 should have as a goal sentencing people for comparable crimes
5 with comparable backgrounds in comparable ways. That's
6 fairness, that's predictability, an important sentencing aim.

7 The guidelines exist to promote that idea. Congress
8 tells me to reach for that goal in the sentencing statute. I
9 do take it seriously. At the same time, what I'm trying to
10 avoid are unwarranted differences. So if there's something in
11 the case that justifies a different result, then that's okay.
12 That's not an unwarranted disparity.

13 And I always look at the individual I'm sentencing,
14 consider that individual person and decide whether something
15 about that person, pro or con, leads me to believe that a
16 conclusion that is different from, for example, what the
17 guidelines would call for is warranted in the particular case.
18 So there's attention between the overall fairness, the
19 guideline approach, and individual sentencing, but I try to
20 pursue both at the same time in a fair and rational way. I'll
21 do that here today as well.

22 I do have to always look out for restitution when I'm
23 sentencing a defendant. That means, is there a victim who's
24 been harmed? The SBA is the victim here. The loss amount is
25 defined, the unreduced loss amount is defined, and then the

1 ultimate loss to the agency is defined. So I do have to
2 include restitution as a component of the judgment. I'll be
3 prepared to do that as well.

4 So that's all on the table. I'm going to consider all of
5 that.

6 What I want to do is hear from the lawyers, and then,
7 Ms. Harris, I'm going to give you a chance to speak as well.
8 Let me hear first from counsel, and then I'll turn to you and
9 give you an opportunity to speak also.

10 Let me start with the prosecutor. Ms. Smith.

11 MS. SMITH: Thank you, Your Honor.

12 In looking at the factors under 3553(a) from the United
13 States' perspective, the need to reflect the seriousness of
14 the offense, promote respect for the law, and provide just
15 punishment is really the controlling factor. I think there is
16 also various serious concern of both specific and general
17 deterrence.

18 You know, abuse of government relief programs is a very
19 serious crime. This conduct took place in the height of a
20 global pandemic and really catastrophic economic consequences,
21 and that's why this money was there, and what happened here
22 was really taking advantage of that.

23 This isn't the only instance of fraud in this program. I
24 am sure that a huge amount of money went out fraudulently, and
25 the United States can only do so much to catch, detect, and

1 prosecute that conduct. So the need for the sentence to deter
2 not only Ms. Harris but others the next time something like
3 this happens or the next time, you know, any government
4 program gets taken advantage of.

5 You know, the guideline range here really reflects the
6 conduct. It reflects the dollar amount at issue, it reflects
7 the steps that were taken in committing the crime in terms of
8 the sophistication of it, and it reflects Ms. Harris's
9 testimony contrary to those facts. It also reflects her lack
10 of criminal history, her largely law-abiding life, so I view
11 that guideline range as the correct sentencing range.

12 As I mentioned in my memo, I think that there's not
13 really any factor that would prompt you to go outside that
14 guideline range. It also reflects, you know, the fact that
15 she hasn't accepted responsibility for this offense, which
16 isn't a factor that takes you outside of the guideline, it
17 just informs what the guideline range is.

18 So for all those reasons, I would ask that the Court
19 impose a guideline sentence in this case.

20 THE COURT: What are you asking for specifically?

21 MS. SMITH: You know, I generally start in the middle
22 and don't really see any reason to go up or down from that.
23 That range reflects the fact that Ms. Harris has had a
24 law-abiding lifestyle, that she's a Criminal History I. I do
25 credit the support of her family and community as seen

1 throughout the trial and here. Those are all positive
2 attributes.

3 But then I have the conduct itself, which is really
4 egregious. You know, not just committing this crime, but then
5 going to the FBI to complain about it, going to Lexington
6 Police to complain about it, suing a landlord you've never
7 paid rent for. You know, those are all aggravating things in
8 my view in how this crime was committed.

9 So sort of balancing those, I'd stay in the middle of the
10 range, which I think is 51 months.

11 THE COURT: And then the financial components of the
12 sentence, what would you say about that?

13 MS. SMITH: Yes. The numbers in the presentence
14 report, so the restitution number for Ms. Harris would be
15 joint and several with her co-defendant. And her number is
16 lower because she was not on the bank accounts for Grace
17 Christian Church, which is why she was not charged in those
18 wires and is not financially responsible for the loss for that
19 entity.

20 So her number is lower than his number. I think that's
21 the 110,000 figure. But it would be joint and several with
22 Mr. Harris. And then would ask the preliminary order of
23 forfeiture be finalized. And I don't think a fine is
24 necessary here. Our focus would be on getting restitution to
25 the SBA.

1 THE COURT: Okay. Because your memo said you wanted
2 a fine, but you're not asking for that?

3 MS. SMITH: Did it say I wanted a fine?

4 THE COURT: Unless I misread it.

5 MS. SMITH: Oh, I see that now.

6 Yeah, I would retract that, Your Honor. I do generally
7 ask for a fine in all cases, and the case law is that that is
8 part of the punishment here, but I think that was included in
9 error.

10 THE COURT: Okay. So the restitution, you're seeking
11 \$110,785.42, right?

12 MS. SMITH: Yes, Your Honor.

13 THE COURT: And the forfeiture amount for her is the
14 same, correct?

15 MS. SMITH: Yes.

16 THE COURT: I'm not making the defendant's argument
17 for the defendant, but what's your reaction on the criminal
18 history?

19 Because if she'd been a true zero, she would have gotten
20 two points off. She's blocked from that benefit by the
21 Illinois conviction. So how should I look at that?

22 MS. SMITH: I think that's how the guidelines are
23 supposed to work. I mean, she has a criminal history point.
24 She's not a zero-point offender and so she doesn't get the
25 benefit of those two additional levels.

1 THE COURT: I think that's true. But you said you
2 start in the middle and you see no reason to vary from the
3 middle. That doesn't strike you as a reason, looking at what
4 that conviction really was?

5 MS. SMITH: No. I mean, I think then would every
6 Criminal History I person have a bottom of the guideline
7 sentence? I don't think that that's correct. The fact that
8 she's a Criminal History I dictates where you are in the
9 guidelines, and the conduct informs where within that
10 guideline range you sentence.

11 THE COURT: Okay. Anything else?

12 MS. SMITH: No, Your Honor.

13 THE COURT: Thank you.

14 Mr. Pillarsdorf.

15 MR. PILLARSDORF: Your Honor, we consider the
16 guideline range, given Ms. Harris's history, to be very
17 excessive, 46 to 57 months. You know, in terms of the
18 relevant factors, to protect the public, Ms. Harris is not
19 going to go out and carjack anybody, she's not going to go out
20 and sell drugs.

21 These are financial crimes, we understand that, but I'd
22 ask the Court to consider the amazing array of letters this
23 Court received about Ms. Harris. She clearly has a following,
24 admirers, and the Court should consider the good deeds she's
25 done in the community.

1 No matter what you think about the Ruby Bailey operation,
2 there were, in my view, reputable, honest, credible people who
3 testified of the good she was doing for the community, and
4 they were basically unchallenged. I know they were brief
5 witnesses, but they were brief witnesses because I don't think
6 there was any reason to challenge their testimony, the good
7 she did in the community.

8 In terms of her criminal record, I still can't figure
9 that out. They said no additional records were available. It
10 was an Illinois charge that was charged at a felony, amended
11 to some misdemeanor probation. But she should not be in any
12 way, I think, penalized for that.

13 You know, having said that, Your Honor, I think a
14 sentence in the guideline range in this case would be
15 excessive. And I think that's why the Supreme Court, I think
16 wisely, said you're no longer bound, and I'd ask the Court to
17 greatly reduce a potential sentence below the 46 to 57
18 guideline range.

19 THE COURT: What do you say about the financial
20 aspects of the judgment?

21 MR. PILLARSDORF: I assume she's going to get 110,000
22 of restitution, Your Honor. I think that's in and of itself
23 enough. And it's pretty clear from her financial status,
24 she's basically insolvent or destitute at this point
25 money-wise. I don't think she has any ability to pay a fine.

1 I know they're not asking for that.

2 THE COURT: Well, the presentence report doesn't say
3 she's insolvent.

4 MR. PILLARSDORF: The way I read it, it does.

5 THE COURT: Do you agree the forfeiture should go
6 final, the preliminary should go final?

7 MR. PILLARSDORF: No objection to that, Your Honor.

8 THE COURT: All right. Anything else?

9 MR. PILLARSDORF: No, Your Honor.

10 THE COURT: Thank you.

11 All right, Ms. Harris. The lawyers have had their say.
12 This is your case. You have the right to speak on your own
13 behalf. We call that your right of allocution. It's a fancy
14 word. It just means you can speak straight to me and tell me
15 anything you want me to know or be aware of or take into
16 account. You don't have to speak. It's a right, not an
17 obligation.

18 Do you have somebody else you want to speak today,
19 Mr. Pillarsdorf? Somebody is raising her hand in the back.

20 MS. BAILEY: Good afternoon.

21 THE COURT: Hang on just a moment, ma'am.

22 Mr. Pillarsdorf, do you and Ms. Harris want her to say
23 something today?

24 THE DEFENDANT: I want to talk to him.

25 THE COURT: Ms. Harris, you and Mr. Pillarsdorf

1 confer. If you want her to speak --

2 THE DEFENDANT: May I talk to him first, Your Honor?

3 THE COURT: That's what I'm saying. Talk to him
4 first.

5 (Mr. Pillarsdorf confers with the defendant.)

6 THE DEFENDANT: Well, Your Honor, thank you for this
7 opportunity --

8 THE COURT: I'm sorry. Just one thing at a time.

9 So Ms. Bailey has had her hand back up there wanting to
10 speak. Do you want me to hear from her, or do you want to
11 speak for yourself?

12 THE DEFENDANT: I'm going to speak for myself.
13 That's my mother.

14 THE COURT: Thank you, ma'am. I'm not going to hear
15 from you today. I appreciate you being here.

16 MS. BAILEY: I'm sorry for disrupting.

17 THE COURT: That's quite all right. Thank you,
18 ma'am.

19 All right. Ms. Harris, back to what I was saying to you.
20 It's your opportunity, not your obligation. I'm glad to hear
21 from you. It's not going to hurt you if you don't speak, but
22 I do welcome your input. And you can go right ahead as long
23 as you want to talk.

24 THE DEFENDANT: Well, I thank the Lord for this
25 opportunity right now, and I understand what has transpired.

1 I don't know where to stand in it, but I appreciate it. And I
2 see that you're fighting on my behalf, my lawyer. I really
3 don't know where to go with this, but I do ask for the
4 leniency of the Court.

5 I do work and do a lot of stuff. I understand that the
6 papers and everything are stacked against me. I understand
7 that, Your Honor. But I do work in the community. I
8 understand that it's not believed that I do, but I do work,
9 and I would like to continue to be in the community to work
10 and help.

11 I do have a mother that I do have to take care of and a
12 mother-in-law. I do have a grand baby that I do help out.
13 You didn't get that letter from Danny, but Danny did write a
14 letter stating that I tend to help her with my grand baby as
15 well.

16 THE COURT: Who is Danny?

17 THE DEFENDANT: Danny is the mother of my grand baby.
18 Danny Florez. She's not here today because she had to watch
19 the baby. But normally I do help her as well.

20 And I do have a business that's in Versailles, Kentucky
21 that I would like to continue to be there to be able to make
22 sure my business continue on. I've been there since 2015. So
23 I definitely would like to see if the Court would have mercy
24 on us to make sure that I'm able to maintain that as well.

25 And I do continue to work in the community with the Ruby

1 Bailey Family Service Center and all the others. But I would
2 like to have the mercy of the Court to be able to be here to
3 continue on and not for just my business to go completely
4 without care.

5 So I don't know really -- I didn't write up anything. I
6 just don't know what to say exactly, but I'm just trying to
7 reach out to let you know that I'm looking for leniency from
8 the Court today.

9 THE COURT: Thank you very much, ma'am.

10 Ms. Smith, anything more you want to say?

11 MS. SMITH: No, Your Honor.

12 THE COURT: Mr. Pillarsdorf?

13 MR. PILLARSDORF: No, Your Honor.

14 THE COURT: All right. It's 12:45. Here are the two
15 options: We can take about a 20-minute break, and I can come
16 back and announce the sentence at that point, or we can break
17 for a little bit longer and come back, say, 1:30, maybe give
18 folks time to get lunch.

19 Mr. Pillarsdorf, I'm going to let your side make the call
20 on it.

21 MR. PILLARSDORF: Whatever you want, Your Honor.

22 THE COURT: Any preference, Ms. Smith?

23 MS. SMITH: No, Your Honor.

24 THE COURT: So I'm going to break for about
25 20 minutes and come back and announce and explain my sentence

1 at that point. So let's break until about 1:05.

2 Thank you.

3 (Recess taken at 12:47 p.m. until 1:08 p.m.)

4 THE COURT: We've reconvened with counsel present,
5 Ms. Harris present as well. I appreciate everybody's patience
6 as I considered the appropriate sentence in this case. I
7 appreciate the advocacy through the case.

8 Ms. Harris, you've got a lot of folks here in the
9 courtroom with you, and I'm glad to see that. I know you've
10 got a very supportive family and folks in the community
11 supportive of you. I read their letters with great interest
12 and care. Good to see them here supporting you today.

13 I've got to sentence in this sad, disappointing
14 circumstance. I often tell people, this courthouse and all
15 courthouses exist by and large based on bad human
16 decisionmaking, and that's what this case is. It's a
17 circumstance of bad criminal decisionmaking by you and
18 Mr. Harris, and that's what brought you before the Court,
19 that's what the jury heard the entire tale of and reached its
20 decision, and so today is judgment day on that.

21 I have to sentence you, and when I sentence, which I do,
22 you know, week in and week out, I'm always careful to remind
23 myself of my correct role. There are three branches in
24 American government. I'm representing one of the three. The
25 lawmakers, Congress, that branch defines what the crime is.

1 It says a lot about sentencing, including the maximum
2 components. Congress created the Sentencing Commission.
3 Congress wrote a sentencing statute telling me what to
4 consider and what goals to pursue, and I listen to the
5 lawmaker. I'm bound by the law like you are.

6 The executive branch is the president through the
7 attorney general down to the prosecutor here in this
8 courtroom, Ms. Smith. That branch decides who to prosecute,
9 what crimes to pursue charges on, represents the government in
10 litigation before the Court.

11 The third branch, the judiciary, that's my branch. We
12 just judge the cases that come before us. No active role.
13 Passive recipient. We judge the cases. And in judging the
14 cases, here you today, I've got to do it in a faithful way
15 under the law. I don't just come out and, you know, do
16 whatever I think is right. It's much more regulated than
17 that. End of the day, I've got to exercise some judgment.
18 But it's not freewheeling. It's part of a system of checks
19 and balances, and the branches have got to maintain their
20 correct lanes for the system to work. So I'm endeavoring to
21 do that today.

22 Many sentencings I don't have a trial, it's a guilty
23 plea. Not the case here. This case was hard fought. Tried
24 it back in March. The jury, I thought, paid attention,
25 listened carefully, thoughtfully to the proof, and ultimately

1 made its decision. I'm going to, of course, sentence with
2 respect to the jury's work in the case.

3 My focus is on the purposes of sentencing. What sentence
4 is needed here to effectively but not excessively serve the
5 purposes that apply? All the factors I've got to consider
6 really are meant, in my view, to help make the decision proper
7 and accurate under that purposeful approach.

8 I read the letters carefully. I respect the people that
9 wrote those letters. I would say, the authors of those
10 letters, none of them sat through the trial and none of them
11 have seen the proof. Their authorship almost completely is
12 based on their relationship with you and their affection for
13 you and their beliefs about you. All those things they're
14 entitled to sincerely hold. And I respect that your life is
15 not -- it doesn't distill down to the wire fraud that we're
16 here about. You've lived a much longer, much deeper life than
17 this criminality. But I would say, those writers, they're
18 looking at the body of your life and pretty much ignoring what
19 I learned within the confines of this courthouse.

20 I got a letter today from a group that calls this case a
21 miscarriage of justice. What I would want to say to that
22 group is, you can believe whatever you want. It's America.
23 You can take whatever position you want, have any opinion you
24 want. This case is about the theft of over a hundred thousand
25 dollars from the taxpayers. That's what happened. And it was

1 meant to be a whole lot more than that. But that's the money
2 that you got and spent before the SBA could diagnose what had
3 happened. So people can not feel good about the verdict or
4 feel good about the verdict. It's a sad verdict, but it's an
5 accurate one and well substantiated under the record.

6 So I've got to sentence based on the conviction, the
7 eight counts of wire fraud, all implementation of a scheme
8 intended to defraud.

9 The purposes include reflecting the seriousness of the
10 offense. This is a high-dollar fraud against a government
11 benefit program. The sentence has got to reflect the
12 seriousness of the underlying conduct. Each of those counts
13 could get 20 years. I'm not going to do anything like that,
14 but that's the kind of territory you're moving in when you
15 commit wire fraud.

16 Every time you do it, every transmission, every wire is
17 an act that is criminal and exposes you to 20 years in federal
18 prison, and it's serious. And the dollars show it, and the
19 law shows it, and the behavior shows it, so the sentence has
20 got to match the gravity of the criminal conduct.

21 Respect for law. You know, you're kind of a paradox, a
22 conundrum, Ms. Harris, because, I mean, I can tell just
23 watching the record and watching the testimony and watching
24 you, listening to the community people, you're a capable,
25 intelligent person who has had accomplishment and has gone

1 through life often investing in others. I mean, I believe
2 that to be true.

3 You have lived a life, this incident aside, essentially
4 free of crime. That shows that you have respect for
5 institutions, you have respect for the boundaries of the law.
6 That's all positive. But this case is a significant detour
7 from the way you've lived most of your life.

8 I've got to promote respect for the law. That means
9 obeying the law, abiding by the law, living within the law in
10 all contexts, not most of the time, all of the time. And this
11 decision to step away from a law-biding life, which seems like
12 something of an aberration -- maybe the stress of COVID
13 contributed to it, maybe it was simply opportunistic in
14 stumbling on this opportunity and realizing it could be
15 exploited. I don't know. I can't look into your soul and
16 know that. But it is conduct directly contrary to the
17 principles of law, so I've got to check that.

18 And I'm especially worried about it and focused on it
19 because of what happened at trial. The behavior at trial
20 included testimony in front of this Court and jury that was
21 false. It was repeatedly false. I found that it was
22 intentionally false material. And the jury, to its credit,
23 saw it for what it was, rejected it, and convicted you.

24 But that doesn't deal with what happens, what the effect
25 is, how the system should respond when a witness commits

1 perjury and obstructs justice, and so it's got to register on
2 the result today.

3 Punishment. There's got to be a punitive component to
4 the decision to commit crime. You made not a one-weak-moment
5 bad decision; you crafted a scheme. It had multiple
6 iterations. It involved multiple steps across multiple
7 platforms over a period of time. So that delving into
8 criminality has got to cost you in a punitive way. There's
9 got to be a sharp cost for the decision to engage in that type
10 of crime.

11 And, you know, frankly, every defendant is entitled to go
12 to trial. I'll respect that to my core as a judge. In
13 Article 3 the Constitution protects it. So that's your right.
14 But as I said earlier, you don't have a right to get on that
15 witness stand and pedal falsehoods. So that conduct, you
16 know, elevates in my mind the punishment, respect for the law,
17 gravity, needs that, you know, are self-evident but are
18 heightened because of those characteristics.

19 Deterrence. Your past doesn't tell me you should need
20 significant individual deterrence, but the community has got
21 to hear that these kinds of crimes are going to come with a
22 bitter harvest, and people who are out there targeting the
23 government, taking advantage of programs, stealing benefits,
24 there's a cost for that, and it's got to be sure and swift and
25 sharp.

1 And I'm certainly talking to the broader community. I
2 want the world to know that if you're going to go steal from
3 the taxpayers in this district that judgment is going to come
4 for that at some point down the road. I'm hoping that will
5 turn some folks away from that choice. I don't think most
6 people need it, I think most people are self-regulating on,
7 you know, honest conduct, but there's a band of our society
8 without a doubt that if they see a weak point, they're going
9 to stress it, and I think that's what happened here. That
10 group has got to hear a contrary message.

11 Protection. You don't have a history of crime. You
12 don't have a history of being destructive to the community. I
13 don't feel like protection is a significant issue here.

14 You know, I don't see any accountability. I don't see
15 any responsibility or remorse. That gives me some concern
16 about, you know, what your attitude is going to be in the
17 future. But, you know, I'm judging the whole record and the
18 whole person, I'm not significantly motivated by a protective
19 desire, especially given the age of the crime, your
20 performance on bond. Those things don't signal to me that
21 you're an ongoing risk.

22 You don't have treatment needs. Unlike most of the
23 defendants I see, Ms. Harris, you don't have a long list of
24 vulnerabilities and frailties. And that's good. That's good
25 to see in terms of your stability. So treatment is not a

1 significant factor here.

2 The factors I've considered do include the guidelines.
3 We've talked about them a lot. So they have an influence.
4 They are a factor the Court must consider, and they're a
5 benchmark, a measurement, for appropriate sentencing. The
6 Supreme Court calls them a starting point, so I've got to
7 consider them. The guidelines have got to have a voice.

8 And I always evaluate whether I should vary, go away from
9 the guidelines. And I can always vary subject to a statutory
10 limit. I can go above the guideline range, I can go below the
11 guideline range, I can sentence within the guideline range.
12 So I consider it in every case. Part of it is the exercise to
13 remind myself analytically that the guidelines aren't binding,
14 so I don't treat them as binding, but I do treat them as
15 having a place at the table.

16 And what I'm told by the appellate courts is, a sentence
17 under 3553, if you're going to vary from the guidelines,
18 you've got to have a reason, something you can lean on and
19 point to that justifies displacing the guidelines. So
20 something about the case or the circumstances or the person
21 that says the guidelines, while they might normally provide
22 the measure, in this case do not. So I always go through that
23 analysis.

24 Is there something here that distinguishes the
25 guidelines, that warrants a result outside the guidelines

1 either direction? And I've done that here. I've listened to
2 Mr. Pillarsdorf's argument. His variance argument,
3 essentially it's a combination of Ms. Harris has been a good
4 person, she's done community work, people in the community
5 support her, the guideline number is too high, and she ran the
6 business more with her heart than with her head, some
7 combination of those principles.

8 I've listened to it. I've considered it. I've
9 considered it against the trial record, what the jury found
10 and what I saw and heard. I've considered whether a variance
11 is appropriate.

12 There are aspects of this record that are sort of pushing
13 pressure up, pushing up on what the purposes call for. Those
14 include respect for the law within this crime and case, the
15 need for punishment, the need to reflect the seriousness of a
16 fraud scheme that also includes as it's tale significant
17 perjury before the Court.

18 All those things are blinking lights saying to the Court,
19 do not vary, do not vary down, it should be a guidelines
20 result. That lack of accountability, the need for punishment,
21 those things are sharp points to be addressed in the ultimate
22 sentence.

23 The nature and circumstances. I've talked some about
24 this. It is important to note, I went through the
25 applications, and, you know, knowing what the record shows

1 about the operation of these entities -- and Ruby Bailey
2 historically versus what was happening in '19, Ruby Bailey has
3 some footprint. The other entities, North Side Market,
4 Turtle Doves, American Workhorse, the church, which is really
5 Mr. Harris's issue primarily, but those business entities, if
6 you add up just what those were seeking in those applications,
7 the foundation for what they were seeking, Ms. Harris is
8 claiming over a million dollars in revenue from 2019 to 2020,
9 that those entities, those nonexistent, largely nonexistent
10 entities grossed a million dollars in 2019.

11 I mean, it's a fiction, and she relied on that fiction to
12 seek, you know, what were public funds in an emergency
13 designed to help taxpayers, designed to keep businesses
14 afloat, keep employees paid, keep the lights on and the entity
15 in a status to survive the pandemic.

16 And, listen, that was a tough time in America, no doubt
17 about it. We all lived it. I think there's a broad area of
18 grace for how hard that was on people. And if that's what
19 this was about, I don't think we'd be in a federal courtroom.
20 This was about taking advantage, taking advantage, presenting
21 fictitious facts, supporting statements, history in an effort
22 to grab public cash. That's what the case is about.

23 And there was, as I found, complexity in that intricacy
24 sufficient to warrant aggravation, perjury sufficient to
25 warrant aggravation, no responsibility acceptance, no remorse,

1 blaming others or flat denial is what the record shows.

2 That's fine, the defendant can take whatever position she
3 wants, but I'm going to call it for what it is. Those are
4 aggravating components in this record.

5 Now, there are mitigators as I look at Ms. Harris, and
6 I've commented on some of them. I would say this about her
7 criminal record. She's Category I. She's got the one
8 Illinois conviction, which the way it was handled, two-year
9 probation, shortened probation. You know, that offense
10 counts. It blocks her from getting the two points off as a
11 true zero. Ms. Smith is right, that's an accurate guideline
12 calculation. But on the scale of record, it's very thin and
13 very light. So she doesn't get that benefit, but, you know,
14 I'm always going to evaluate what is blocking this person from
15 the benefit and the solidity of that.

16 The letters I've read. There are mitigating components
17 to that that I've commented on. The JCIN figures, not argued
18 by the defense, but I always look at that. And, you know,
19 across the country, wire fraud defendants, 250 of them with
20 23-I figures are not getting 46 to 57. On average, they're
21 getting lower, 35, 36 months.

22 Now, I don't sentence to the average, but that kind of
23 tells you something nationally about a Court's views of how
24 the guidelines are shaking out in wire fraud cases. But what
25 I don't have, though, is how many of those went to trial, how

1 many involved no acceptance, how many involved a perjury
2 component, sophisticated means component. I don't have that.
3 But it's at least worth knowing that typically courts do drop
4 a bit in this context relative to the guidelines. That's what
5 the numbers would tend to show.

6 I noted Ms. Harris's bond compliance, which is positive.
7 The crime is four years old, and nothing in the interim of
8 concern that I've seen. That's helpful when it comes to
9 things like danger and ongoing respect for the law at least.
10 That's helpful to her.

11 The tenacity of the Harrises' claim here, sort of being
12 found out and not throwing their hands up and saying,
13 shouldn't have claimed this, here's the money back, having the
14 opposite reaction, digging in, that says something. That's
15 sort of how the case has been defended, and, you know, it goes
16 into the mix. It's not, Oh, gosh, I made a bad decision, I
17 misrepresented things, how can I make it right. No. It's
18 really going into attack mode, and that's notable.

19 And I just have to say, the Harrises to whatever degree
20 involving their children is of concern to me, their adult
21 children now at least. But their daughter was on one of those
22 applications. That's, you know, putting a child in peril in a
23 financial circumstance. It's certainly at least worrisome in
24 terms of potentially exposing even an adult child. So at
25 least something that seems worth noting to me.

1 So what should the result be? The aim is a sentence
2 sufficient but no greater than necessary to meet the statutory
3 purposes. As I've related, the max is 20 years per count.
4 The guideline range is 46 to 57, and the government is at the
5 midpoint, about 51 months, and the defendant has sought a
6 variance down potentially all the way to a probationary term.

7 I've surveyed the full record and grappled with it. The
8 variance case here really is that the numbers are excessive,
9 that the guidelines are excessive, that the defendant's done
10 good in the community, and that a variance would be
11 appropriate.

12 I normally am very willing to vary on first-time
13 offenders who have not done any time before in custody because
14 I think that's going to have, you know, much more of an
15 impact, so normally I'm very open to exploring a variance. In
16 this case, the obdurate falsity through the testimony and
17 otherwise in the execution of the scheme and concealment,
18 those things on this record just are strong markers against
19 varying, as are the stark need for the sentence to address the
20 gravity, respect for law, and punishment purposes, as well as
21 general deterrence.

22 And as deeply as I considered it, this is not a case
23 where I'm willing to vary. I don't think it's appropriate. I
24 am going to go, though, to the bottom of the guideline range
25 and impose a custodial sentence of 46 months. That's going to

1 be the result today. The Court also will order restitution in
2 the full loss amount as stated in the presentence report.
3 That will be payable through the clerk to SBA.

4 I'm going to make Kelly Harris responsible for the full
5 amount that she had a hand in, the 110,000 and change. So
6 she'll be fully on the hook for that amount. The preliminary
7 forfeiture order also will go final as it relates to Kelly
8 Harris in the amount stated in that order. I'm not going to
9 fine her. I think the other financial components and the
10 carceral term are sufficient, so I will not impose a fine.

11 The BOP period. I am going to recommend that she
12 participate in appropriate educational and vocational
13 training, that she participate in a mental health screening
14 and be given access to appropriate treatment, and that she be
15 designated to the facility closest to her home that the BOP
16 can get her.

17 I assume that's her request, Mr. Pillarsdorf?

18 MR. PILLARSDORF: Yes.

19 THE COURT: That will be the recommendation.

20 Did you have a supervision recommendation, Ms. Smith?

21 MS. SMITH: No, Your Honor. I'd defer to the Court.

22 THE COURT: It's one to three years. I'm going to
23 impose two years of supervision.

24 So for the first two years post custody, Ms. Harris, I am
25 going to put you on supervised release. During that period,

1 you're going to have to abide by court-imposed rules that are,
2 again, designed to keep the community safe and keep you out of
3 trouble.

4 It's important that you follow those rules, and you've
5 done that on bond. You have to continue to follow the rules
6 that I'm going to impose today throughout that supervision
7 period. If you don't, you're putting your liberty back at
8 risk.

9 And if you violate or are accused of violating a
10 condition, I'll bring you back to Court and we'll have a
11 hearing on that. That's very informal. The upshot is, the
12 government has the burden of proving any violation. It has to
13 prove a violation by a preponderance of the evidence at that
14 hearing. But it's informal, the rules of evidence don't
15 apply, so it's a pretty low burden for the government. You'll
16 have counsel, but there's no jury. The Court makes a
17 decision.

18 If I find a violation, Ms. Harris, I can revoke you and
19 send you back to the BOP for up to two years, then I can put
20 you back on supervision again for up to three years minus the
21 revocation. If you violate a second time, the same process.
22 It can cost you up to two additional years.

23 So the point is, just follow the rules diligently. Don't
24 commit any violations. That will protect your freedom going
25 forward.

1 That 46 months, of course, will be concurrent across all
2 the counts. The supervision term of two years will also be
3 concurrent across all the counts.

4 The conditions I'm going to impose include a set that are
5 mandated by Congress, so these are required conditions. The
6 other conditions I'm going to impose are ones reasonably
7 required to deter crime, protect the public, and provide you
8 access to any structure or programming. They're the minimum I
9 can impose and they do square with the guidelines.

10 The mandatory terms include the following: All these are
11 in the judgement. You can't commit any federal, state, or
12 local crime. You cannot unlawfully possess or use any
13 controlled substance.

14 I'm going to suspend the drug testing provision because
15 the defendant has no history of drug abuse.

16 You will have to make restitution as ordered, so I've
17 imposed a restitution judgment. So as ordered, you'll have to
18 make those payments. That would include a schedule. 20
19 percent of any amount you earn in custody. This is not a
20 limit on the government. It can otherwise seek to collect
21 against any assets, including deposits. But your earnings
22 inside, it will be up to 20 percent of those. And then once
23 you're out on supervision, we'll put you on a payment schedule
24 in consultation with Probation and assessment of your finances
25 at that point, and you'll have to comply with that payment

1 schedule. You'll also have to give a federal DNA sample.

2 The additional terms I'm going to impose include the
3 following:

4 You'll report to Probation as soon as you get out and
5 then as directed. You cannot travel outside your home
6 district without getting permission first from Probation. You
7 have to be truthful at all times with Probation. You have to
8 live in an approved location. There are mechanics for
9 relocating. If you need to move or relocate, there are
10 mechanics for doing that. Follow those. Probation can visit
11 you at any time. You have to let that happen. I will require
12 you to work full time at lawful employment.

13 You cannot communicate or interact with anyone you know
14 is engaged in crime or criminal activity. You cannot have
15 contact with anyone you know to be a felon unless you get
16 permission first from Probation to have that contact. I will
17 except Neal Harris from that rule, so you will be able to have
18 contact with him.

19 Is there anybody else in her family or circle,
20 Mr. Pillarsdorf, we need to talk about as an exception?

21 MR. PILLARSDORF: I can't think of any, Your Honor.

22 THE COURT: Do you want to confer with her?

23 (Mr. Pillarsdorf confers with the defendant.)

24 MR. PILLARSDORF: No, Your Honor.

25 THE COURT: Okay. If you're arrested or questioned

1 by law enforcement, you have to notify Probation of that
2 immediately.

3 You are a felon, Ms. Harris. You cannot at any point
4 from now on possess a firearm, ammunition, or destructive
5 device. During this period, you cannot have those things. Of
6 course, you also cannot have a dangerous weapon in your
7 possession, custody, or control.

8 I'm suspending condition 11 and condition 14 as
9 inapplicable.

10 If Probation deems you to be a risk to another person or
11 entity, it can give notice to that person or entity or require
12 you to do so. And essentially follow the instructions of
13 Probation throughout the period.

14 Finally, you cannot incur new credit charges or open new
15 additional lines of credit without Probation approval, and it
16 can only give approval if you're current on your restitution
17 payment schedule. And you have to give Probation access to
18 any requested financial information throughout the supervision
19 period.

20 I don't see any basis for a search condition.

21 Is the government requesting that?

22 MS. SMITH: No, Your Honor.

23 THE COURT: No community service in the case. I
24 don't think that's warranted. No fine as indicated.

25 There is a mandatory special assessment of \$100 per

1 count. Ms. Harris, that is going to be your obligation. That
2 will be \$800 total. That's in the nature of a court cost.
3 That's required, so that will be your responsibility in the
4 judgement. Forfeiture will go final.

5 I don't think the defendant's been in custody at all in
6 this case. Is that right?

7 MS. SMITH: That's correct, Your Honor.

8 THE COURT: So if she has like a processing day or
9 something that would qualify as custody, she would get that.
10 Otherwise, there's not a custodial credit issue.

11 Restitution will be as stated, and placement
12 recommendation will be as stated.

13 That's going to be the Court's judgment.

14 Do you understand the conditions you're going to be
15 under, Ms. Harris?

16 THE DEFENDANT: A little, Your Honor. I'm taking it
17 that I'm going to go into custody?

18 THE COURT: I'm not quite to that point yet. But
19 those were the conditions that are going to apply when you're
20 on supervised release.

21 Do you understand that?

22 THE DEFENDANT: On supervised release, yes, sir.

23 THE COURT: Post prison those will be the conditions
24 you're under.

25 Do you understand those?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: All right. Does either side request any
3 additional discussion of the basis of the Court's decision?

4 Ms. Smith?

5 MS. SMITH: No, Your Honor.

6 THE COURT: Mr. Pillarsdorf?

7 MR. PILLARSDORF: No, Your Honor.

8 THE COURT: Any objections not already made under
9 *Bostic* or otherwise?

10 Ms. Smith?

11 MS. SMITH: No, Your Honor.

12 THE COURT: Mr. Pillarsdorf?

13 MR. PILLARSDORF: No, Your Honor.

14 THE COURT: Mr. Pillarsdorf, did I fail to address
15 any of your variance arguments?

16 MR. PILLARSDORF: No, Your Honor.

17 THE COURT: I am going to have the clerk, Ms. Harris,
18 read you a notice concerning your right to appeal.

19 Go right ahead.

20 (The form entitled "Court's Advice of Right to Appeal"
21 was read aloud in open court by the clerk.)

22 THE COURT: Thank you.

23 Mr. Pillarsdorf, if you'll cover that with her again
24 after court, I'd appreciate it.

25 Ms. Harris, it's a 14-day deadline to timely appeal. So

1 to appeal, you've got to file a notice of appeal with the
2 clerk. That has to happen within 14 days of when the judgment
3 is entered.

4 That judgment will be entered, I think, before the end of
5 today, so you'd have 14 days from then to file that notice of
6 appeal. Talk to your lawyer about it. He'll follow your
7 instructions. But just be aware of that 14-day deadline to
8 timely initiate an appeal.

9 Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right.

12 So, Ms. Smith, I want to see if there's anything else we
13 need to take up on behalf of the government. And I do want
14 you to address the issue of her custodial status.

15 MS. SMITH: No other issues to take up, Your Honor.

16 Assuming there is an appeal, I would oppose bond pending
17 appeal. I don't think there's anything under the statute that
18 would qualify under 3143.

19 THE COURT: Okay.

20 Mr. Pillarsdorf, besides the custody issue we'll talk
21 about, is there anything else I need to take up today from the
22 defendant?

23 MR. PILLARSDORF: No, Your Honor.

24 THE COURT: Okay. So tell me your position on
25 custody.

1 MR. PILLARSDORF: Judge, she's been 100 percent
2 compliant. I'd ask that you give her a report date.

3 THE COURT: So here's the analysis under 3143.
4 "Except as provided in paragraph 2, the judicial officer shall
5 order that a person who has been found guilty of an offense
6 and sentenced to imprisonment be detained" -- and this assumes
7 the filing of an appeal, which has not yet happened, but it
8 is, I assume, anticipated. So that person must be detained
9 unless, "(a), the person clearly and convincingly shows she is
10 not likely to flee or pose a danger to the safety of any other
11 person; and, (b), the appeal is not for the purpose of delay
12 and raises a substantial question of law or fact likely to
13 result in reversal, a new trial, or a sentence that does not
14 include a term of imprisonment."

15 So tell me how you meet those standards, Mr. Pillarsdorf.

16 MR. PILLARSDORF: Your Honor, I think we have an
17 issue as to your guidelines rulings. I think Your Honor
18 indicated, at least as to one of them, it was a close call.
19 So we'd ask -- I think she's certainly not likely to flee, and
20 I'd ask that you give her a report date.

21 I don't know who will represent her on appeal. I really
22 can't address that. She probably will qualify for appointed
23 counsel.

24 THE COURT: So your argument would be that the
25 sophisticated means is close enough that that might be

1 substantial on appeal?

2 MR. PILLARSDORF: Yes, Your Honor.

3 THE COURT: All right.

4 What do you say, Ms. Smith?

5 MS. SMITH: I don't think it's a substantial issue on
6 appeal. I think the case law will support the application
7 here. But even if that were the case, it would require
8 resulting in a sentence that does not include a term of
9 imprisonment, and I don't think that that would be the case
10 even if sophisticated means didn't apply.

11 THE COURT: All right.

12 Any other argument, Mr. Pillarsdorf?

13 MR. PILLARSDORF: No, Your Honor.

14 THE COURT: So I think she would meet (b)(1)(A), and
15 I would be comfortable finding that she's not likely to flee
16 or pose a danger since she's been on bond the whole way
17 through, including since the jury verdict. So I think she
18 would meet (A).

19 It's just very difficult to meet (B) because you've got
20 to show a substantial question that's likely to result in
21 reversal, a new trial, or a noncustodial sentence. And I
22 tried the case. I don't remember there being an issue that I
23 had concern about on the substantiality and legitimacy of the
24 verdict. There was not a post-trial motion seeking a new
25 trial or raising an issue like that.

1 And even if I'm wrong on the sophisticated means, even if
2 I'm wrong on the obstruction, her guideline range would still
3 be custodial, because even a 21-I would be 37 to 46, and 19
4 would be 30 to 37. So even if I'm wrong on the things that
5 were contested, it seems to me she's certainly still going to
6 have a custodial term to serve. So, unfortunately, I believe
7 the statute does require that she be remanded to the marshal's
8 custody.

9 I see the marshal is present. I will direct that
10 Ms. Harris be taken into custody today to commence the service
11 of her sentence.

12 Anything else we need to take up, Ms. Smith?

13 MS. SMITH: No, Your Honor.

14 THE COURT: Mr. Pillarsdorf?

15 MR. PILLARSDORF: No, Your Honor.

16 THE COURT: Do you have any questions about today,
17 Ms. Harris?

18 THE DEFENDANT: No. Well -- no, Your Honor.

19 THE COURT: Okay.

20 THE DEFENDANT: No, I don't.

21 THE COURT: I, of course, will see Mr. Harris in a
22 week.

23 THE DEFENDANT: Wait, Your Honor.

24 THE COURT: Yes?

25 THE DEFENDANT: Is there any way that I could report

1 in and not have to go into custody today, to be with my family
2 to get things in order, please?

3 THE COURT: I certainly understand the desire for
4 that, Ms. Harris, but I just went through the statutory
5 analysis, and there's nothing in that that gives me authority
6 to release you at this point. No additional argument was
7 made, so I am going to put you in the marshal's custody.

8 I truly regret this circumstance in your life. I hope
9 you'll make it through the sentence in a positive productive
10 way and return to society and contribute to it, which you've
11 done most of your life, this difficult detour notwithstanding.
12 So you're going to have to pay this debt, emerge with that
13 debt paid, but there is a period to be paid for the crime, and
14 that's going to begin today.

15 Yes?

16 THE DEFENDANT: May I ask my lawyer a question?
17 Because I talked to him earlier about this. I wasn't sure of
18 it. But I thought there was a bail bond that I could apply
19 for or be a part of, a bond.

20 THE COURT: Do you want to talk to him?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: Go ahead.

23 (Mr. Pillarsdorf confers with the defendant.)

24 THE COURT: Anything else, Ms. Harris?

25 THE DEFENDANT: No. I just talked to him. He said

1 he'll talk to me after this and we'll work on something.

2 THE COURT: Okay. She'll be remanded to the
3 marshal's custody.

4 Good luck to you going forward.

5 That will conclude matters in this case for today and we
6 will stand adjourned.

7 (Proceedings concluded at 1:48 p.m.)

8 - - -

9

10 C E R T I F I C A T E

11 I, LAUREN I. GOOTEE, RMR, CRR, certify that the
12 foregoing is a correct transcript from the record of
13 proceedings in the above-entitled case.

13

14 /s/ Lauren I. Gootee
15 LAUREN I. GOOTEE, RMR, CRR
16 Official Court Reporter

December 10, 2024
Date of Certification

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(5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: Kelly Harris
CASE NUMBER: 5:22-CR-100-REW-01
DISTRICT: Eastern District of Kentucky – Central Division at Lexington

STATEMENT OF REASONS

(Not for Public Disclosure)

Sections I, II, III, IV, and VII of the Statement of Reasons form must be completed in all felony and Class A misdemeanor cases.

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

- A. The court adopts the presentence investigation report without change.
- B. The court adopts the presentence investigation report with the following changes: (Use Section VIII if necessary)
(Check all that apply and specify court determination, findings, or comments, referencing paragraph numbers in the presentence report.)
 - 1. Chapter Two of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to base offense level, or specific offense characteristics)
 - 2. Chapter Three of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility)
 - 3. Chapter Four of the United States Sentencing Commission Guidelines Manual determinations by court: (briefly summarize the changes, including changes to criminal history category or scores, career offender status, or criminal livelihood determinations)
 - 4. Additional Comments or Findings: (include comments or factual findings concerning any information in the presentence report, including information that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions; any other rulings on disputed portions of the presentence investigation report; identification of those portions of the report in dispute but for which a court determination is unnecessary because the matter will not affect sentencing or the court will not consider it)
- C. The record establishes no need for a presentence investigation report pursuant to Fed.R.Crim.P. 32.
Applicable Sentencing Guideline: (if more than one guideline applies, list the guideline producing the highest offense level) _____

II. COURT FINDINGS ON MANDATORY MINIMUM SENTENCE (Check all that apply)

- A. One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.
- B. One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below the mandatory minimum term because the court has determined that the mandatory minimum term does not apply based on:
 - findings of fact in this case: (Specify) _____
 - substantial assistance (18 U.S.C. § 3553(e))
 - the statutory safety valve (18 U.S.C. § 3553(f))
- C. No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE: (BEFORE DEPARTURES OR VARIANCES)

Total Offense Level: 23
Criminal History Category: I
Guideline Range: (after application of §5G1.1 and §5G1.2) 46 to 57 months
Supervised Release Range: 1 to 3 years
Fine Range: \$ 20,000.00 to \$ 200,000.00

Fine waived or below the guideline range because of inability to pay.

DEFENDANT: Kelly Harris
CASE NUMBER: 5:22-CR-100-REW-01
DISTRICT: Eastern District of Kentucky – Central Division at Lexington

STATEMENT OF REASONS

IV. GUIDELINE SENTENCING DETERMINATION (Check all that apply)

- A. The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range does not exceed 24 months.
- B. The sentence is within the guideline range and the difference between the maximum and minimum of the guideline range exceeds 24 months, and the specific sentence is imposed for these reasons: (Use Section VIII if necessary).
- C. The court departs from the guideline range for one or more reasons provided in the Guidelines Manual. (Also complete Section V)
- D. The court imposed a sentence otherwise outside the sentencing guideline system (i.e., a variance). (Also complete Section VI)

V. DEPARTURES PURSUANT TO THE GUIDELINES MANUAL (If applicable)

- A. The sentence imposed departs: (Check only one)
 - above the guideline range
 - below the guideline range
- B. Motion for departure before the court pursuant to: (Check all that apply and specify reason(s) in sections C and D)
 - 1. Plea Agreement
 - binding plea agreement for departure accepted by the court
 - plea agreement for departure, which the court finds to be reasonable
 - plea agreement that states that the government will not oppose a defense departure motion
 - 2. Motion Not Addressed in a Plea Agreement
 - government motion for departure
 - defense motion for departure to which the government did not object
 - defense motion for departure to which the government objected
 - joint motion by both parties
 - 3. Other
 - Other than a plea agreement or motion by the parties for departure

C. Reasons for departure: (Check all that apply)

- | | | |
|---|--|--|
| <input type="checkbox"/> 4A1.3 Criminal History Inadequacy | <input type="checkbox"/> 5K2.1 Death | <input type="checkbox"/> 5K2.12 Coercion and Duress |
| <input type="checkbox"/> 5H1.1 Age | <input type="checkbox"/> 5K2.2 Physical Injury | <input type="checkbox"/> 5K2.13 Diminished Capacity |
| <input type="checkbox"/> 5H1.2 Education and Vocational Skills | <input type="checkbox"/> 5K2.3 Extreme Psychological Injury | <input type="checkbox"/> 5K2.14 Public Welfare |
| <input type="checkbox"/> 5H1.3 Mental and Emotional Condition | <input type="checkbox"/> 5K2.4 Restraint Abduction or Unlawful | <input type="checkbox"/> 5K2.16 Voluntary Disclosure of Offense |
| <input type="checkbox"/> 5H1.4 Physical Condition | <input type="checkbox"/> 5K2.5 Property Damage or Loss | <input type="checkbox"/> 5K2.17 High-Capacity Semiautomatic Weapon |
| <input type="checkbox"/> 5H1.5 Employment Record | <input type="checkbox"/> 5K2.6 Weapon | <input type="checkbox"/> 5K2.18 Violent Street Gang |
| <input type="checkbox"/> 5H1.6 Family Ties and Responsibilities | <input type="checkbox"/> 5K2.7 Disruption of Government Function | <input type="checkbox"/> 5K2.20 Aberrant Behavior |
| <input type="checkbox"/> 5H1.11 Military Service | <input type="checkbox"/> 5K2.8 Extreme Conduct | <input type="checkbox"/> 5K2.21 Dismissed and Uncharged Conduct |
| <input type="checkbox"/> 5H1.11 Charitable Service/Good Works | <input type="checkbox"/> 5K2.9 Criminal Purpose | <input type="checkbox"/> 5K2.22 Sex Offender Characteristics |
| <input type="checkbox"/> 5K1.1 Substantial Assistance | <input type="checkbox"/> 5K2.10 Victim's Conduct | <input type="checkbox"/> 5K2.23 Discharged Terms of Imprisonment |
| <input type="checkbox"/> 5K2.0 Aggravating/Mitigating Circumstances | <input type="checkbox"/> 5K2.11 Lesser Harm | <input type="checkbox"/> 5K2.24 Unauthorized Insignia |
| | | <input type="checkbox"/> 5K3.1 Early Disposition Program (EDP) |

Other Guideline Reason(s) for Departure, to include departures pursuant to the commentary in the Guidelines Manual: (see "List of Departure Provisions" following the Index in the Guidelines Manual.) (Please specify)

D. State the basis for the departure. (Use Section VIII if necessary)

DEFENDANT: Kelly Harris
CASE NUMBER: 5:22-CR-100-REW-01
DISTRICT: Eastern District of Kentucky - Central Division at Lexington

STATEMENT OF REASONS

VI. COURT DETERMINATION FOR A VARIANCE (If applicable)

A. The sentence imposed is: (Check only one)

- above the guideline range
below the guideline range

B. Motion for a variance before the court pursuant to: (Check all that apply and specify reason(s) in sections C and D)

1. Plea Agreement

- binding plea agreement for a variance accepted by the court
plea agreement for a variance, which the court finds to be reasonable
plea agreement that states that the government will not oppose a defense motion for a variance

2. Motion Not Addressed in a Plea Agreement

- government motion for a variance
defense motion for a variance to which the government did not object
defense motion for a variance to which the government objected
joint motion by both parties

3. Other

- Other than a plea agreement or motion by the parties for a variance

C. 18 U.S.C. § 3553(a) and other reason(s) for a variance (Check all that apply)

- The nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1):
Mens Rea, Role in the Offense, General Aggravating or Mitigating Factors: (Specify)
Extreme Conduct, Victim Impact, Dismissed/Uncharged Conduct
The history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1):
Aberrant Behavior, Age, Charitable Service/Good Works, Community Ties, Diminished Capacity, Drug or Alcohol Dependence, Employment Record, Family Ties and Responsibilities, Lack of Youthful Guidance, Mental and Emotional Condition, Military Service, Non-Violent Offender, Physical Condition, Pre-sentence Rehabilitation, Remorse/Lack of Remorse, Other: (Specify)
Issues with Criminal History: (Specify)
To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense (18 U.S.C. § 3553(a)(2)(A))
To afford adequate deterrence to criminal conduct (18 U.S.C. § 3553(a)(2)(B))
To protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))
To provide the defendant with needed educational or vocational training (18 U.S.C. § 3553(a)(2)(D))
To provide the defendant with medical care (18 U.S.C. § 3553(a)(2)(D))
To provide the defendant with other correctional treatment in the most effective manner (18 U.S.C. § 3553(a)(2)(D))
To avoid unwarranted sentencing disparities among defendants (18 U.S.C. § 3553(a)(6)) (Specify in section D)
To provide restitution to any victims of the offense (18 U.S.C. § 3553(a)(7))
Acceptance of Responsibility, Early Plea Agreement, Time Served (not counted in sentence), Policy Disagreement with the Guidelines (Kimbrough v. U.S., 552 U.S. 85 (2007): (Specify)
Conduct Pre-trial/On Bond, Global Plea Agreement, Waiver of Indictment, Waiver of Appeal, Cooperation Without Government Motion for Departure

Other: (Specify)

D. State the basis for a variance. (Use Section VIII if necessary)

DEFENDANT: Kelly Harris
CASE NUMBER: 5:22-CR-100-REW-01
DISTRICT: Eastern District of Kentucky – Central Division at Lexington

STATEMENT OF REASONS

VII. COURT DETERMINATIONS OF RESTITUTION

A. Restitution Not applicable.

B. Total Amount of Restitution: \$ 110,785.42

C. Restitution not ordered: *(Check only one)*

1. For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
2. For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
3. For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
4. For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s)'(s) losses were not ascertainable (18 U.S.C. § 3664(d)(5)).
5. For offenses for which restitution is otherwise mandatory under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327 or 3663A, restitution is not ordered because the victim(s) elected to not participate in any phase of determining the restitution order (18 U.S.C. § 3664(g)(1)).
6. Restitution is not ordered for other reasons: *(Explain)*

D. Partial restitution is ordered for these reasons: *(18 U.S.C. § 3553(c))*

VIII. ADDITIONAL BASIS FOR THE SENTENCE IN THIS CASE *(If applicable)*

The Court sentenced Kelly Harris to achieve the purposes in § 3553(a)(2), to the extent they apply in light of all case circumstances. *See* § 3551(a). Pursuant to 18:3553(a), the sentence considers the nature and circumstances of the offense and the history and characteristics of the defendant; it also accounts for the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, and protect the public from further crimes of the defendant, while avoiding unwarranted disparity. The Court has reckoned its options among sentencing kinds and has regarded the non-binding guidelines and any apt policy statements. The Court made final its preliminary forfeiture order. Victim restitution in the full amount set forth in the PIR is imposed.

A jury convicted Harris of eight separate counts of wire fraud, a Class C felony. Her conduct is serious—Harris, in conjunction with her husband and co-defendant, submitted multiple falsified loan applications to obtain funds from an SBA loan (EIDL) program created to provide financial relief to small businesses amid the COVID-19 pandemic. In total, Harris stole \$255,100 from taxpayers and intended to steal much more. If successful, her fraudulent applications would have yielded \$451,453 in federal funds. The resulting sentence must match the gravity and seriousness of Harris's rank deception. The scale, complexity, climate at the time, targeting of taxpayer money, and persistence in dishonesty are issues of note.

While Harris's criminal record is minimal, the Court has plain concern about her respect for the law. During trial, Harris gave extensive perjurious testimony; that obstruction (largely in tune with the deception practiced relative to the offense itself) warranted an enhancement to her sentence. At no point, even in her post-conviction allocution, has Harris taken any responsibility for her deplorable crimes or expressed any accountability or remorse. The need to promote respect for the law is paramount and evident. This contrasts with a life otherwise largely within the law. Harris's generally clear record does impact the Court's view, but her mendacity before the Court must get attention. The sentence must also include a punitive component, a sharp, metered cost for this multi-step, multi-prong scheme.

Outside of the instant offense, Harris has largely lived a crime-free life, abating the need for specific deterrence. However, the Court must send a message to others that taking advantage of government relief programs will come with swift and weighty punishment. The need for prospective protection is not significant. Before and after trial, Harris has remained on bond in full compliance with all terms. Given her light criminal history, she does not present an ongoing risk. The need for treatment is not present in this case. Thus, some 3553 purposes have low applicability. Those that do apply, though (gravity, respect for law, punishment, general deterrence), shout for due recognition and representation in the result.

The record reflects some mitigators. For most of her life, Harris has lived in accordance with the law as an active and contributing member of her community. As her many letters in support indicate, Harris is a giving person with strong ties to her family and her community. She fully complied with her bond, and since the crime occurred (some four years ago), she has not engaged in any additional criminal activity. Regrettably, these crimes seem a significant divergence from her prior path. It is disappointing and relevant that Harris proceeded to lie to the Court and jury in defending the case. The many falsehoods, detailed at sentencing, show adherence to the fraudulent character of the scheme. Such behavior, evincing plain disrespect for system integrity as to this case, directly seasons the Court's view about an apt sentence.

The Guidelines place Harris at a 23/1, producing a range of 46 to 57 months. The Government sought a middle-of-the-guideline sentence of 51 months' imprisonment, while the defense requested a variance down below the guideline range, even to probation. A bottom-end sentence of 46 months followed by 2 years' supervision is the parsimonious result. The Court rejects a variance in this case, given the scope of the fraud scheme, the number of false entities, the economic harm, the degree of concealment that persisted post detection, the extent of the false testimony, and the lack of accountability. The need for accuracy as to gravity, just punishment, respect for the law, and general deterrence strongly counsel against a variance. However, the light record (really, a thin, single point), Harris's community/family support, and the fact that this is her first period of custody ease some of the sentencing-target intensity. This yields a bottom-range result. The sentence is sufficient but no greater than necessary to serve the § 3553(a)(2) purposes to the extent they apply. The term is adequately but not excessively grave, punitive, promotive of respect for the law, and generally deterrent. Further, a 2-year supervision term will appropriately provide oversight upon Harris's reentry into society, along with structure for financial repayment components. The Court declined to impose a fine.

Harris's crimes mark, one hopes in isolation, an unfortunate and aberrant period in an otherwise law-abiding life. The Court trusts that, after paying her necessary debt to society, Harris will return to the community as a productive and participatory member. Though the Court considered fully the variance arguments (largely, that Harris has done good things and that the guidelines are excessive), the Court declines the invitation. At bottom, this was a scheme of thorough and unapologetic dishonesty, producing a theft of significant public funds. The lack of candor extended to the testimony given at trial. Ms. Harris must be held to account, and the aggravated components of the offense keep the Court within the properly calculated guideline range.

DEFENDANT: Kelly Harris
CASE NUMBER: 5:22-CR-100-REW-01
DISTRICT: Eastern District of Kentucky – Central Division at Lexington

Defendant's Soc. Sec. No.: 346-72-2937

Date of Imposition of Judgment: July 1, 2024

Defendant's Date of Birth: 3/13/1968


Signature of Judge

Defendant's Residence Address: 201 Twin Shores Court
Lexington, Kentucky 40515

Honorable Robert E. Wier, U.S. District Judge
Name and Title of Judge

Date: 7.1.2024

Defendant's Mailing Address: Same as above