CASE NO. 22-3538

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

BRIAN HIGGINS

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

OPENING BRIEF OF APPELLANT BRIAN HIGGINS

MELISSA M. SALINAS (MI-P69388)
University of Michigan Law School
Federal Appellate Litigation Clinic
Jeffries Hall, Room 2058, 701 South State Street
Ann Arbor, MI 48109-1215
734-764-2724
salinasm@umich.edu
Counsel for Brian Higgins

ERICA ARENSMAN, RACHEL HARRINGTON, and NOAH HARRISON
University of Michigan Law School
Federal Appellate Litigation Clinic
Law Students on Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT REGARDING ORAL ARGUMENT

Appellant Brian Higgins requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Sixth Circuit Rule 34(a). The record in this case is lengthy and complicated, spanning thousands of pages. Oral argument will assist the Court in assessing the arguments regarding the district court's evidentiary decisions, calculation of restitution, and empaneling of the jury.

Furthermore, this appeal is litigated with the assistance of the University of Michigan Law School's Federal Appellate Litigation Clinic. Undersigned counsel intends to request this Court allow the students on the brief to argue this case. The Clinic's curriculum demands rigorous preparation, including review and moots by peers, professors, and practitioners. For these reasons, Higgins's oral argument is anticipated to be particularly well-prepared and useful to this Court's decision making. It will also serve an important educational value.

JURISDICTIONAL STATEMENT

Original jurisdiction was established through a multiple-count indictment in the Southern District of Ohio charging Brian Higgins with violating 18 U.S.C. §§ 1341 and 1343. R.5, Indictment, PageID#12–18. Higgins was convicted of three counts of mail fraud under 18 U.S.C. §§ 1341 and 1342 and two counts of retaliating against a witness, victim, or an informant under 18 U.S.C. § 1513(e) in the United States District Court for the Southern District of Ohio. R.150, TT Vol. VIII, PageID#2333–34. The district court sentenced Higgins to 36 months imprisonment. R.151, Sent. Hr'g Tr., PageID#2379. Higgins timely filed a notice of appeal. R.132, Notice of Appeal, PageID#1165. This Court has jurisdiction to adjudicate this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

In 2014, Brian Higgins lived in Dayton, Ohio. R.5, Indictment, PageID#12. Higgins ran multiple businesses, including a biohazard transporting corporation and several restaurants. R.148, TT Vol. VI, PageID#1988, 1994. He lived at a residence on Meeker Creek Drive ("the Meeker Creek residence"), in a house he purchased with his ex-wife in 2007. *Id.* at PageID#1996.

Nationstar Mortgage held the mortgage on the Meeker Creek residence. R.144, TT Vol. II, PageID#1485. In 2014, Nationstar bought a homeowners insurance policy on the residence from insurance company Assurant. *Id.* at PageID#1485.

Investigation and Arrest

In July 2014, a leaking fish tank caused significant water damage to the house. R.148, TT Vol. VI, PageID#2002. Higgins immediately began trying to fix the damage. *Id.* at PageID#2004. Among other work, Higgins removed electrical wiring, repaired drywall, and attempted to dry out the house. *Id.* at PageID#2004, 2007. He paid for these repairs in cash. *Id.* at PageID#2007–08.

Within days of the leak, Higgins also contacted Assurant Insurance and met with a claims adjuster. R.148, TT Vol. VI, PageID#2008. After inspecting the home, Assurant planned to give Higgins an estimate of the cost to fix the damage. *Id.* at PageID#2016. Assurant concluded it would take $132,613.14 to repair the house. *Id.*

at PageID#2016. Assurant dispersed funds to Nationstar, and Nationstar issued three checks to pay for the repairs. R.144, TT Vol. II, PageID#1574.

The adjuster instructed Higgins to find contractors to assist in damage repair. R.148, TT Vol. VI, PageID#2009. Higgins searched for a contractor and an acquaintance connected him with Mike Marshall. *Id.* at PageID#2011. Marshall and his colleague Scott Waters owned United Demolition Excavating & Site Management ("United Demolition"). *Id.* at PageID#2016. In early October, Higgins hired United Demolition to assist with the repairs. *Id.* at PageID#2015–16.

During the repair process, Marshall and Waters failed to reimburse Higgins for services and materials he paid for. R.148, TT Vol. VI, PageID#2041. Higgins spent several years attempting to get this money back. *Id.* at PageID#2052–53. After speaking with an attorney in 2020, Higgins filed a lawsuit against Marshall and Waters. *Id.* at PageID#2054–55.

Unbeknownst to Higgins, Marshall and Waters were both working as FBI informants during the time they assisted with his home repairs. R.148, TT Vol. VI, PageID#2056. After both men began working as informants, the FBI paid them for hundreds of hours of work unrelated to Higgins between 2013 and 2016. R.146, TT Vol. IV, PageID#1656–57.

In 2014, Marshall was working with the FBI on an unrelated investigation when Higgins hired him. R.146, TT Vol. IV, PageID#1643. Marshall then contacted

the FBI and alleged Higgins committed insurance fraud. *Id.* At the FBI's instruction, Marshall and Waters began recording their meetings with Higgins. *Id.* at PageID#1658. These recorded meetings continued through April 2015. *Id.* at PageID#1684.

Based on those recordings, the government filed criminal charges against Higgins at the end of 2018. R.5, Indictment, PageID#12. In the first of four indictments against Higgins, the government charged him with three counts of mail fraud and one count of wire fraud. *Id.* The indictments alleged Higgins submitted false information about his home repairs to the insurance company. *Id.* at PageID#15.

Prosecution and Pre-Trial Proceedings

While preparing for trial, Higgins filed a motion requesting funds for an expert fraud examiner to help review over 1300 pages of financial records. R.46, Mot. for Funds, PageID#253. The district court refused to authorize funds, even though the government later relied on its own fraud examiner to present its case at trial. Docket Entry: 09/30/2020.[1] In denying Higgins's request, the court failed to address the necessity of expert services and the prejudice that would result from lack of expert

[1] This is a September 30, 2020 text-only docket entry that appears between docket items 48 and 49.

help. But the district court granted Higgins's motion to appoint co-counsel, deeming the case "extremely difficult." R.48, Order on Mot. for Co-Counsel, PageID#262.

The government filed a pre-trial motion *in limine* to introduce evidence of prior acts under Federal Rule of Evidence 404. R.62, Mot. in Lim., PageID#381; R.63, Mot. In Lim., PageID#395. The alleged acts included liens on the Meeker Creek residence and a 2014 recording in which Higgins discussed ways to respond to hypothetical allegations of wrongdoing. *Id.* Higgins's trial counsel opposed the motion, arguing the court should exclude the prior acts as impermissible character evidence or, alternatively, exclude them because the prejudicial impact of the evidence substantially outweighed its probative value. R.68, Def.'s Resp., PageID#673-76. Nevertheless, the district court admitted the evidence. R.75, Order on Mot. in Lim., PageID#714–16, 720–24.

In December 2021, the government filed its fourth and final indictment. R.95, 4th Superseding Indictment, PageID#895. Three weeks before trial, Higgins's two trial attorneys moved to withdraw, citing a complete breakdown of the attorney-client relationship that would inhibit their ability to conduct an adequate defense. R.97, 2nd Mot. to Withdraw, PageID#913. The court waited over two weeks to hold a hearing on the matter and denied the motion, despite Higgins's and trial counsel's clear and unequivocal affirmation that the attorney-client relationship was no longer functional. R.103, Order Den. 2nd Mot. to Withdraw, PageID#1003.

Trial Proceedings

Jury selection for Higgins's trial began on January 10, 2022. R.143, TT Vol. I, PageID#1274. At the close of voir dire, Higgins objected that the jury was selected from a venire that was racially unrepresentative of the community. *Id.* at PageID#1419–27. The venire did not include a single Black potential juror, *id.* at PageID#1419–27, even though 13% of Higgins's community in the Southern District of Ohio is Black. U.S. Census Bureau, *QuickFacts,* https://www.census.gov/quickfacts/fact/table/US/PST045221 (last accessed Nov. 28, 2022). The district court proceeded to trial over Higgins's fair cross-section challenge. R.143, TT Vol. I, PageID#1429. Higgins also moved for a mistrial at the close of the government's case-in-chief, again citing an unrepresentative jury pool. R.148, TT Vol. VI, PageID#1978–79. The court denied the motion for mistrial. *Id.* at PageID#1979.

During the trial, the court excluded key portions of Higgins's insurance expert's testimony after wrongly concluding that the expert's opinions were inadmissible. R.102, Order on Mot. to Excl. Expert Test., PageID#989–93, 994–97.

Verdict and Sentencing

The jury convicted Higgins on three counts of mail fraud and two counts of retaliation. R.150, TT Vol. VIII, PageID#2333–34. The court sentenced Higgins to 36 months imprisonment. R.151, Sent. Hr'g Tr., PageID#2379. In addition, the court

imposed $84,113.04 in restitution, over Higgins's objection that the figure reflected an improper method of calculation. R.151, Sent. Hr'g Tr., PageID#2381; R.124, Mem. Opp'n to Restitution, PageID#1136–35. Despite the dispute over the proper amount and calculation method for restitution, the court's restitution order did not explain its reasoning.

SUMMARY OF THE ARGUMENT

The court abused its discretion with respect to multiple pretrial and evidentiary issues. First, it abused its discretion by denying Higgins's trial counsel's motion to withdraw. Higgins and his trial counsel timely informed the court of a total breakdown in communication necessitating a substitution of counsel. By denying the request, the court forced Higgins to go to trial with trial counsel adverse to his interests.

Second, the court abused its discretion under the Criminal Justice Act of 1964 when it refused to authorize funds for an expert fraud examiner. Higgins and his trial counsel needed an expert to understand and analyze the financial documents central to the government's case. While the government benefitted from the testimony of an expert fraud examiner, Higgins was prevented from doing the same. Without this expert, Higgins suffered prejudice in preparing for and responding to the government's case at trial.

Third, the court abused its discretion when it severely limited the substance of insurance expert Chris Johnson's opinions. Johnson was a qualified expert whose conclusions were relevant and reliable. By excluding these conclusions, the court prejudiced Higgins.

Fourth, the court abused its discretion in admitting misleading, irrelevant, and highly prejudicial evidence that lacked a legitimate, non-propensity purpose. The

court should have excluded the liens and a 2014 recorded statement under Rule 403 because their probative value was substantially outweighed by their prejudicial impact and likelihood of misleading the jury. The combined effect of the district court's evidentiary decisions constitutes cumulative error.

The court also erred in empaneling a jury after Higgins objected to an unrepresentative jury venire. Since the onset of the pandemic, jury venires in the District have significantly underrepresented the distinctive and significant Black population in the community. The court's decision violated Higgins's Sixth Amendment right to an impartial jury drawn from a representative cross-section of the community.

Finally, the court abused its discretion by imposing restitution based on an impermissible method of calculation. The court accepted the government's restitution calculation, which improperly reflected Higgins's alleged gain, instead of the alleged victim's actual loss.

ARGUMENT

I. The court violated Higgins's Sixth Amendment right to counsel by denying counsel's second motion to withdraw

The court abused its discretion when it denied counsel's second motion to withdraw. At the motion hearing, Higgins and trial counsel described a total breakdown in communication necessitating withdrawal of counsel in order to ensure Higgins received adequate representation. The court should have granted the motion to withdraw because the relationship between Higgins and counsel had become unproductive and even "adversarial." R.140, Withdrawal Hr'g Tr., PageID#1233. Such a relationship cannot fulfill the Sixth Amendment's guarantee of assistance of counsel.

A. Standard of Review

This Court reviews a court's denial of a motion to withdraw as counsel for abuse of discretion, considering "the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense." *Benitez v. United States*, 521 F.3d 625, 635 (6th Cir. 2008) (quoting *United States v. Iles*, 906 F.2d 1122, 1130 n.8 (6th Cir. 1990)).

The court also must consider the interests of justice, meaning "*both* [the defendant's] rights and the rights of the public." *Cobb v. Warden, Chillicothe Corr. Inst.*, 466 F. App'x 456, 463 (6th Cir. 2012) (emphasis in original) (citing *United*

States v. Marrero, 651 F.3d 453, 467 (6th Cir. 2011)). Higgins preserved the issue when counsel filed the second motion to withdraw and presented their argument at a motion hearing. *See* R.97, 2nd Mot. to Withdraw, PageID#913; R.140, Withdrawal Hr'g Tr., PageID#1226–58.

B. Higgins timely informed the court of a total breakdown in the attorney-client relationship and moved for withdrawal of counsel

Higgins diligently brought his concerns to the court's attention and did not delay in informing the court that his relationship with counsel had become untenable. Attorneys Laufman and Sack moved to withdraw as Higgins's counsel on December 20, 2021, three weeks before trial. R.97, 2nd Mot. to Withdraw, PageID#913. As counsel stated at the motion hearing, the event precipitating the motion—a "lengthy" and "considered" meeting—took place just before counsel moved to withdraw. R.140, Withdrawal Hr'g Tr., PageID#1254.

Trial counsel put the court on notice as soon as it was clear that the attorney-client relationship was no longer functional. This Court has previously found a motion to withdraw filed three weeks before trial to be timely when the motion was filed promptly in response to precipitating events. *See United States v. Powell*, 847 F.3d 760 (6th Cir. 2017); *see also United States v. Collado-Rivera*, 759 F. App'x 455 (6th Cir. 2019) (finding timely a motion to withdraw filed two weeks before a sentencing hearing).

The court failed to address the motion for more than two weeks, holding a hearing five days before trial. R.140, Withdrawal Hr'g Tr., PageID#1226. Higgins should not be faulted for the court's delay in holding a hearing. It should find, instead, that Higgins's notification was timely and sufficient, as it did in *Powell*, 847 F.3d at 780.

C. The district court's inquiry into Higgins's complaint was inadequate

The district court improperly focused its inquiry on its perception of the quality of Higgins's attorneys and the amount of time counsel had spent on the case when it denied the motion to withdraw and forced Higgins to trial without counsel of choice. *See* R.140, Withdrawal Hr'g Tr., PageID#1249. The issue here is not whether trial counsel had prepared before trial, but whether "the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense." *Benitez*, 521 F.3d at 635 (quoting *Iles*, 906 F.2d at 1130 n.8.

D. The breakdown of the attorney-client relationship required substitution of counsel

The court abused its discretion in finding "there was not the kind of complete breakdown in communication that would necessitate substitution of counsel." R.103, Order Den. 2nd Mot. to Withdraw, PageID#1004 (quoting *United States v. Watson*, 620 F. App'x 493, 502 (6th Cir. 2015)). At the hearing on the motion to withdraw,

Laufman informed the court that "[t]his is a case we should not go forward on. Our ability to represent [Higgins] is, unfortunately, fatally flawed." R.140, Withdrawal Hr'g Tr., PageID#1255. Laufman further noted that the relationship had not only "failed very mutually," but had in fact become "an adversarial relationship." *Id.* at PageID#1253, 1233.

Sack, for her part, explained, "there is simply no relationship. There is nothing left. There is no meaningful discussions (*sic*) being had." R.140, Withdrawal Hr'g Tr., PageID#1235. Higgins made clear that the reason he wanted new counsel was "quite frankly, our relationship." *Id.* at PageID#1246, 1236.

This was more than a disagreement about strategy. It was a clear example of a total breakdown in trust and communication. This breakdown in the "basic trust between counsel and client" undercuts "a cornerstone of the adversary system." *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981).

In compelling Higgins to undergo a criminal trial "with the assistance of an attorney with whom he ha[d] become embroiled in irreconcilable conflict," the district court "deprive[d] him of the effective assistance of any counsel whatsoever." *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970) (citing *Entsminger v. Iowa*, 386 U.S. 748 (1967); citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)); s*ee also Daniels v. Woodford*, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing *United States v. Adelzo-Gonzales*, 268 F.3d 772, 779 (9th Cir. 2001) ("Where a criminal defendant

has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel.").

It is difficult to imagine a situation where lawyers and their client could more unequivocally inform a court their relationship was broken beyond repair. Nor one where forced representation would more clearly deprive the defendant of an effective advocate. No amount of preparation would cure this adversarial relationship. The district court abused its discretion in denying counsel's second motion to withdraw.

II. The court abused its discretion when it refused to authorize funds for an expert fraud examiner

The district court abused its discretion under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e), ("CJA") when it refused to authorize funds for an expert fraud examiner. In so doing, it prejudiced Higgins's ability to prepare for trial and respond to the mail fraud charges.

Higgins required expert help to review and understand the extensive financial records in this case. In refusing Higgins's request, the court disregarded Congress's purpose in enacting the CJA. The CJA requires that courts consider two factors when authorizing funding: whether services are necessary to mount a plausible defense and whether denial of those services will result in prejudice. *United States v. Gilmore*, 282 F.3d 398 (6th Cir. 2002). The court failed to address either.

Here, the services were essential to Higgins's defense, and their denial prejudiced Higgins in defending against the mail fraud charges. The end result was that the government had access to the same type of fraud examiner Higgins was denied. This created an imbalance of power between Higgins and the government.

A. Standard of Review

This Court reviews denial of authorization for expert services for abuse of discretion. *Gilmore*, 282 F.3d at 406.

In September of 2020, Higgins asked the court to authorize $4,375.00 in CJA funds to cover the cost of hiring an expert forensic accountant with fraud examiner certification. R.46, Mot. for Funds, PageID#253. The court denied Higgins's motion eight days later in a docket entry entered on September 30, 2020.

B. Higgins needed an expert to contest the mail fraud charges

The court denied Higgins's motion for expert help despite agreeing that the case against him was "extremely difficult." Docket Entry: 09/30/2020.[2] Using insurance and financial documents spanning nearly ten years, the government alleged Higgins engaged in a scheme to defraud by misusing insurance money meant to pay for home repairs. During the eight-day jury trial, the government offered testimony from ten different witnesses and admitted 133 exhibits. R.148, TT Vol.

[2] This is a text only docket entry that appears on September 30, 2020, between docket items 48 and 49.

VI, PageID#1949–52. Many of these exhibits were Higgins's financial records—over 1000 pages of bank statements, checks, and transaction data.

With the volume and complexity of the financial records, trial counsel needed assistance from a trained fraud examiner with forensic accounting expertise. The government focused its case on proving Higgins misused the insurance company's money. It analyzed transactions from multiple financial institutions and multiple accounts including Higgins's personal bank account, a joint account with his ex-wife, the business account for his restaurant, and accounts for United Demolition. R.147, TT Vol. V, PageID #1915. The government alleged that part of Higgins's scheme to defraud was illustrated by his transfer of money between these accounts over a period of several years. R.149, TT Vol. VII, PageID#2222–23. This argument came up frequently during trial:

"What happened to that money? Well, it was split among two accounts that Mr. Higgins holds, and some of it was withdrawn in cash . . . [it was spent on uses] that those funds from the mortgage company are not intended to be put."	R.149, TT Vol. VII, PageID#2212.
"On April 30 of 2015, that check is deposited again into Brian Higgins' joint account. . . . What happens? Well, it's what happened before. Mr. Higgins begins draining the funds. There's a transfer among accounts."	R.149, TT Vol. VII, PageID#2222–23.
"And then you see, of course, the transfer of funds between accounts and the way that money has been spent, the withdrawals in cash . . . ."	R.149, TT Vol. VII, PageID#2232.

Before trial, Higgins clearly articulated his need for an expert to analyze the financial records that were essential to the government's case. R.46, Mot. for Funds, PageID#253. He provided the court with three pieces of information: (1) a forensic accountant with fraud examiner certification was needed to review over 1300 pages of bank records, (2) a qualified expert already agreed to work on the case, and (3) that expert needed twenty-five hours to complete the work. *Id.* at PageID#253–54. Trial counsel stated that, without this expert, they would not be able understand the financial records provided by the government. *Id.* at PageID#253.

Fraud examiners and forensic accountants are trained in analyzing these kinds of documents. This Court has credited their methods. *See, e.g.*, *United States v. Wellman*, 26 F.4th 339 (6th Cir. 2022) (relying on a forensic accountant's efforts to "follow the money" as reason to dismiss a sufficiency of the evidence claim); *F.D.I.C. v. Jeff Miller Stables*, 573 F.3d 289 (6th Cir. 2009) (affirming grant of summary judgment in an unjust enrichment case based on figures authenticated by forensic accountants).

Unlike Higgins, the government was able to benefit from an expert in this field. Federal Bureau of Investigation fraud examiner Susan Sigler reviewed the financial records and testified at trial as a government witness. R.147, TT Vol. V, PageID#1914. Sigler spoke in detail about bank records from Fifth Third Bank and Wright-Patt Credit Union—the exact records identified in Higgins's motion for

expert funds as warranting the assistance of a fraud examiner to understand. *Id.* at PageID#1915; R.46, Mot. for Funds, PageID#253.

Like the government, Higgins needed the assistance of a trained fraud examiner to analyze these records. Despite this clearly articulated need, the court refused to grant Higgins the necessary funds.

C. The court violated 18 U.S.C. § 3006A(e) by denying Higgins's motion

The court denied Higgins's request for funds in an unreasoned docket entry without mentioning Higgins's expressed need for a fraud expert. This perfunctory denial came eight days after Higgins requested funds:

> NOTATION ORDER DENYING 46 Sealed Motion for Excess Funds for Expert Witness as to Brian Higgins (1). *At this time with the recent appointment of co-counsel*, the Court would DENY Defendant's motion. Signed by Judge Thomas M. Rose on 9/30/20.

See Docket Entry: 09/30/2020 (emphasis added).[3] On the same day, the court granted trial counsel's motion for the appointment of co-counsel, issuing a very brief order that reads, in pertinent part:

> *The Court deems this case extremely difficult* and finds that in the interest of justice the appointment of an additional attorney is necessary. The Court finds Defendant's Motion for Appointment of Co-Counsel (ECF No. 42) is well-taken and GRANTS the same.

[3] This text-only docket entry appears on September 30, 2020, between docket items 48 and 49.

R.48, Order on Mot. for Co-Counsel, PageID#262 (emphasis added). In this entry, the court explicitly acknowledged the complexity of the case against Higgins.

The court's ruling disregarded the fundamental purpose of the CJA: "[T]o place indigent defendants as nearly as may be on a level of equality with nonindigent defendants . . . ." *United States v. Tate*, 419 F.2d 131, 132 (6th Cir. 1969). CJA funding is intended to fund "investigative, expert, or other services necessary for adequate representation" if a defendant cannot afford to pay for them. 18 U.S.C. § 3006A(e)(1).

The ruling on Higgins's motion provided only one reason for denying his request: the addition of a new attorney to his team. This is not enough.

When a court rules on requests for CJA-funded services, it must consider whether "(1) such services are necessary to mount a plausible defense, and (2) without such authorization, the defendant's case would be prejudiced." *Gilmore*, 282 F.3d at 406. To demonstrate services are necessary, defendants must explain what work an expert would perform, how that work would meaningfully benefit them, and why an expert is needed to achieve that benefit. *See, e.g.*, *United States v. Roberts*, 919 F.3d 980 (6th Cir. 2019). Higgins satisfied this Court's requirements by doing all three. The court, in contrast, failed to address these requirements.

1. Higgins explained the work a fraud examiner would perform

Higgins told the court exactly what a fraud examiner would do: to start, the expert would review the thousands of pages of financial records that Higgins and his counsel could not understand themselves. This sets Higgins apart from other defendants who fail to explain what need CJA services meet.

In *United States v. Pacheco*, for example, a defendant requested funds for an investigator on three separate occasions to help identify new witnesses. 466 F. App'x 517, 522 (6th Cir. 2012). The district court granted the first two requests but denied the third. *Id.* This Court affirmed that decision, finding that—after months of searching for witnesses unsuccessfully—the defendant could not explain how another batch of funds would help him. *Id; see also United States v. Nixon*, 802 F. App'x 925 (6th Cir. 2020) (holding a defendant's request for an expert lacked specifics or any explanation of how the expert's testimony would address a point of contention). But where the defendant in *Pacheco* fell short, Higgins did not: when he requested CJA funds, he told the court exactly what he needed from a CJA-funded expert.

2. Higgins demonstrated that fraud examiner assistance would have meaningfully benefitted him

Higgins also illustrated why expert assistance would benefit his case. In *Roberts*, a defendant appealed a district court's denial of funds for a forensic

accountant at sentencing. 919 F.3d at 980. Because the defendant's contested sentence enhancement was based entirely on testimony from another witness, this Court held that the accountant's testimony would not have meaningfully benefitted him. *Id.* at 986–87.

Here, unlike in *Roberts*, an expert would have meaningfully benefitted Higgins. He and his counsel could not understand the financial records without one.

3. Higgins showed how fraud examiner testimony would have addressed a topic where expert assistance was necessary

Higgins demonstrated why expert assistance was necessary. Without this expert, Higgins and his counsel could not understand the records provided to them by the government—let alone prepare to defend against charges based on them. The court admitted that the case against Higgins was "extremely difficult." R.48, Order on Mot. for Co-Counsel, PageID#262.

Defendants must show that requested CJA services are for work that defense counsel cannot perform themselves. Higgins's motion made clear that only an expert could provide the help he needed. Neither Higgins nor defense counsel could testify about the complex financial transactions and relationships alleged by the government. Unlike the practice of interviewing witnesses, forensic accounting is a service that requires an expert. *See, e.g.*, *Wellman*, 26 F.4th at 339; *United States v. Taylor*, 2013 WL 3322188 (S.D. Ohio 2013) (holding that defendant charged with making fraudulent statements to the IRS was entitled to a forensic accountant under

the CJA). Higgins and his team needed help, and they explained to the court why they needed it.

Higgins clearly articulated his need for CJA funds. A fraud examiner could have analyzed each of the financial documents in detail, helped Higgins prepare to cross examine the government examiner, and presented an alternative narrative about what the transactions did or did not show. By denying the motion, the court hamstrung Higgins's defense.

D. The court's violation of the CJA prejudiced Higgins

The court's denial of expert funds resulted in prejudice, both during Higgins's preparation for trial and in the trial itself.

1. Higgins suffered prejudice while preparing for trial

Attorneys are not accountants or fraud examiners. Nevertheless, in denying Higgins's motion for expert funds, the court equated the two.

Higgins expressed a specific need for the help of an expert to understand the records the government planned to admit at trial. The expert identified by Higgins estimated her work would take a minimum of twenty-five hours to complete. R.46, Mot. for Funds, PageID#254. Denial of Higgins's motion meant the court limited expert funding to only $900, equivalent to fewer than five hours of work. *Id.* The addition of another attorney to Higgins's team was no substitute for twenty hours of work by a specialized expert in a complex field. *Invitrogen Corp. v. Clontech Labs.,*

Inc., 429 F.3d 1052, 1068 (Fed. Cir. 2005) ("Unsubstantiated attorney argument regarding the meaning of technical evidence is no substitute for competent, substantiated expert testimony."). Limiting Higgins's access to this expert assistance effectively foreclosed Higgins from meaningfully engaging with the complex financial aspects of this case.

2. Higgins suffered prejudice at trial

The testimony of a fraud examiner was crucial at trial. Though Higgins did not have one, the government did. The government examiner testified in minute detail about dozens of financial documents. She dissected every transfer and withdrawal critical to the government's case and helped the government present a complex narrative of alleged misdirection and fraud. Without the benefit of expert help in preparing for trial, Higgins and his attorneys could not meaningfully contest that narrative.

The Ninth Circuit has held that denying CJA funds constitutes an abuse of discretion where expert services were critical to the defense and would have enabled effective cross examination of a government expert. *United States v. Chase*, 499 F.3d 1061, 1068 (9th Cir. 2007). In *Chase*, the defendant in a drug case requested funds for an expert to contest the quantity of drugs the government attributed to him. *Id.* at 1066. The court held that expert aid could have enabled defense counsel to more effectively cross examine the government forensic expert. *Id.* at 1066–67. Like

in *Chase*, without CJA funds, counsel was not prepared to effectively cross examine the government examiner.

While a non-indigent defendant would have hired a competing expert to prepare trial counsel for cross examination, Higgins could not. CJA funding was his only option—and the district court prevented him from utilizing it.

The Second Circuit has held that denying expert funds constitutes an abuse of discretion where the government benefitted from their own comparable expert at trial. *United States v. Durant*, 545 F.2d 823, 828 (2d Cir. 1976). In *Durant*, the government based its robbery case on fingerprints purportedly belonging to the defendant. *Id.* at 824. The Second Circuit held that the court reversibly erred by denying the defendant a fingerprint expert. *Id.* While both the government and the defendant in *Durant* emphasized fingerprint evidence during their summations, the defendant had to "get along without his own expert." *Id.* at 828. Higgins was forced to do the same.

The record shows obvious harm to Higgins's case. The government examiner showed the jury a 24-slide presentation breaking down when Higgins received checks from Nationstar and United Demolition in an attempt to show how Higgins spent the insurance money. R.147, TT Vol. V, PageID#1933. This testimony created an "aura of reliability" bolstering the government examiner's explanation of Higgins's financial documents. *Moisenko v. Volkswagenwerk Aktiengesellschaft*,

198 F.3d 246 (Table), 1999 WL 1045075, *4 (6th Cir. 1999) (unpublished table decision).

By limiting expert funds to $900, the district court denied Higgins's trial counsel a defense expert who could contradict this uniquely damaging testimony. Instead, Higgins could only rely on arguments from his trial counsel to attack it. Attorney argument is no substitute for expert testimony. *See, e.g.*, *Invitrogen Corp.*, 429 F.3d at 1068.

3. The denial of funds created an insurmountable power imbalance in the government's favor

The result of the court's decision was devastating. In a trial where charges stemmed from Higgins's financial records, only one side was equipped with a fraud examiner to discuss those records. Higgins did not have expert assistance in investigating facts, assessing the availability of defenses, or preparing cross examinations—all areas where expert help is critical. *See Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (noting that experts help with investigation and developing defenses); *Gilbert v. California*, 388 U.S. 263, 267 (1967) (noting that experts assist in preparing cross-examination). By denying access to a fraud examiner who could do these things, the court prejudiced Higgins.

III. The court abused its discretion by limiting and excluding relevant expert testimony

The district court further abused its discretion by excluding expert Chris Johnson's conclusions. Trial courts are meant to act as gatekeepers for expert testimony, but a court abuses its discretion when it excludes clearly relevant evidence. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1999). Johnson's expert opinions were clearly relevant. The court's ruling gutted the substance of those expert opinions and was an abuse of discretion.

A. Standard of Review

This Court reviews rulings on the admissibility of expert opinions for abuse of discretion. *United States v. Martinez*, 588 F.3d 301, 323 (6th Cir. 2009).

Higgins hired Chris Johnson, an insurance expert with a three-decade-long career in the claims industry. R.94, Mem. in Opp'n to Mot. to Excl. Expert Test., PageID#879. When the government moved to exclude Johnson's opinions, Higgins opposed that motion. *Id.* at PageID#881. Higgins raised these arguments again at trial during a proffered statement outside the presence of the jury. R.149, TT Vol. VII, PageID#2202–03.

B. Johnson was a qualified expert

Higgins needed help from an insurance expert to prepare his defense. The charges against Higgins alleged his ongoing participation in a scheme to defraud Nationstar, the claimholder on his home's insurance policy. R.57, 2nd Superseding

Indictment, PageID#327. When Higgins requested an insurance expert's help, trial counsel stated "it's imperative that we have an expert who can explain the [insurance] process and what happens in this particular case . . . it's certainly integral to our defense." R.138, Mot. Hr'g Tr., PageID#1196.

Johnson was qualified to provide that help. He previously worked as both a claims handler and corporate counsel at insurance companies. R.94, Mem. in Opp'n to Mot. To Excl. Expert Test., PageID#879. Johnson also ran his own insurance consulting company for over eight years. *Id.* He had the knowledge, skill, experience, and training necessary to meet the bar set for expert testimony by F.R.E. 702.

Courts must act as gatekeepers for expert testimony. *See Daubert*, 509 U.S. at 592; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). But the district court abused its discretion by excluding Johnson's opinions. Experts qualified under F.R.E. 702 must be allowed to give opinion testimony if doing so will help the jury understand evidence or determine a fact at issue. *Glaser v. Thompson Med. Co., Inc.*, 32 F.3d 969, 971 (6th Cir. 1994). Johnson was qualified to discuss insurance practices; the court said as much in its order on the government's motion. R.102, Order on Mot. to Excl. Expert Test., PageID#885. Each of his opinions fit squarely within that field of expertise. But the court still refused to admit the substance of Johnson's opinions because it incorrectly ruled they were irrelevant.

C. Johnson's opinions were relevant and reliable

Johnson's excluded opinions were both relevant and reliable. When proposed expert testimony checks both of those boxes, this Court has held that the expert may testify. *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 429 (6th Cir. 2007) (holding that discretion to admit expert testimony depends on relevance and reliability of the expert opinions); *Palatka v. Savage Arms, Inc.*, 535 F. App'x 448, 453 (6th Cir. 2013) (holding that the district court erred by excluding an expert opinion).

Relevance is a low bar, *Tennard v. Dretke*, 542 U.S. 274, 284 (2004), and Johnson's proffered testimony cleared it. The opinions in his report were relevant for three reasons. They (1) tended to disprove an element of the mail fraud charges, (2) called into question the veracity of the information those charges were based on, and (3) provided necessary context to an incredibly confusing case. The trial court abused its discretion in excluding each of those relevant opinions.

1. Johnson's sixth and seventh opinions proved that Nationstar was not deprived of any money

Johnson's sixth and seventh opinions—that Assurant and Nationstar were satisfied with the home repairs and were not actually deprived of any money—were almost entirely excluded by the court. R.102, Order on Mot. to Excl. Expert Test., PageID#996. The court framed these opinions as efforts to blame the victim,

excluding them because "damages are not an element of criminal mail fraud" and "whether the alleged victim was, in fact, actually deprived of money or property is not determinative." *Id.* The court's decision was an abuse of discretion.

Despite the court's statement, these opinions were still relevant. It is true that the mail fraud statute required proving *either* that "the victim was actually deprived of money or property *or* that the defendant intended to defraud the victim of the same." *United States v. Utz*, 886 F.2d 1148, 1151 (9th Cir. 1989) (emphasis in original). But the government planned to present evidence about both. In its motion to exclude Johnson's testimony, the government stated the fraud charges related to "the manner in which the funds were actually used." R. 91, Mot. to Excl. Expert Test., PageID#865. The government also claimed Johnson did not do enough to address the issue of actual deprivation. R.98, Reply Mem. in Supp. of Mot. to Excl., PageID#923. The government tried to argue that Higgins deprived Nationstar of money or property. Despite this, Johnson was prevented from testifying to the contrary. Johnson's opinion on the subject was relevant, and the court abused its discretion by excluding it.

2. Johnson's eighth opinion tended to make it less likely that Higgins actually defrauded Nationstar

Johnson's eighth opinion—that there were deficiencies in Assurant's investigation of the claim—was relevant because it tended to make it less likely that Higgins committed fraud. In *United States v. Poulsen*, a court held that evidence in

a fraud case "tending to show that the Government failed to follow up on fruitful leads, misinterpreted information in a material way, or employed faulty investigative techniques, could be probative of whether the Government has made its case against Defendants." 543 F. Supp. 2d 809, 811 (S.D. Ohio 2008). Johnson identified some of those same failings in Assurant's investigation of Higgins and the claim on his property. R.94, Mem. in Opp'n to Mot. to Excl. Expert Test., PageID#885. The government relied on that investigation in bringing fraud charges against Higgins. Accordingly, Johnson's opinion in this area was relevant because, as in *Poulsen*, it was probative of whether the government made its case against Higgins.

Higgins raised this argument, but the court still chose to exclude Johnson's eighth opinion. R.94, Mem. in Opp'n to Mot. to Excl. Expert Test., PageID#885–86; R.102, Order on Mot. to Excl. Expert Test., PageID#997. It is unclear why. In its order, the court made a series of conclusory statements—that this opinion blamed the victim and confused the issues, and that Higgins was not charged with insurance fraud—none of which addressed the core argument in favor of relevance: that failures in Assurant's own investigation affected the quality of the government's investigation. In doing so, the court abused its discretion.

3. Johnson's third opinion tended to disprove the government's interpretation of Higgins's behavior

Johnson's third opinion was that Higgins reasonably expected to receive part of the Actual Cash Value (ACV) payment made by Assurant. The court ruled that

this opinion was irrelevant, confusing, and therefore inadmissible. R.102, Order on Mot. to Excl. Expert Test., PageID#992–93. This ruling was also an abuse of discretion.

This opinion was relevant because Higgins's understanding that he would receive part of the ACV payment contextualizes his communications with Assurant. It also casts doubt on the government's assertion that Higgins's behavior was intended as part of a scheme to defraud. Despite this, the court ruled that Johnson could explain what an ACV payment was but could not discuss any other part of this opinion. *Id.* at PageID#993. The court said Johnson's opinion was not relevant because it was an attempt to interpret contractual language. But Johnson's explanation was well within his area of expertise as someone who has spent his career evaluating claims like this one.

The court also concluded Johnson's opinion might mislead or confuse the jury. R.102, Order on Mot. to Excl. Expert Test., PageID#992. In fact, it would have done the opposite. As Higgins pointed out on multiple occasions, the charges against him were anything but straightforward.

At times, even the government demonstrated confusion about exactly who was defrauded and how. The first and second indictments alleged that Assurant was the victim of Higgins's scheme to defraud. But the third indictment—filed three weeks after Johnson's *Daubert* hearing—changed the alleged victim to Nationstar.

R.94, Mem. in Opp'n to Mot. to Excl. Expert Test., PageID#876 (citing R.57, 2nd Superseding Indictment, PageID#327, 225; R.26, Order on Mot. to Withdraw, PageID#786, 795). Additional context from Johnson explaining the insurance claims process and how someone like Higgins might believe he was owed money would have helped to *avoid* confusion, not created more of it.

D. Excluding the substance of Johnson's opinions prejudiced Higgins

By incorrectly ruling that Johnson's expert opinions were irrelevant, the district court severely limited Johnson's ability to testify.

Johnson's report detailed nine opinions he intended to offer at trial. The court's order on the government's motion excluded entirely or placed severe limitations on each of them. R.102, Order on Mot. to Excl. Expert Test., PageID#1000. At trial, the court placed *even more* limitations on Johnson's ability to testify by limiting him to only three topics: (1) the fact that Higgins had an insurable interest in the Meeker Creek residence, (2) definitions of terms of art in the insurance field, and (3) general practices in generating insurance estimates including paperwork and inspection of ongoing repairs. R.148, TT Vol. VI, PageID#2120–21. The court stated that Johnson could not testify about *any other opinions* listed in his report. *Id.* at PageID#2110.

These rulings prejudiced Higgins. Barring Johnson from testifying about the substance of his opinions deprived Higgins of the ability to challenge the

government's story of wrongdoing in a meaningful way. He could not present evidence that Nationstar was not deprived of property or that the government's investigation was lacking because it relied on Assurant's poor investigation. Because Johnson was confined to merely defining terms and explaining processes, he could not provide a counternarrative to any government witness who testified about Higgins's insurance claim.

In incorrectly holding that Johnson's opinions were irrelevant, the court effectively gutted every substantive piece of his testimony. Doing so was an abuse of discretion.

IV. The district court erred by admitting misleading, and highly prejudicial, liens and recorded statements which were inadmissible under Rules 403 and 404

The district court further erred by admitting two contested pieces of evidence: (1) the liens on the Meeker Creek residence at the time of the insurance claim and (2) a 2014 recording. These were admitted into evidence under Rule 404(b) over Higgins's opposition. R.75, PageID#715, 720.

There was no legitimate, non-propensity purpose to admit the liens or the recorded statement under F.R.E. 404(b). Furthermore, the district court should have excluded the liens and the recorded statement under F.R.E. 403 since their probative value was substantially outweighed by their prejudicial impact and likelihood of misleading the jury.

A. Standard of Review

In reviewing evidentiary determinations, this Court generally reviews factual determinations for clear error, and legal conclusions de novo. *United States v. McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005). This Court reviews the admission of 404(b) evidence under a three-step inquiry that follows the standard from *Huddleston v. United States*, 485 U.S. 681, 691 (1988). *See United States v. Clay*, 667 F.3d 689, 693 (6th Cir. 2012). Under this inquiry, the Court first reviews for clear error the factual determination that other acts occurred. Second, the Court reviews de novo the legal determination that the acts were admissible for a permissible 404(b) purpose. Finally, the Court reviews for abuse of discretion the determination that the probative value of the evidence is not substantially outweighed by unfair prejudicial impact under F.R.E. 403.

Higgins properly preserved his evidentiary claims by opposing the government's motions *in limine* to admit the liens and the recording. R.68, Resp. to Government's Motions in Lim.; *see United States v. Garcia-Guia*, 468 F. App'x 544, 550 (6th Cir. 2012) (citing *Lawn v. United States*, 355 U.S. 339, 353 (1958)).

B. The liens had limited probative value and a high prejudicial effect

The court erred when it admitted evidence of liens on the Meeker Creek residence under F.R.E. 404(b), purportedly to show motive of insurance fraud. To admit evidence under 404(b), a court must find (1) the prior acts occurred, (2) the

acts were admissible for a legitimate 404(b) purpose, and (3) the probative value of the evidence was not substantially outweighed by unfair prejudice. *Clay*, 667 F.3d at 693.

Even assuming the court did not clearly err in finding the acts occurred, the court erred in the second and third steps. The liens served no legitimate, non-propensity purpose, and their prejudicial impact and potential to mislead the jury substantially outweighed their minimal probative value.

1. The liens served no legitimate, non-propensity purposes

The court claimed the liens showed motive and intent because the "indebted nature of the Meeker residence" provided Higgins with "incentive to improperly divert" insurance funds. R.75, Entry & Order Granting Mtn. in Lim., PageID#715. However, the true purpose, and unmistakable impact, of the liens was to cast Higgins as a financially irresponsible individual who could not be trusted with money, particularly when it came to the Meeker Creek residence.

The causal link between the liens and Higgins's "incentive to improperly divert" insurance funds is weak. R.75, Entry & Order Granting Mtn. in Lim., PageID#715. Evidence of Higgins's incentive to commit insurance fraud would derive from affirmative, external motives—that is, what he planned to do with the diverted funds. But here, the government aimed to prove the *lack* of incentive to submit an insurance claim and make the necessary repairs.

Even setting aside this peculiar formulation of incentives, the liens did not meaningfully diminish, much less negate, Higgins's incentive to properly repair the house. Higgins had significant personal interest in restoring the residence because he lived there. The government conceded this at trial, stating "there is no dispute that Brian Higgins had interest in the Meeker Creek residence. He lived there." R.146, Trial Tr., PageID#2208. And by the government's own admission, "it was not inappropriate on its face for [Higgins] to be filing a[n insurance] claim." R.146, Trial Tr., PageID#2208. In sum, the liens neither removed Higgins's incentive to properly use the funds to repair the property, nor did they provide an incentive to divert the funds to improper uses. Therefore, this Court should find, under de novo review, that the district court failed to identify a legitimate, permissible purpose for the liens.

2. The liens were substantially more prejudicial than probative

Aside from the lack of permissible purpose to admit the liens, the court also abused its discretion by admitting them over Higgins's F.R.E. 403 concerns. Any probative value of the liens was minimal, and their prejudicial impact was severe. Higgins was not tried for defaulting on his mortgage. Yet sharing the liens with the jury had the effect of unfairly staining Higgins as someone who could not be trusted with money – particularly when it came to the Meeker Creek property. In a case with complex and convoluted facts, this reputational harm was particularly damaging. The relative simplicity of the liens and the corresponding reputational harm Higgins

suffered by their admission led the jury's attention away from the difficult task of making the complex factual determinations about the transactions at the core of the case – factual determinations which should have determined their verdict. Therefore, the prejudicial effect of the liens substantially outweighed the liens' minimal probative value.

C. The court also erred by admitting a non-probative, prejudicial audio recording from 2014

The court erred when it admitted a 2014 recording to show Higgins's purported intent and common scheme, plan, or *modus operandi* as it related to the witness tampering charges. In the recording, Higgins can be heard stating "when confronted with a claim of wrongdoing, a person should level similar assertions against accusers, even pursuing lawsuits against them." R.68, Resp. to Government's Motions in Lim., PageID#674. The basis of the witness tampering charges against Higgins were lawsuits filed against adverse witnesses.

The court erred under the second and third prongs for admitting 404(b) evidence: the recording was not admissible for a legitimate, non-propensity purpose, and the probative value of the evidence was substantially outweighed by the unfair prejudice.

1. The recording served no legitimate, non-propensity purpose

Despite contrary claims, the recording's true purpose and impact was to attack Higgins's character and suggest he was disposed to commit the conduct charged as witness tampering. The court ruled the recorded statements showed Higgins's "checker-like strategy to retaliate" against the government's witnesses. R.75, PageID#723. To the contrary, the statements were off-hand comments made in 2014, six years prior to when Higgins filed the lawsuits underlying the witness tampering charges. The temporal remoteness between the recorded statements and the alleged witness tampering undercut the court's conclusion that the statements are probative of Higgins's intent. *See United States v. Bell*, 516 F.3d 432, 443 (6th Cir. 2008) (quoting *United States v. Haywood*, 280 F.3d 715, 721 (6th Cir. 2002) ("To determine if evidence of other acts is probative of intent, we look to whether the evidence relates to conduct that is 'substantially similar and reasonably near in time' to the specific intent offense at issue.").

Moreover, "[t]o qualify as *modus operandi* evidence, the similarity between the prior [act] and the charged offense must be striking." *United States v. Joseph*, 270 F. App'x 399, 406 (6th Cir. 2008). Here, the statements were generalized and not indicative of how Higgins would respond to the fact-specific criminal fraud accusations in this case. Finally, the use of *modus operandi* prior act evidence is generally limited to situations where identity is in question. *See id.* ("*Modus*

operandi provides a proper ground for admission when identity is at issue."); *see also id.* at 404 (explaining common scheme or plan evidence as a "design or plan which, if proved, may raise the inference that the accused was the perpetrator of the crime in question") (internal quotation marks omitted). Here, there is no dispute Higgins was the person who filed the lawsuits against the government's witnesses, so *modus operandi* evidence served no legitimate purpose. The admission of the recording served only the forbidden purpose of proving Higgins had the propensity to commit the charged conduct.

2. The recording was substantially more prejudicial than probative

Aside from the lack of permissible purpose to admit the recording, the recording was substantially more prejudicial than probative under F.R.E. 403. The probative value of the recording was minimal, but its prejudicial impact was severe. To a layperson, and to the jury, the recording would resemble a confession. In a case with complex and convoluted facts, the recording provided a shortcut to the jury and created unfair prejudice through the "chance that the jury will convict [Higgins] because of his prior [statement], instead of his charged, conduct." *United States v. Asher*, 910 F.3d 854, 861 (6th Cir. 2018). The lack of a limiting instruction accompanying the recording is further sign of unfair prejudice. *Id.* at 862.

D. The court's errors were not harmless because of the prejudice and likelihood of jury confusion imparted by the liens and the recorded statement

The erroneous admission of the liens and the recorded statement was not harmless. The simplicity of this evidence relative to the complexity of other trial testimony risked leading the jury to infer Higgins' guilt based on his character and prior acts, rather than the transactions at the core of this case.

Without an adequate relevant jury instruction to cure the testimony's high potential for prejudice, this Court cannot conclude the error did not influence the jury, or had but very slight effect. *See Kotteakos v. United States*, 328 U.S. 750, 764 (1946). These errors therefore were not harmless, and reversal is necessary.

V. Even if the court's errors were individually harmless, the errors' cumulative effect was so prejudicial that it rendered Higgins's trial fundamentally unfair in violation of due process

Even if the Court were to decide the court's errors in denying Higgins's counsel's motion to withdraw, denying him expert funds, limiting his expert's testimony, and admitting the liens and recorded statements were harmless in isolation, the errors cumulatively produced a fundamentally unfair trial in violation of due process. *United States v. Adams*, 722 F.3d 788, 832 (6th Cir. 2013).

A. Standard of Review

This Court reviews claims of cumulative error for fundamental fairness. *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1981). To obtain a new trial based upon

cumulative error, a defendant must show the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair. *United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993).

B. The cumulative effect of the court's multiple errors violates due process

The court's refusal to grant counsel's motion to withdraw, combined with the denial of Higgins's motion for funds for a forensic accountant, and the court's exclusion of key portions of his insurance expert's testimony, prevented Higgins from supporting his theory of the case. Admitting prejudicial character evidence exacerbated this issue.

The cumulative effect of the court's denying Higgins the necessary tools to present a defense while admitting inflammatory testimony rendered the trial fundamentally unfair, depriving him of due process. *Adams*, 722 F.3d at 832. Thus, this Court must remand for a new trial. *Parker*, 997 F.2d at 222 (remanding due to cumulative prejudice for a combination of evidentiary and indictment errors).

VI. The court violated Higgins's Sixth Amendment right to trial by an impartial jury by selecting a jury from a venire that did not represent a fair cross-section of the community

The court erred in proceeding to trial with a jury selected from a venire unrepresentative of the community. The Supreme Court has set forth a three-prong test for fair cross-section challenges, requiring the defendant to show:

> (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to the systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

Here, the court proceeded to trial despite a complete absence of African Americans on the jury venire. In doing so, the court disregarded the particular circumstances of the COVID-19 pandemic, which has imposed disproportionate hardship on Black communities resulting in systematic exclusion of Black jurors. Higgins satisfies each of the *Duren* prongs and the court erred in denying the fair cross-section challenge.

A. Standard of Review

This Court reviews de novo whether a court violated a defendant's right to trial by an impartial jury selected from a fair cross-section of the community. *United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008). Higgins preserved his Sixth Amendment fair cross-section challenge by raising an objection at the close of voir dire and moving for a mistrial at the close of the government's case-in-chief. R.143, TT Vol. I, PageID#1419–27; R.148, TT Vol. VI, PageID#1978–79.

B. Higgins's venire excluded a distinctive group in the community

The court violated Higgins's right to a jury drawn from a fair cross-section of the community by proceeding with a venire that did not have a single Black potential

juror. R.143, TT Vol. I, PageID#1419–27. Black individuals have been similarly underrepresented in every other venire in the District since the onset of the COVID-19 pandemic.

1. African Americans are a distinctive group

The exclusion of African Americans from the jury venire satisfies the first *Duren* prong because African Americans are "a 'distinctive' group in the community." 439 U.S. at 364. There is no question that Black people are a cognizable group for purposes of a fair cross-section challenge. *See, e.g.*, *Ambrose v. Booker*, 684 F.3d 638 (6th Cir. 2012). "It has long been established that racial groups cannot be excluded from the venire from which a jury is selected." *Holland v. Illinois*, 493 U.S. 474, 478 (1990). Given that African Americans are a distinctive group, Higgins satisfies the first prong of *Duren*'s test.

2. African Americans were not fairly and reasonably represented in the District's venires during COVID-19

Higgins satisfies *Duren*'s second prong because "the representation of [African-Americans] in venires from which juries [were] selected [was] not fair and reasonable in relation to the number of such persons in the community." 439 U.S. at 364. The right to trial by an impartial jury is a fundamental right in our criminal justice system. Time and again, courts have recognized that a diverse jury pool that fairly and reasonably represents the community is necessary to vindicate this right. *See, e.g.*, *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (the Sixth Amendment

"necessarily contemplates an impartial jury drawn from a cross-section of the community"); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.").

The Supreme Court made clear in *Duren* that a defendant need not prove discriminatory purpose or intent to mount a successful fair cross-section challenge. 439 U.S. at 364–66. Instead, Sixth Amendment challenges are "concerned with *impact*, or the systematic exclusion of a cognizable group regardless of how benevolent the reasons." *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (emphasis in original).

The fair cross-section requirement recognizes that white people and people of color have different lived experiences based in part on race and that diversity of experience and perspective among jurors substantively enriches jury deliberations. *See, e.g.*, *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972) ("It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."). As the *Taylor* Court explained, a jury cannot serve its constitutional purpose "if large, distinctive groups are excluded from the [jury] pool." 419 U.S. at 530. Simply put, the Sixth Amendment "forbids any substantial underrepresentation of minorities, regardless

of whether the State's motive is discriminatory." *Alston v. Manson*, 791 F.2d 255, 258 (2d Cir. 1986).

The underrepresentation of African Americans in Higgins's venire and the jury venires for each of the other trials in the District since March 17, 2020 satisfies both the "absolute disparity" and "comparative disparity" tests. Absolute disparity measures the difference between the percentage of the community that makes up the distinctive group and the percentage of individuals in the venire that are members of the same group. *Smith v. Berghuis*, 543 F.3d 326, 337 (6th Cir. 2008) (reversed on other grounds). Comparative disparity divides the absolute disparity by the population figure for a distinctive group and "measures the diminished likelihood that members of an underrepresented group . . . will be called for jury service." *Id.* at 338 (quoting *Ramseur v. Beyer*, 983 F.2d 1215, 1231–32 (3d Cir. 1992) (internal quotations omitted)). Courts can rely on census data to establish the percentage of the cognizable group in the community. *See, e.g.*, *Duren*, 439 U.S. at 365.

Approximately 13% of Higgins's community, the Southern District of Ohio, is Black. U.S. Census Bureau, *QuickFacts,* https://www.census.gov/quickfacts/fact/table/US/PST045221 (last accessed Dec. 16, 2022).[4] And yet Higgins's jury venire was completely devoid of African American potential jurors.

[4] This figure was calculated by summing Census Bureau data from the eight counties that make up the Southern District of Ohio – Dayton division.

R.143, TT Vol. I, PageID#1419–27. Of the 243 potential jurors who appeared for service in the District's five jury trials during the COVID-19 pandemic, only seven were Black. 6th Cir. Dkt #23, Mtn. to Supp. Record, Page#7–11.

Because African Americans constituted 13.00% of the community but only 2.88% of the District's venires, the absolute disparity in this case is 10.12%. The Supreme Court previously established a 10% absolute disparity threshold, although it stated 10% is "not a bright-line rule." *Ambrose*, 684 F.3d at 643 (citing *Swain v. Alabama*, 380 U.S. 202 (1965)). The corresponding 77.8% comparative disparity should trouble this Court. *See, e.g.*, *Garcia-Dorantes v. Warren*, 801 F.3d 584, 600 (6th Cir. 2015) ("Here, the absolute disparity for African-Americans of 3.45% and corresponding 42% comparative disparity are sufficient to satisfy the second *Duren* prong.").

This is sufficient to show the representation of African Americans in the jury pool was not "fair and reasonable in relation to the number of such persons in the community." *Duren*, 439 U.S. at 364 (holding that appellant sufficiently established a prima facie violation by demonstrating a 39.5% absolute disparity and 73.1% comparative disparity in the female composition of the jury pool). As this Court has explained, "[w]here the distinctive group alleged to have been underrepresented is small, . . . the comparative disparity test is the more appropriate measure of underrepresentation." *Smith*, 543 F.3d at 338. By either measure, the record

demonstrates that the court's venires did not fairly and reasonably represent the Southern District of Ohio.

C. The process of selecting jurors amidst the ongoing COVID-19 pandemic inherently excluded eligible Black persons from the jury pool

Higgins satisfies the third *Duren* prong because the underrepresentation of African Americans in the venire reflects "systematic exclusion of the group in the jury-selection process." 439 U.S. at 364. The court erred in concluding the jury-selection system was adequate by failing to account for the unequal impact of the COVID-19 pandemic on minority communities.

On May 29, 2020, the district court issued General Order 2020-17, which provided, in relevant part, for the attachment of a special COVID-19 statement to summons mailings and the creation of a unique COVID-19 excuse code to track juror deferrals and excuses. United States District Court for the Southern District of Ohio, *Reconstitution Plan*, 14 (May 29, 2020), https://www.ohsd.uscourts.gov/sites/ohsd/files//General%20Order%2020-17.pdf (last accessed Dec. 16, 2022). The sample statement explained that individuals could request excusal from service if they were at high risk for infection from COVID-19 or lived with others at a high risk of infection. *Id.* at App'x IV.

In *Smith*, this Court explained that the Sixth Amendment is implicated "when the particular system of selecting jurors makes [social] factors relevant to who is . .

. ultimately . . . excused from service." 543 F.3d at 341. This Court also found an excusal policy which "allow[s] prospective jurors to essentially 'opt out' of jury service if jury duty would constitute a hardship based on child care concerns, transportation issues or the inability to take time from work" was a systematic exclusion that produced unacceptable underrepresentation in the jury pool. *Id.* at 340.

That same principle applies here. The brunt of the COVID-19 pandemic has not been borne equally across our society. Studies have shown that Black persons are more likely to be hospitalized and to die from infection than white persons. *See, e.g.*, Tai et al., *Disproportionate Impact of COVID-19 on Racial and Ethnic Minority Groups in the United States: A 2021 Update*, 9 J. of Racial and Ethnic Health Disparities 2334, 2334–39 (2022). More locally, a May 2020 report found that Black Ohioans accounted for 25.5% of COVID-19 cases, 30.4% of hospitalizations, and 16.5% of deaths, despite making up roughly 13% of the state's population. Health Policy Inst. of Ohio, *Ohio COVID-19 Disparities by Race* (May 20, 2020), https://www.healthpolicyohio.org/wp-content/uploads/2020/05/HPIODataBrief_COVIDDisparitiesByRace.pdf (last accessed Dec. 16, 2022).

Black individuals are also more likely to work in essential or service jobs, raising exactly the hardship opt-out concern this Court addressed in *Smith*. *See* Daniel C. DeSimone, *COVID-19 Infections By Race: What's Behind the Health*

Disparities?, Mayo Clinic (Oct. 6, 2022), https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-infection-by-race/faq-20488802 (last accessed Dec. 16, 2022). And Black Americans are nearly twice as likely as white Americans to live in multigenerational households, *see* D'Vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households*, Pew Research Center (Apr. 5, 2018), https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/ (last accessed Dec. 16, 2022), heightening health concerns given the increased risk of severe COVID-19 infections among the elderly. As this Court stated in *Smith*, "[t]he introduction of non-random factors into a jury selection process has been found to support an inference of systematic exclusion." 543 F.3d at 341.

Fifty-two potential jurors appeared for Higgins's jury selection. 6th Cir. Dkt #23, Mtn. to Supp. Record, Page#7. Given the District's racial composition, the likelihood that any individual venire member would not be Black is 0.87. There is a mere 0.0007% probability that a randomly selected pool of fifty-two potential jurors in the Southern District of Ohio would not contain a single Black individual.[5] The

[5] The statistical likelihood of a venire of fifty-two having no Black members would be equal to 0.87 (the probability that an individual venire member is non-Black) times 0.87 for each venire member, or 0.87 to the 52nd power. *See* Brian Murphy

statistical probability that only seven of 243 randomly selected venire people would be Black is even lower at 0.00000004%.[6]

An extraordinarily low probability that the underrepresentation would have occurred by chance alone supports a finding that the system itself contributed to the exclusion of Black potential jurors. *See Smith*, 543 F.3d at 340. This Court's *Smith* decision relied on *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996), which found the defendant had made a prima facie case where the probability of calling only seventy African Americans out of 5,424 potential jurors was less than 0.1%. Given the disparate impact of the pandemic and the extreme improbability that the underrepresentation occurred randomly, Higgins satisfies the third *Duren* prong.

The court denied Higgins—himself a Black man—the right to be tried by a jury chosen from a pool representative of his own community. The underrepresentation of African Americans in Higgins's venire raises the concern that

---

& Rachelle Barr, *Elementary Statistics*, https://mat117.wisconsin.edu/4-probability-of-independent-events/ (last accessed Dec. 16, 2022) (explaining the methodology for calculating the statistical likelihood of independent events is multiplying the probabilities of each individual event occurring).

[6] See National Institute of Standards and Technology, *Engineering Statistics Handbook: Binomial Distribution*, https://www.itl.nist.gov/div898/handbook/eda/section3/eda366i.htm (last accessed Dec. 16, 2022) for details on calculating a cumulative binomial probability. This figure is the probability that seven or fewer potential jurors would be Black.

racial bias may have affected the outcome, exactly the harm the Sixth Amendment protects against. *Garcia-Dorantes*, 801 F.3d at 599.

The COVID-19 pandemic has presented unprecedented challenges for courts tasked with administering justice. But the district court was wrong to allow Higgins's constitutional rights to give way to administrative efficiency, no matter how unusual or extreme the situation. The record makes clear that Higgins's jury venire did not adequately represent the community.

D. The government failed to show attainment of a fair cross-section was incompatible with a significant government interest

By showing a complete absence of Black venire members, Higgins made a prima facie showing of a fair cross-section violation. Once Higgins made this showing, the burden shifted to the government to justify the infringement by showing that attainment of a fair cross-section was incompatible with a significant government interest. *Duren*, 439 U.S. at 368. The government did not meet this burden.

In response to trial counsel's objection, the government made only a single assertion: that the reason for the absence of the two African American jurors on the original juror list was purely speculative. R.143, TT Vol. I, PageID#1428. At no time did the government articulate a significant government interest in proceeding to trial with an unrepresentative jury pool.

There was no pressing need for this case to proceed to trial immediately. Higgins was not in custody and was willing to waive his speedy trial right. R.143, TT Vol. I, PageID#1419. The court had the discretion to grant a continuance and wait for the impact of the pandemic to abate and should have done so given the unique circumstances. This Court now has the opportunity to correct the lower court's error by vacating Higgins's conviction and remanding for further proceedings.

VII. The court miscalculated restitution by using the wrong method of calculation

The court abused its discretion by imposing restitution over Higgins's objection. The court ordered Higgins to pay $84,113.04 in restitution to Nationstar. R.146, Trial Tr., PageID#2381. This was the exact amount sought by the government, and represents the cumulative sum of money that the government alleged Higgins diverted from insurance payments.

Restitution should reflect the victim's actual loss, but the $84,113.04 instead reflects Higgins's alleged gain. It therefore is not the appropriate measure of restitution. The court should have calculated restitution by determining the diminished value to the Meeker residence a direct result of the alleged diversion of funds. This determination necessarily required additional documentation and expert testimony to ascertain the value of the work performed on the house, compared to the value of the work expected.

A. Standard of Review

This Court reviews de novo whether restitution is permitted under the law, and, if authorized, it reviews the award for an abuse of discretion. *United States v. Kilpatrick*, 798 F.3d 365 (6th Cir. 2015). A district court abuses its discretion when it "relies on clearly erroneous findings of fact, improperly applies the law, or employs an erroneous legal standard," or when the appellate court is "firmly convinced" that the trial court "committed a clear error of judgment." *Id.* at 378 (quoting *United States v. Miner*, 774 F.3d 336, 348 (6th Cir. 2014) (internal citations omitted).

Higgins preserved his objection to the calculation of restitution opposing the order of restitution. R.124, Memo in Opp. To Order of Restitution, PageID#1136-1137. He renewed his objection to the method of calculation at his sentencing hearing. R.151, Sentencing Tr., PageID#2369.

B. The district court abused its discretion by calculating restitution based on Higgins's gain despite the lack of direct connection between the purported gain and the victim's actual loss

The district court abused its discretion in calculating restitution because its approach to calculating restitution misapplied the law. The district court also failed to adequately explain its restitution order, despite disputes over the proper method of calculation. R.151, Sentencing Tr., PageID#2381.

Restitution "is intended to compensate victims only for losses caused by the conduct underlying the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 416 (1990). Therefore, "restitution must be based on the victim's loss rather than the offender's gain." *Kilpatrick*, 798 F.3d at 388 (quoting *United States v. George*, 403 F.3d 470, 474 (7th Cir. 2005) (internal quotation marks omitted). The "government bears the burden of proving a victim's actual loss by a preponderance of the evidence." *Id.* While courts need not "calculate restitution with *exact* precision, *some* precision is required—[s]peculation and rough justice are not permitted." *Id*. (quoting *United States v. Ferdman*, 779 F.3d 1129, 1133 (10th Cir. 2015) (internal quotation marks omitted).

Because the court imposed the exact amount of restitution sought by the government, this Court can reasonably infer that the district court adopted the government's method of calculation. The $84,113.04 restitution calculation was impermissibly based on Higgins's gain, instead of Nationstar's actual loss. Nationstar's actual loss was the diminished value of the Meeker residence as a result of Higgins's alleged diversion of funds. *See United States v. Sosebee*, 419 F.3d 451, 456 (6th Cir. 2005) (explaining that in the context of property, "fair market value is ordinarily the proper determination of loss"). The court could not use Higgins's gain to measure Nationstar's loss unless the government established a "direct correlation between the two." *Kilpatrick*, 798 F.3d at 390 (quoting *United States v. Zangari*, 677

F.3d 86, 93 (2d Cir. 2012) (internal quotation marks omitted). The government had neither proven Nationstar's actual loss nor established a direct correlation between Nationstar's loss and Higgins's gain.

Indeed, the government's restitution request simply summed the total amount it believed Higgins diverted. R.121, Sent. Mem., PageID#2368-2369; Trial Tr., PageID#1133. The district court did not explain its reasoning in calculating restitution, despite the dispute over how restitution should be calculated. R.151, Sentencing Tr., PageID#2381; *see Gall v. United States*, 552 U.S. 38, 50 (2007) (holding a district court "must adequately explain the chosen sentence to allow for meaningful appellate review"). Nevertheless, based on the district court's imposition of the exact amount requested by the government, it is reasonable to infer that the district court adopted the government's erroneous method of calculation. R.146, Trial Tr., PageID#2381. Therefore, the district court misapplied the law when it calculated restitution.

This Court confronted an analogous situation in *Kilpatrick* and found the district court abused its discretion. In *Kilpatrick*, the district court ordered a convicted criminal defendant to pay the Detroit Water & Sewage Department (DWSD) $4,584,423 in restitution, which reflected the defendant's profits from contracts with the DWSD that were obtained through extortion. 798 F.3d at 388. This Court reversed the restitution order, finding the $4.5 million was not the

DWSD's actual loss because the money would have gone to other contractors absent the defendant's extortion. *Id.* at 390.

The *Kilpatrick* Court found the actual loss would be difficult to precisely calculate without data on what the DWSD would have paid to other contractors had the contract bidding process not been rigged. 798 F.3d at 390. Rather than taking these steps, the district court "threw up [its] hands too soon." *Id*. Therefore, the Court remanded to the district court to recalculate restitution, instructing that the district court "may (1) request the government to submit additional evidence; (2) hold an evidentiary hearing; and (3) conduct further proceedings limited to the restitution award" to determine the proper amount. *Id.* Notably, the Court also held that if "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, a district court may forgo restitution." *Id*. at 388 (citing 18 U.S.C. § 3663A(c)(3)(B)) (internal quotation marks omitted).

This Court should take a similar approach here. The $84,113.04 restitution order does not reflect Nationstar's actual loss. Therefore, the restitution order must be vacated, and the issue remanded for further proceedings to calculate restitution based on Nationstar's actual loss. Nationstar's actual loss is the extent to which Higgins's alleged diversion of funds directly diminished the value of the Meeker

Creek property. As in *Kilpatrick*, an accurate calculation of the actual loss likely requires additional documentation and expert testimony, as permitted by 18 U.S.C. § 3664(d)(4).

This documentation and testimony would be necessary for the district court to confirm the value of property after the repair work that was performed and compare it to the value of the property if no funds had been diverted from repair work. However, if the court determines the process of determining complex issues of fact related to the cause or amount of the Nationstar's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to Nationstar is outweighed by the burden on the sentencing process, it could forgo restitution pursuant to 18 U.S.C. § 3663A(c)(3)(B). This Court should vacate the restitution order and remand with instructions that the court either (1) forgo restitution, or (2) properly calculate restitution and document its findings and methodology.

CONCLUSION

Mr. Higgins respectfully requests that this Court reverse the judgment of conviction and remand the case for further proceedings.

Respectfully submitted,

/s/ Melissa M. Salinas
Melissa M. Salinas (MI–P69388)
University of Michigan Law School
Federal Appellate Litigation Clinic
701 South State Street
Room 2058, Jeffries Hall

Ann Arbor, MI 48109-1215
Phone: (734) 764-2724
Counsel for Brian Higgins

Erica Arensman
Rachel Harrington
Noah Harrison
University of Michigan Law School
Federal Appellate Litigation Clinic
Law Students on Brief

December 16, 2022

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. The above brief has been prepared using Microsoft Word 14-point Times New Roman font. Excluding the cover page, table of contents, table of authorities, statement with respect to oral argument, certificate of compliance, certificate of service, and designation of relevant district court documents, the brief is comprised of **12,621 words**, and, therefore, complies with Federal Rule of Appellate Procedure 32(a)(7)(B).

2. The above brief was filed on **December 16, 2022**, using the Court's ECF system, which will send notice of this filing to all counsel of record indicated on the electronic receipt.

/s/ Melissa M. Salinas
Melissa M. Salinas (MI-P69388)
Counsel for Brian Higgins

DESIGNATION OF DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b) and 30(g), Appellant Brian Higgins hereby designates the following relevant district court documents:

DESCRIPTION OF ENTRY	DATE FILED	RECORD ENTRY NO.	PAGE ID# RANGE
Indictment	12/13/2018	5	12-18
Order Allowing Appointing CJA Counsel	04/02/2020	26	90
Motion for Expert Funds	09/22/2020	46	253-259
Order on Motion for Appointment of Co-Counsel	09/30/2020	48	262
Second Superseding Indictment	12/17/2020	57	326-339
Government's Motion in Limine No. 3	01/21/2021	62	381-394
Government's Motion in Limine No. 4	01/25/2021	63	395-403
Response to Government's Motions in Limine	02/16/2021	68	669-676
Order Granting in Part and Denying in Part Government's Motions in Limine	03/16/2021	75	710-725
Government's Motion to Exclude Expert Testimony	11/08/2021	91	852-869
Memo in Opposition to Government Motion to Exclude Expert Testimony	12/13/2021	94	875-892
Fourth Superseding Indictment	12/16/2021	95	895-909
Second Motion to Withdraw	12/20/2021	97	913-914
Reply Memo in Support of Government's Motion to Exclude Expert Testimony	12/23/2021	98	915-926
Order Granting in Part and Denying in Part	01/04/2022	102	980-1002

Government's Motion to Exclude Expert Testimony			
Order Denying Second Motion to Withdraw	01/06/2022	103	1003-1006
Sentencing Memo	05/02/2022	121	1119-1125
Memo in Opposition to Order of Restitution	05/25/2022	124	1134-1138
Notice of Appeal	06/13/2022	132	1165-1166
Transcript of Hearing on Motion to Retain Expert	09/20/2022	138	1192-1206
Transcript of Hearing on Second Motion to Withdraw	09/20/2022	140	1226-1259
Trial Transcript, volume 1	09/20/2022	143	1274-1437
Trial Transcript, volume 2	09/20/2022	144	1438-1616
Trial Transcript, volume 4	09/20/2022	146	1622-1777
Trial Transcript, volume 5	09/20/2022	147	1778-1947
Trial Transcript, volume 6	09/20/2022	148	1948-2133
Trial Transcript, volume 7	09/20/2022	149	2134-2289
Trial Transcript, volume 8	09/20/2022	150	2290-2350
Sentencing Transcript	09/20/2022	151	2351-2390