IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	
Vs.	Case No.: 2:20-cr-114-JES-MRM
CASEY DAVID CROWTHER, Defendant.	

SENTENCING HEARING PROCEEDINGS
BEFORE THE HONORABLE JOHN E. STEELE

June 29, 2021
10:01 a.m.

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL V. LEEMAN, ESQUIRE
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ALSO PRESENT: CASEY DAVID CROWTHER, DEFENDANT

Proceedings reported and transcribed by computer-aided stenography.

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On behalf of the Defendant:

JESSICA HOLLOBAUGH

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P R O C E E D I N G S

(Court called to order.)

THE DEPUTY CLERK: Your Honor, case 2:20-cr-114-JES-MRM: The United States of America versus Casey David Crowther.

THE COURT: Thank you.

Counsel, if you'd identify yourselves and your respective clients beginning with counsel for the government.

MR. REICHLING: Good morning, Your Honor. Trent Reichling, Michael Leeman, and Suzanne Nebesky on behalf of the United States. Also present at counsel's table is United States Secret Service Agent Brian Kirby.

THE COURT: All right, good morning.

MS. WAID: Good morning, Your Honor. Nicole Waid on behalf of Casey Crowther.

THE COURT: All right. I notice we have a standing room only crowd. What I'm going to do is fill in the jury with those of you standing and see how many we have left. I do that with the caveat that, once you sit down, you can't be leaving until we take a recess. And so, those of you who want to stay, the first however many we have seats, come on up. If you're too shy, you can leave the courtroom.

(Pause.)

THE COURT: Jodi can stay right there. Just backfill. And the people in the center seats can stay there, that's fine.

(Pause.)

THE COURT: We got everybody? All seats? All right, we'll see how that goes. I know we still have some people standing, but we'll just see how that works out.

All right, this is the time set for sentencing with regard to Mr. Crowther. Are both sides ready?

MR. REICHLING: The United States is ready, Your Honor.

MS. WAID: Yes, Your Honor, defense is ready.

THE COURT: All right. Ms. Waid, if you and Mr. Crowther would come on up to the podium for me, please.

Mr. Crowther, on March the 22nd of 2021, you entered a plea of guilty to counts five and six of a second superseding indictment. Count five charged you with bank fraud in violation of Title 18 United States Code Sections 1344 and Section 2, while count six charged you with making a false statement to a financial institution in violation of Title 18 United States Code Sections 1014 and Section 2. I have previously accepted your pleas of guilty and adjudicated you guilty of those offenses.

On March the 26th of 2021, a jury found you guilty of counts one, two, three, and four of a second superseding indictment. Count one charged you with bank fraud in violation of Title 18 United States Code Section 1344 and Section 2.

Count two charged you with making a false statement to a financial institution in violation of Title 18 United States Code Section 1014 and Section 2. And counts three and four charged you with illegal monetary transactions in violation of Title 18 United States Code Sections 1957 and Section 2.

We have now reached the stage of the proceedings where it's my obligation to decide what sentence should be imposed upon you. Have you read the presentence report that's been prepared in this case?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And have you discussed the contents of that report with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Ms. Waid, have you, likewise, read the presentence report in the case and discussed the contents with your client?

MS. WAID: Yes, Your Honor.

THE COURT: Counsel for the government, have one or both of you read the presentence report and discussed it with whoever you wish to?

MR. REICHLING: Yes, Your Honor.

THE COURT: All right.

My normal procedure and what I would propose to do in this case is to first discuss any objections to the facts set forth in the presentence report. Then to address the sentencing guideline calculations in terms of whether there's objections to those. And, finally, to address the pending motion for a variance and the sentence to be imposed.

I believe both sides have submitted exhibits. I infer from that that somebody anticipates calling witnesses. Perhaps I'm wrong, but that seems to be the situation.

MS. WAID: Your Honor, we had anticipated calling two witnesses. One for the obstruction enhancement, but the government has told us that they're not going to forward with part of that enhancement where we would need a witness. And the second witness that we have is pursuant to the loss amounts. So it would depend on how the Court is going to rule if we need testimony.

THE COURT: All right. Well, that brings up a better point. Let me first ask whether there's any aspect of the calculation of the sentencing guidelines that the government does not support and we'll see.

MR. REICHLING: Your Honor, I believe the government, with regards to one of the enhancements, is going to concede that it does not apply, and that is the enhancement that -- with respect to the position of trust enhancement. And I'm trying to find where that's located in the presentence report. My apologies, Judge.

THE COURT: Yeah, it's going to be paragraph 83.

MR. REICHLING: That's correct, Judge.

While the government does understand probation's reasons for including it, that being that the defendant's role as the owner and president of Target Roofing definitely lent credence to his use of PPP funds in that it wasn't questioned by his upper management team or employees of Target Roofing, the government believes the case law is too difficult in terms of supporting the government getting behind this particular enhancement. So the government concedes that it does not apply.

THE COURT: Does that mean that you would suggest the Court sustain the objection to that?

MR. REICHLING: Yes, Your Honor, that would be fine with the government.

THE COURT: All right.

Ms. Waid, anything else with regard to that particular adjustment?

MS. WAID: No, Your Honor.

THE COURT: All right. The Court will sustain the objection. The Court will delete paragraph 83 and, of course, delete the plus two that had resulted.

All right, any additional aspect of the sentencing guideline calculations to which there is no support from the government?

MR. REICHLING: No, Your Honor.

THE COURT: All right.

With regard to the Court's proposal to first address factual objections in the contents of the report, then the application of the guidelines, I suppose, someplace in there where it may need testimony, anyone have a better procedure or better process to follow?

MS. WAID: No, Your Honor, that's fine with the defense.

MR. REICHLING: I have no suggestions, Your Honor.

THE COURT: All right. Let's take a look at the presentence report with regard to any outstanding factual objections. I don't recall any factual objections being filed by the government. Is that still the government's position?

MR. REICHLING: Yes, Your Honor.

THE COURT: All right. In terms of factual objections from the defendant -- Mr. Crowther, you may stand there, if you wish, or you may have a seat while we go through this process. It's up to you.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right.

Ms. Waid, any actual objections to the current version of the presentence report?

MS. WAID: The objections that we had prior, Your Honor, still stand. I can, for the Court and for the record, actually put down the parts of the trial transcripts that support that. So for paragraph --

THE COURT: Let me stop you here.

MS. WAID: Yup.

THE COURT: I have, actually, the first version to which there were objections, basically, the current version that's before the Court. I've not compared one version to the other. So you're going to need to make your factual objections anew to the current version and let me rule on those because I don't know what was changed from one version to the other.

MS. WAID: Correct. So for in paragraph five --

THE COURT: Yes.

MS. WAID: -- where it is represented that they are loan proceeds or bank proceeds, not -- or they're represented that they're SBA loan proceeds, not bank proceeds, we agree that that's what the indictment says. We disagree factually that those were the facts of the case. And that cite would be Stephen Miller's transcript, paragraph 47, lines 22 to 25, paragraph 48, lines 1 through 7.

THE COURT: All right. I'm with you at paragraph 5. And let me find the reference to the SBA that you're referring to. Oh, here it is.

So the objection isn't that it misstates the indictment, it's just that the indictment misstates the evidence?

MS. WAID: Yes.

THE COURT: Is that the bottom line?

MS. WAID: That's the objection, Your Honor, yes.

THE COURT: All right, I understand that. What, if anything, did you want me to do with regard to the language in paragraph five?

MS. WAID: Nothing, Your Honor. We just, for the record, wanted to put that on the record.

THE COURT: Okay. That's fine then. What's next?

MS. WAID: In paragraph 17, the paragraph mischaracterizes the CARES Act. The loan was actually a 1 percent loan between the borrower and the lender and, although it could be eligible for forgiveness, there was no requirement that it must be used for payroll and benefits.

The cite to that -- and, again, this is for the record, Your Honor -- is the Miller trial transcript at page 62, 8 through 10; the DeCicco trial transcript at page 26, lines 4 through 5 and 11 through 15, page 33, line 17 through 34.

THE COURT: What's the change in paragraph 17 that you want me to make?

MS. WAID: I would say that, instead of the loan was to be used to pay payroll and benefits, the loan could be forgiven if it was used to pay payroll and benefits to keep American workers employed.

THE COURT: Well, the sentence, or the paragraph, rather, begins, "The PPP loan was a forgivable loan." Does it address your problem to change that to something like, "The PPP loan could be forgivable loan" --

MS. WAID: Yes.

THE COURT: -- instead of was?

MS. WAID: Yes, Your Honor. The PPP loan was a 1 percent, low-interest loan that could be forgivable would be preferable.

THE COURT: So if I change that first sentence to read, "The PPP loan was a 1 percent loan, which could be a forgivable loan," does that address your concerns?

MS. WAID: Yes, sir.

THE COURT: Any other suggested changes in that paragraph?

MS. WAID: No, Your Honor.

THE COURT: Any objection from the government to the Court's suggested change?

MR. LEEMAN: No, Your Honor.

THE COURT: All right. I will direct that that change be made to paragraph 17.

All right, Ms. Waid, what's next?

MS. WAID: In paragraph 18, Your Honor, and it's trial Exhibit No. 8 we were looking at, it says in the application, the borrower had to certify that they were going to use the PPP loan for specific business purposes, and it's referring to trial Exhibit 8.

We would ask that it state, "The PPP application form was an SBA form utilized for forgiveness, but filled out by the borrower at the time of the application for the loan."

THE COURT: Say, again, your suggested --

MS. WAID: Yes, Your Honor.

THE COURT: -- sentence, please.

MS. WAID: Sorry. "The PPP application form was an SBA form utilized for forgiveness, but filled out by the borrower at the time of application for the loan."

THE COURT: Why is that difference significant?

MS. WAID: Because it's actually not -- he's convicted of bank fraud and it was an SBA form, not an actual part of the bank loan application forms, and the argument being that the language in the SBA form tracks the language of the interim final rules, which the SBA has later come out and said were inaccurate and needed to be changed.

THE COURT: All right. What says the government?

MR. LEEMAN: Your Honor, this seems to me to be an attempt to really add facts that they lost at trial. The application was on an SBA form, but it was the application for the loan. As the Court, no doubt, remembers, a large part of their defense was there was some division between you could get a loan, but -- and you could use it for what you wanted, but once you applied for forgiveness, that's when these constrictions or restrictions applied, rather. I believe that's what they're trying to do here by inserting this language it was a form utilized for forgiveness. I haven't heard any evidence of that, Your Honor. The application that we used at trial and which is referred to here was provided to the bank to get the bank to make a loan. Whether it was generated by the SBA or not is besides the point. It was the application used by the bank to generate the loan.

So, on top of that, Your Honor, I don't see how that meaningfully adds anything. And so, you know, to the extent we believe they're trying to sort of insert facts that weren't supported by the trial record in support of their defense in a case that they lost, we would object to it.

THE COURT: All right. The Court's going to overrule the objections and the Court finds that paragraph 18 as written is accurate and, therefore, as I said, the objection will be overruled.

What's next?

MS. WAID: For paragraph 27, Your Honor, with regard to the opening of the new account.

THE COURT: Yes.

MS. WAID: We had an objection in there that we would like to maintain that, according to -- there's some still confusion on the trial record as to the opening of that account pursuant to Government's Exhibit Trial Exhibit No. 100 where a bank account had just been opened a couple weeks prior and --

for Target Roofing and there were no funds in that account pursuant to the trial record and so it would be unclear as to why a new account would be opened.

We just wanted to get that on the record, that there was some confusion regarding three different accounts; the operating account, an account that was opened on April 10th, and account that was opened on March 23, 2020.

THE COURT: Is there any portion of paragraph 27 as written that, in your view, needs to be changed or you just want the record to reflect your position?

MS. WAID: We'd like the record to reflect our position, please.

THE COURT: All right. It will so reflect.

What's next?

MS. WAID: In paragraph 29, it appears from Government's Exhibit 20, Trial Exhibit 20, that the different calculation was based upon employee withholdings.

THE COURT: And so what part of paragraph 29 needs to be corrected, in your view?

MS. WAID: Again, we just wanted that clarification for the record.

THE COURT: Again, nothing specific to be changed in the presentence report, just your position on the record?

MS. WAID: Correct.

THE COURT: Okay. And what's the next paragraph?

MS. WAID: In paragraph 50, this is where, Your Honor, that we were going to put on a witness to state that the letter from the bank was actually utilized to provide to customers and in order to make them feel comfortable that Target was a viable business. We were going to present evidence and we're happy to present that evidence, but the government indicated to me this morning that they were not going to proceed on that position.

THE COURT: All right.

What says the government then with regard to paragraph 50?

MR. LEEMAN: Your Honor, as a factual matter, are we talking about paragraph 50 or 48, Your Honor? I'm sorry. In the new PSR.

THE COURT: I thought it was paragraph 50 that you said; is that correct --

MS. WAID: Yes.

THE COURT: -- Ms. Waid?

MR. LEEMAN: Thank you, Your Honor. Just give me a minute. I was reading the wrong paragraph.

THE COURT: Sure.

(Pause.)

MR. LEEMAN: Your Honor, the part about the letter being sent is factually accurate. The government is happy to excise some portion, if Mr. Crowther has some proposed language.

We are not going to be asking the Court to base any obstruction enhancement based on the provision of the -- a letter went to the -- from the bank to Mr. Crowther which said he was in good standing. That bank was then forwarded to the government. Or that letter was then forwarded to the government. So the letter was sent, that's factually accurate, so I don't believe any facts about the letter being sent need to be removed. But to the extent language within paragraph 50 suggests that the good standing letter being sent is the basis for obstruction, we would get comfortable with removing that language, Your Honor

THE COURT: All right. So, as I understand, there's still a request for the obstruction of justice enhancement. Just the premise for that is not based upon this letter.

MR. LEEMAN: That's right, it's narrower, Your Honor.

THE COURT: Okay.
And so what portion of that paragraph do you suggest I strike?

MS. WAID: I would suggest, Your Honor, the last sentence be struck.

THE COURT: That begins, "Additionally, trial testimony."

MS. WAID: Yes.

THE COURT: Any objections?

MR. LEEMAN: No, Your Honor.

THE COURT: The Court will strike the last sentence in that paragraph.

All right, what's the next paragraph?

MS. WAID: Paragraph 60, Your Honor.

THE COURT: Sixty. Okay.

MS. WAID: There were no allegations or evidence established at trial that any PPP funds were utilized to purchase a horse. I believe that evidence was brought in as other crimes evidence pursuant to the way it was characterized on the wire. So we'd suggest striking buy a horse from paragraph 60.

THE COURT: What says the government?

MR. REICHLING: Your Honor, while the government's focus was not on the defendant's misuse of PPP funds in trial on the horse, the government did present sufficient evidence showing that the defendant went at great lengths to disguise the purchase of the horse. The purchase of the horse, I believe, was on June 1st of 2020. The defendant moved over PPP funds into his bank account -- this is all from evidence presented at trial. The defendant moved PPP funds over to his main operating account, which was the account used to buy the horse on May 7th of 2020. The government inferred that -- or the evidence suggested, at least circumstantially, that the great extent to which the defendant went to disguise his purchase of a horse by calling it roofing materials to the bank, by sending an email to the bank and asking them for proof the wire went through because he needed to provide something to his guys so they can pick up roofing materials showed -- exhibited what we believed was intrinsic evidence of the fraud and the great lengths that he had went to supported at least the notion that the defendant was utilizing PPP funds to purchase the horse.

We would agree, though, that, you know, there is no direct link between a transfer of money and then the purchase of a horse factually within the bank records because of the time -- the temporal distance between the time the money was transferred over and the purchase of the horse, but I think it is important to note that the defendant went to great lengths to disguise the purchase and use of at least his main operating funds to buy the horse. So I don't know how Your Honor wants to handle the insertion within the presentence report that he bought a horse with PPP money. While it wasn't the focus of the government's case, we did believe that the evidence of the horse purchase was intrinsic to the PPP fraud.

THE COURT: Ms. Waid, is the gist of the objection that the reference to buying a horse is improperly in a paragraph that is captioned Summary of the Offense Conduct?

MS. WAID: Yes, Your Honor.

THE COURT: So it's not a dispute that a horse was purchased for $55,000, it's just that that was, in your view, not part of the charged offense?

MS. WAID: Yes, Your Honor. My objection is that it states that the horse was bought with PPP funds and the trial record, as it stands, is that all of the business funds at that point in time were commingled into an operating account and there was various accounts receivables going into those accounts and so there was no way, and nor did the government do it at trial, trace those as PPP funds.

THE COURT: I'm not sure that a reasonable jury couldn't have made that finding. You have $1.7 million or so transferred I think it was early June and a horse purchased some time after that from that operating account. That's certainly true.

MS. WAID: But it's certainly true, also, if the bank records are viewed as part of the trial exhibits, that there was lots and lots of money going into those accounts as soon as different projects were being paid for and so that money as an S Corp is actually money that Mr. Crowther could take as a distribution later on in the year. It's also the amount of working capital that they had was -- I don't see how they could possibly trace the PPP funds to the horse based upon the amount of money that was coming into those accounts at that time. So it's just the buying the horse that I do not believe is supported by the evidence.

THE COURT: All right. To the extent that paragraph

60 is captioned Summary of the Offense Conduct and to the extent that the allegation about buying a horse was not set forth in the second superseding indictment, the Court's going to sustain the defendant's objection. The Court will strike the phrase, "Buy a horse," from that paragraph and, otherwise, leave it as is.

All right. What's the next paragraph?

MS. WAID: I would say in paragraph 61, towards the end of the paragraph, it states, "Additionally, Crowther altered bank statements to receive a mortgage towards the purchase of a new residence which he did not rightfully have the money for the down payment." We disagree with the fact that he did not rightfully have the money for the down payment and don't believe that the evidence at trial actually supports that.

THE COURT: This is on the guilty plea portion?

MS. WAID: This was actually -- yes, this is the mortgage fraud.

THE COURT: All right, okay.

MS. WAID: So, whereas we agree that he committed mortgage fraud, absolutely, we do not believe that he -- he did have sufficient money for the down payment is what the argument is.

THE COURT: And what was the fraud that he committed?

MS. WAID: He altered bank statements to make it look like all that money was in one bank account instead of several different bank accounts.

THE COURT: So he had the money -- your view is he could have got the mortgage lawfully, but -- because he had the money for the down payment, but, nonetheless, he falsified the bank records?

MS. WAID: Correct.

THE COURT: All right. What says the government?

MR. REICHLING: Your Honor, the government would object. The evidence, although we did not have a trial on the mortgage fraud counts, the evidence, Your Honor, is that the defendant moved $400,000, approximately, from his Jade Avenue account into his main operating account. On the same date he transferred those funds into his main operating account, he pulled $150,000 from his Target Roofing business line of credit into his main operating account and then used remaining liquid assets that were already in Target Roofing's main operating business account to then wire out 600 -- I don't have the exact number, Your Honor, but 600, I think, 80 something thousand dollars to the bank.

What the defendant hid, Your Honor, really, was his use of another form of liability or debit, which was the use of line of credit funds. That's the focal point and something that the lender in this case, which would have been incredibly material to their determination of whether to approve or disprove of his loan application or his mortgage application, was his use of $150,000 from his line of credit to purchase the home. The bank records, which are actually -- were put into evidence for other reasons, you know, with regards to the other accounts, support the fact that, on the day the defendant wired the money to purchase the house, he pulled $150,000 from his line of credit after comingling funds from another account into his main operating account.

So I believe that that factual distinction is incredibly important and supports the fact that the defendant used line of credit funds. He did not have the appropriate amount of money in his accounts to pay for the down payment. The ending balance of the main operating account on July 30th, which was the date preceding the day he wired funds for the purchase of the home, was $200,000. That was what was in the Target Roofing main operating account. The funds he transferred over were $400,000. He had to come up with approximately 680 or so thousand dollars for his down payment on his mortgage. He did not have enough money in his main operating account and also including his money from this other Jade Avenue account to come up with this down payment. It's certainly obvious, at least from the government's point of view, that the use of the line of credit funds on the same date was to fund the down payment of the mortgage. Otherwise, he would have completely liquidated all of Target Roofing's assets, its liquid assets, to put down a down payment on a house.

THE COURT: Well, as I understand the arguments, it's certainly not contested that the defendant altered bank statements to receive the mortgage towards the purchase of a new residence and is not -- there's no objections to the reference to the $150,000 business line of credit. The only issue is the phrase, "Which he did not rightfully have the money for the down payment." I don't see that as being an element of the offense to which he pled guilty or in any way, whether it's true or not, impacting his guilt or the potential sentence, quite frankly. The Court's going to sustain the objection to the extent it will strike the phrase, "Which he did not rightfully have the money for the down payment," from that paragraph.

And what's next?

MS. WAID: And then I believe we go on to the adjustments, Your Honor.

THE COURT: Let me call your attention first to paragraph 63, which is part of the victim impact, and there was some indication of restitution being made by June the 25th. What's the update, if any, as to that?

MS. WAID: Yes, Your Honor, and there's actually an exhibit marked.

Mr. Crowther was able to pay $30,000 towards the loan. He wanted to pay the entire amount; however, we're currently in a construction crisis where there are no building materials. It's a supply and demand issue due to the pandemic and many of his projects have been halted. So a lot of the money he was anticipating getting in has not got in as of yet, but he has made a $30,000 payment.

THE COURT: Should paragraph 63 just be stricken or is there some modification that may be helpful?

MS. WAID: Let's see.

You could say, "Cheffer acknowledges that Sanibel Captiva Community Bank is owed the 2.98 from Casey Crowther from the PPP loan. Mr. Crowther has paid $30,000 towards that loan." And I want to say it's actually Exhibit I in my -- in Defendant's Exhibits that I can proffer to the Court.

THE COURT: So if I leave the first sentence in, add a sentence that he's paid $30,000, then do the math, that would come up with the restitution figure?

MS. WAID: Yes, Your Honor. And he anticipates being able to pay more of it off as the accounts receivable are received and as projects begin to be funded again pursuant to the shortage.

THE COURT: All right. And do you want that included in the paragraph or is that just information for the Court?

MS. WAID: That's just information for the Court, Your Honor.

THE COURT: All right.

What says the government with regard to paragraph 63?

MR. LEEMAN: Yes, Your Honor.

Is the Court considering, essentially, leaving the first sentence, striking the rest, and adding something to the effect of he has paid $30,000 by the date of the sentencing?

THE COURT: That's exactly what I'm considering.

MR. LEEMAN: Thank you, Your Honor.

I just want to confirm that we actually had -- we did get exhibits last night and I want to see how firm the proof is. I don't want to speak for the bank receiving a $30,000 payment. We hadn't been informed of that. The last we had been informed of the bank was that they had not received any payment, but it was not as early as last night, Your Honor, when we received the exhibits.

THE COURT: All right. Go ahead and check.

MR. REICHLING: I don't have an Exhibit I on your exhibit list; so...

THE DEPUTY CLERK: I believe it's H.

MR. REICHLING: It ends at H.

MS. WAID: Oh, Exhibit H. I apologize.

(Pause.)

MR. LEEMAN: I've got the bank attorney nodding to me from the jury box that the payment was, in fact, made.

MR. CHEFFER: That's correct, Your Honor.

MR. LEEMAN: So we don't have the exhibit from Ms. Waid. I don't know. It's just as likely it's an oversight by our office in printing as it was her sending it to us. But, given Mr. Cheffer's indicating that the payment was made, we don't have an objection to the amendment to the PSR, Your Honor.

THE COURT: All right. Well, his nodding is good enough for the Court.

And what was the date that the defendant paid the $30,000 to the bank; does anyone know for sure?

THE DEFENDANT: I believe it was yesterday, Your Honor.

THE COURT: So that would be the 28th of June?

THE DEFENDANT: No, the 25th. I'm sorry, Your Honor, it was the 25th.

THE COURT: 25th? Thank you.

MS. WAID: Exhibit H corroborates it was the 25th, Your Honor.

(Pause.)

THE COURT: All right, here's what I propose: Is to leave the first sentence or paragraph 63 as is, to delete the remainder of the paragraph, to add the following sentence:

"Defendant paid $30,000 to bank on June 25, 2021, leaving a balance of $2,068,700." First of all, someone needs to check my math.

MR. LEEMAN: I believe your math is good, Your Honor. Thank you.

THE COURT: That's the first time then.

All right. Any objections to those changes to paragraph 63?

MS. WAID: No, Your Honor.

PROBATION OFFICER: Your Honor, could you repeat the --

THE COURT: Sure. The new sentence reads, "The defendant paid $30,000 to the bank on June 25, 2021, leaving a balance of $2,068,700."

PROBATION OFFICER: Thank you.

THE COURT: Okay. All right, what's the next paragraph or do we get into guideline issues?

MS. WAID: We got into guideline issues adjustments for obstruction of justice, Your Honor.

THE COURT: Okay. How do the parties propose to proceed with regard to the sentencing guideline issues and testimony that may be required?

MS. WAID: I'd ask Your Honor, first, if Your Honor's inclined to actually provide the enhancement and then argument from either side. Like I said, we were going to put on a witness for the obstruction of justice, but the paragraph 65 of the letter of good standing, apparently, is no longer an issue for the government. So it's really just the initial letter that was sent by me in September of 2020, pre-indictment, in an attempt, pursuant to Rule 408 settlement negotiations, to make this, in all honesty, a civil case instead of a criminal case.

THE COURT: Well, I want to hear oral argument as to all of the proposed adjustments. I don't know if there's factual issues or disputes with regard to some of them. I think some of them -- how should I phrase this -- give me more pause than others. That doesn't mean one side's going to win or lose, but the first thing we need to do, I guess, is figure out if there's any factual disputes. And then, if so, the Court will have to resolve those factual issues. Then rule as to the law. So I don't think I can tell you right now how I'm going to rule, if that's what you're asking.

MS. WAID: Okay. Well, there were some legal -- well, actually, it was abuse of trust was more of a legal issue in our words, but that's no longer on the record; so...

THE COURT: Well, I mean, for example, is the other part of the obstruction of justice statements made by the defendant? I don't recall testimony at trial with regard to statements made by the defendant or counsel postarrest. If there's a dispute as to that, we probably need to take testimony. If both sides agree as to the facts, then you can tell me and we'll proceed from there. Then it becomes simply a legal issue. But, as I sit here now, I don't know.

MS. WAID: Right.

THE COURT: So how do you intend to proceed? Do you just want to proceed by paragraph and I'll call upon you to tell me if there's any factual dispute? And, if not, I'll hear legal argument as to that paragraph and then move on to the next one or something else?

MS. WAID: That works for the defense, Your Honor.

MR. LEEMAN: It does work for the government, too, Your Honor. And, just to sort of clarify, the government, I don't -- we don't really have any plans to call any witnesses. To the extent we have exhibits, I think they are things which are already in the trial record. We have marked, for instance, exhibits of transcripts from trial testimony. We would be introducing those. I don't believe any of these things are going to be objectionable. Of course, we can cross that bridge when we come to it.

THE COURT: Okay.

MR. LEEMAN: But, as far as testimony goes, we're certainly happy to just sort of see how it plays out.

THE COURT: Well, all right. Well, let me do it this way then: The next paragraph that gives me concern and that I want either oral argument or testimony or some combination of both is paragraph 76, the calculation of the guidelines. Specifically, the calculation of the loss amount. And, again, I don't know if there's factual disputes or just, you know, legal argument, but you can tell me right now. Paragraph 76 has a plus 16. As I understand, the defendant says it should be a plus zero. And so either proceed with testimony or oral argument at your pleasure.

MS. WAID: Yes, Your Honor. We have both oral argument and we also do have a witness for the loss amounts.

THE COURT: Okay. Well, let's start with the witness then.

MS. WAID: Okay. And this witness also, if we can jump just so we don't have to -- if it's easier for the Court to bring her back, will also be testifying for the financial information provided by the defendant. Essentially, you know, the monthly income and cash flow as well in order to just clarify that for the PSR.

THE COURT: I guess my preference, unless she has scheduling issues, is to separate those testimony into two different occurrences.

MS. WAID: Okay. That's fine, Your Honor. And so, just from our perspective prior to putting her on, the reason that we believe that the loss amounts should be zero are because the intended loss pursuant to probation was the loan amount, however, as the Court knows, the sentencing guidelines make that also subjective. And the evidence, you know, at trial and beyond, has shown that Mr. Crowther actually had always intended to pay the bank. He's in constant communication with the bank. He's already made a payment. As soon as he actually got the loans, he was paying employees as well. So there's really no evidence to show otherwise and we believe that there can be no intended loss if the purpose was to pay his employees and his employees were, in fact, paid and that there's no evidence at trial to suggest otherwise, frankly.

We do want to put on evidence, Your Honor, of the allowable expenses that were spent by Target. That's all in the trial record. So just kind of summarizing what those allowable expenses were. In the event that the Court decides, alternatively, to go with a government benefits kind of loss analysis, because the trial record is extremely clear that the majority of that money, even taking apart the boat and the promissory note, was spent on allowable expenses, which, in fact, would most likely have been forgivable pursuant to the CARES Act. And so we would be calling Jessica Hollobaugh for those types of -- for that type of evidence and kind of summary witness testimony in order to clarify for the record what those expenses were.

THE COURT: All right.

MS. WAID: And, for the record, too, we'd also like to -- for the intended loss, the loan is still a performing loan and, again, Mr. Crowther is paying off on that. So we'll call Ms. Hollobaugh to the stand.

MR. REICHLING: And, Your Honor, if I just -- the government may briefly respond.

I believe the appropriate -- at least the government would be proceeding under the actual loss amount, which was the amount of money that was caused to be lent to the defendant based upon misrepresentations that the defendant made concerning his use of the funds. I believe there's ample testimony from trial from Diane Knott, as well as other exhibits admitted at trial, that these funds, which were to the tune of $2,098,700, for the most part, were not used for payroll expenses, utilities, rent, or interest on a mortgage. The record was quite clear that, but not for the defendant's misrepresentations concerning his use of the funds, the defendant would never have gotten this loan. The testimony of Kyle DeCicco at trial was that, had the bank known that the defendant was going to use a portion of these funds to purchase a boat, they would have never approved the loan.

So the government is proceeding under the belief that the actual loss amount is the appropriate loss amount here because that's the amount of money the bank parted with based upon the defendant's misrepresentations. So, for those reasons, Your Honor, we do believe that that $2,098,700 is applicable here as the loss amount because it is the actual loss amount. I don't believe the guidelines call for the idea that, if you defraud a financial institution into giving you money or giving you a loan, that you can then say okay, I intend on paying it back now, I should be credited that toward my loss. In fact, the guidelines do contemplate a situation in which the defendant, or a defendant, would begin to make repayments towards a loan or other financial obligation they procured by fraud, but the guidelines state that if it is because -- if it comes after the defendant is aware that he's being investigated or after his arrest, those wouldn't apply as credits towards loss.

So, to me, it appears to be more of a legal discrepancy or difference of opinion between the government and the defense. I think there's ample testimony and evidence that was provided at trial that would show that the actual loss amount is this $2,098,700 figure.

THE COURT: Well, your amount of loss theory differs than the theory expressed in the presentence report; correct?

MR. REICHLING: That is correct. I believe the government's opinion would be that the defendant intended to cause a loss or intended to get this money. We believe the actual loss and the intended loss would likely be the same amount of money, but the case law, when it comes to fraud cases, is that it's the greater of the actual loss or the intended loss in determining the guideline loss amount. So we believe that Your Honor can proceed under the actual loss theory as well and get to the same number, but we do believe that that is the appropriate number based on the actual loss theory.

MS. WAID: For the record, Your Honor, we disagree with that legal analysis. An actual loss --

THE COURT: I'm shocked.

MS. WAID: -- just doesn't -- no.

THE COURT: All right. Do you still desire to call a witness or are we, basically, at a legal issue?

MS. WAID: We would still like to put on a witness for -- in the event, like we said, of the -- to show the allowable expenses that were paid pursuant to the CARES Act in the event that the Court decides to rule in more of a government benefits type of analysis for loss. We'd also like to put on just kind of the amount of money that was spent by Target of kind of allowable expenses pursuant to the CARES Act and the sum of that loan being utilized in allowable expense purposes as required by the statute.

THE COURT: The government has not requested that I utilize a benefits analysis to calculate loss; is that correct?

MR. REICHLING: That's correct, Judge.

THE COURT: All right, so since no one has asked me to do that, I don't intend to do it.

MS. WAID: Okay.

THE COURT: So it comes down to either actual loss or intended loss and the calculation of that. So that may give you some guidance as to what you do or don't need to do with the witness. As to the second part of her testimony, I'll certainly allow that and she can summarize however you wish the amount of money that you claim were acceptable expenses.

MS. WAID: Okay. Thank you, Your Honor.

Can I just have a brief moment with my client just --

THE COURT: Sure.

MS. WAID: -- for a quick discussion?

(Pause.)

MS. WAID: Your Honor, we are going to call the witness briefly just because we believe there is an intent argument and get some testimony from there.

THE COURT: That's fine.

MS. WAID: Thank you.

THE DEPUTY CLERK: Do you solemnly swear or affirm the testimony you are about to give in the case now before the Court will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE DEPUTY CLERK: Thank you. If you would have a seat in the witness box. And, once seated, if you would state your name and spell it.

THE WITNESS: Sure.

THE DEPUTY CLERK: Thank you.

(Pause.)

MS. WAID: Court's indulgence. I'm just doing technical work here.

(Pause.)

Thereupon,

JESSICA HOLLOBAUGH,

Having been called as a witness on behalf of the Defense, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION ON BEHALF OF THE DEFENSE

BY MS. WAID:

Q. Good morning.

A. Good morning.

Q. Could you please state your name and spell it for the record?

A. Sure. Jessica Hollobaugh. It's J-E-S-S-I-C-A. Hollobaugh is H-O-L-L-O-B-A-U-G-H.

Q. Okay. And can you please let the Court know your education?

A. Sure. I have a bachelors's in accounting from Richard Stockton College of New Jersey.

Q. Okay. Do you have any licenses or certifications?

A. Yes, I'm a certified public accountant. I also hold my accreditation in business valuation and I am a certified fraud examiner.

Q. Okay. Where do you work?

A. Withum Smith & Brown.

Q. And how long have you been with them?
A. They are a national accounting firm. I've been with them for 18 years.
Q. Okay. And what's your role there?
A. So I started with them 18 years ago in our general audit, tax, and business consulting largely focused on construction contractors. And, about halfway through my career, I transitioned into our forensic and litigation support group. And, in that group, I am now the market leader of our forensic investigation and white collar group.
Q. Okay. Are you a member of any other groups at Withum?
A. Yes, we have a construction services team. I know I just briefly mentioned, for a good portion of my career, I focused on audit and tax of construction companies, so I've maintained a relationship with that group as the litigation liaison. And, most recently, about a year-and-a-half ago, as a result of the PPP loans and the CARES Act, we started an SBA financial services team, and I'm also a part of that team.
Q. And as a leader of Withum's white collar team and a member of the SBA services team, have there been any changes in your workload over the past year?
A. Absolutely. So we largely do all types of forensic investigations, but over the last year, we've been engaged on quite a bit of these PPP related matters.

Q. And by PPP, what do you mean?

A. Paycheck Protection Program. So we've been engaged both in active investigations and then also just under the consult of attorneys. So there's been a lot of ambiguity and clients are a bit concerned that they may not have properly interpreted the rules from the onset or are a little concerned with what the forgiveness rules are. So we've been consulting with attorneys to help them through that phase.

Q. And did you attend Mr. Crowther's trial?

A. Yes, I did.

Q. Have you had a chance to review the trial exhibits?

A. Yes, I have.

Q. Okay. I'm going to show you what has been marked as Exhibit No. C. And then I'm also going to provide you with C1 through 9 and we're going to go over those individually.

MS. WAID: Permission to approach, Your Honor.

THE COURT: You may. Freely.

Q. I'm showing you what has been marked as Exhibit C. Can you tell me what it is, please?

A. This is a summary schedule that I put together based on a review of the trial exhibits which were submitted and it's a schedule that just summarizes the different categories of forgivable expenses and the amount that was expended out of Target Roofing's bank account over the covered period on those categories.

Q. And what's a forgivable expense?
A. So, in the CARES Act, the SBA allowed for certain categories of expenses. And, if the borrower was to spend money over the course of the covered period in those categories, they were eligible to apply for forgiveness for the loan amount.
Q. Okay. So the SBA is the final decision maker on forgiveness. How did you decide what to include in your summary?
A. Based on accounting knowledge, just classified the items that fell within these designated categories and then applied -- there are some restrictions. For example, payroll is limited up to $100,000 per year. So just applied those restrictions to those categories.
Q. And what types of allowable expenses may be forgivable?
A. So the SBA originally set forth several categories, one of which being -- it was payroll. So gross payroll along with state and local employer taxes, group health insurance. In addition, it was rent payments, utility payments, and then interest payments on mortgages. They did subsequently extend those categories in, I believe, February of 2021, and those categories were extended to include things such as supplies and materials and operations expenses.
Q. What documents did you review to prepare Exhibit C?

A. So you'll see I also provided a bunch of exhibits behind this so we can go into detail on each one, but for the most part, it was the Government's Exhibits 70 through -- I believe it was 88. It was the bank statements and supporting documents of Target Roofing.
Q. Okay. And is your summary a fair and accurate depiction of summarizing what was in those trial records?
A. Yes; correct.
MS. WAID: Your Honor, we'd like to admit Defense Exhibit C.
THE COURT: Any objections?
MR. REICHLING: No, Your Honor. No objections, Your Honor.
THE COURT: Defendant's C will be admitted.
(Defendant's Exhibit Number C admitted into evidence.)
BY MS. WAID:
Q. Okay. And can you please explain to the Court what is in this summary report?
A. Sure. So the summary exhibit is just a summary of those categories that I just talked about. And the numbers in the far right column are the numbers that I was able to ascertain only from the documents that have been set forth in the trial exhibits as used for forgivable purposes.
Q. Okay. What's the timeframe for this?

A. The covered period was a 24-week covered period. It started on the date that Target received the PPP loan, which was on April 14th, and so it ran through September 28th of 2020.

Q. Okay. And what is the number of total forgivable or allowable expenses pursuant to your summary report?

A. So I was able to quantify $3,496,000 of expenses, which were expended on forgivable expenses. I will caution you, and we'll get into it a bit later, there are likely more, but I just couldn't quantify the full dollar amount based on the documents that had already been submitted at trial.

Q. Okay. And what was the PPP loan amount?

A. $2,098,700.

Q. Okay. And could you tell us what the forgivable expenses paid in excess of that loan amount were?

A. $1,397,300.

Q. Okay. I'd like you to please look at Defense Exhibit C1. Can you please tell me what that is?

A. Sure. This is -- in the far -- well, you don't have it.

So this is a summary that I created of the payroll costs that were expended by Target during the 24-week covered period and I created this based on the Government's Exhibit C8. I'm sorry, that was the Defense Exhibit C8.

Q. Okay. The Defense Exhibit C8, which was the payroll records; is that correct?

A. Correct.

Q. Okay. And there had been some trial testimony regarding 39 employees. Are those 39 employees included in this analysis?

A. So in the analysis I completed, they were included in the total number because they were included in the payroll, but what I did was, for purposes of determining what the forgivable expenses were, I did back out all of the 39 employees as well as five family members that were hired during this same time period.

Q. Okay. And, with that exception or that caveat, is this a fair and accurate summary of the payroll paid during the covered period as recorded on Defense Trial Exhibit C8?

A. Yes, it is.

MS. WAID: We'd like to admit C1.

THE COURT: Any objections?

MR. REICHLING: No, Your Honor.

THE COURT: C1 will be admitted.

(Defendant's Exhibit Number C1 admitted into evidence.)

THE COURT: Are you going to move to admit C2 through 9?

MS. WAID: Yes, Your Honor.

THE COURT: Any objections to those admissions?

MR. REICHLING: No, Your Honor.
THE COURT: C2 through 9 will be admitted likewise.
(Defendant's Exhibit Number C2 - 9 admitted into evidence.)
BY MS. WAID:
Q. And could you give me the total amount of payroll paid during the covered period based upon C1?
A. Sure. The total amount paid was $3,549,000. As I just mentioned, I did back out the 39 employees and the five family members. So, after backing them out, it was still $3,415,147.
Q. Okay. And can you please look at Government -- I mean, Defense Exhibit C2? Can you please tell us what this is?
A. Sure. This is also just a summary of activity which occurred and was recorded in Exhibit 70 through 78. And, like I mentioned before, not only was payroll an eligible expense, but you could also use it to pay the state and local taxes of the employees.
What Exhibit C2 represents are the total payments that were made to Workforce Business Services. So Workforce Business Services is a PEO entity. When Target would pay payroll, they wouldn't pay the gross payroll to employees and then a separate payment for state and taxes and a separate payment for other items. It was one dollar amount lumped together.

So what this represents is that, during the covered period, there were over $3.7 million in payments to that PEO. We just talked about 3.5 million of that related to the gross payroll. So what that means is, in addition to those amounts, there was another $227,000 that was paid to Workforce Business Solutions, which would represent items such as your state and local taxes, retirement costs, as well as payments for the PEO service.

So the difficulty with this, again, is because we didn't have other documents in trial exhibits, I couldn't calculate the exact amount of what portion of that 227 represents state and local taxes, but there are some additional state and local taxes that would be eligible embedded in that number.

Q. And these -- and this number 227,205.53 would be a forgivable amount?

A. Not the entire amount. The portion within there that's state and local taxes would be a forgivable amount.

Q. Can you please look at C4?

A. Did you mean to skip C3?

Q. No. C3? Sorry about that.

A. Sure.

THE DEFENDANT: C3?

MS. WAID: C3.

Q. And can you tell us what this is, please?

A. Sure. C3 is a summary of the group health and life insurance payments as taken from Exhibit 73 through 88 that total $97,556 during the covered period. Similar to the state and local taxes, there are some limitations with the health insurance. So the forgivable portion is only the employer portion. We're not able to, just based on the documents submitted at trial, we're not able to separate those two. But, also, a portion of that 97,556 would be forgivable.

Q. Okay. And C4, please. What does this exhibit represent?

A. This exhibit represents the total rent payments that were made during the covered payment -- or covered period. So for the 24-week covered period, Target paid $123,130 in rent. The CARES Act did specify that rent paid to related parties, which this was, was only forgivable up to the extent that that rent was used for mortgage interest by the related party. So what you'll see on the bottom half of the schedule is actually from Exhibit C6 at trial and what that outlines is the total interest payments that were made by the related party during the covered period of 56,498.

Q. Which are potentially forgivable expenses?

A. The 56,498 is a forgivable expense, yes.

Q. Okay. Could you please go to C5?

A. Yes.

Q. What does this exhibit represent?

A. This represents lease payments. So rent payments on officer, copier, and printer services. Again, a summary of which came from trial Exhibit 70 through 88. The total of which are $6,068.
Q. And could you please go to C6? What does this exhibit represent?
A. C6 is another summary from Exhibits 70 through 88, and it outlines all of the utilities payments that were paid during the covered period totaling $37,739. Again, the utilities payments do represent forgivable expenses.
Q. Okay. And C7, please. What does this exhibit represent?
A. C7 represents a summary of all the payments that were made on vehicle and equipment loans during the covered period and they total $277,407. The CARES Act allowed the portion of those loan payments, which was interest on the loan, to be forgivable. I've only been able to quantify the first ten days based on the documents submitted at trial. So, within the first ten days of the covered period, there was $4,136 of interest expense made -- paid that would be forgivable.
Q. And C8, please.
A. C8 is a summary of the materials and supplies costs that were paid over the covered period. And the total of these items are $3,359,121. These payments were required to be essential to the operations and made pursuant to a contractor

order in order to be forgivable. We haven't been provided with the invoices underlying all these payments so I cannot quantify any of these as forgivable, although, I think it's safe to assume that roofing supplies would be essential to a roofing business.

Q. And, finally, C9, could you please look at that?

A. Sure. C9, similar, this is just a summary of what is called covered operations expenses that were paid during the covered period that total 21,530. Dataforma, which is listed on here, is the software program. It's a roofing software that's utilized for the operations.

Q. Okay, thank you.

I'm going to now show you what's been marked as Exhibit No. -- or letter D and D1.

MS. WAID: Permission to approach, Your Honor?

THE COURT: You may.

MS. WAID: Thank you.

Q. So you're looking at what's been marked Defense Exhibit D. Can you please tell us what it is?

A. Sure. Just like we talked about before, this is a summary of Trial Exhibit C8, which set forth the total gross payroll that was paid to Target Roofing employees throughout the time period of January 2020 through October of 2020.

Q. And did you make a payroll trend analysis based upon Defense Exhibit C8?

A. Yes, I did. So what I did is I just separated the amount of the payments that were made prior to the PPP period and then the amount that were paid during the PPP period.

Q. Okay. And is this a fair and accurate summary of Trial Exhibit C8?

A. Yes, it is.

MS. WAID: We'd like to move in Exhibit D, Your Honor.

THE COURT: Any objections?

MR. REICHLING: No, Your Honor.

MS. WAID: And D1 as well, Your Honor, please.

THE COURT: Any objections?

MR. REICHLING: No, Your Honor.

THE COURT: D and D1 will be admitted.

(Defendant's Exhibit Numbers D & D1 admitted into evidence.)

BY MS. WAID:

Q. So, in your analysis, can you tell us what occurs with the Target salaries in the weeks prior to the company receiving the PPP loan?

A. Yes. So, starting around February timeframe when COVID really started to impact a lot of businesses, you'll see that the gross payroll is declining at a pretty rapid rate. So, in February of 2020, you're looking, in the beginning, at about $130,000 in payroll per week. And, by the first week in

April 2020, payroll had been cut down to approximately $80,000 per week.

Q. Okay. And what occurs with the Target salaries once the company actually receives the PPP money?

A. Immediately after the company receives the PPP money, the salaries are restored and actually start to jump above where they were prior to receiving the PPP funds.

Q. And is that consistent throughout the covered period?

A. Yes, it is.

MS. WAID: Court's indulgence.

(Pause.)

MS. WAID: Nothing further, Your Honor.

THE COURT: All right. From the government?

MR. LEEMAN: Yes, Your Honor. Just to make sure I'm not running afoul, would the Court allow me to do the cross-examination? I ask because I had been prepared to do any cross for this witness at trial. I feel a little better prepared. I know Mr. Reichling has been the one not objecting to things, but before I get up there and start asking questions, I wanted to make sure.

THE COURT: Well, for the purpose of this witness, I'll consider both of you fungible. So you may proceed.

CROSS-EXAMINATION ON BEHALF OF THE GOVERNMENT

BY MR. LEEMAN:

Q. Good morning, ma'am.

A. Good morning.
Q. So you sat here during trial?
A. I did.
Q. Every day?
A. I think -- I believe every day except for the first day.
Q. Were you here for the testimony from the gentleman from the Social Security Administration who looked at some identification documents?
A. Yes.
MS. WAID: Objection, Your Honor. Outside the scope.
THE COURT: Overruled so far. We'll see where it's headed.
Q. You were here for that?
A. Correct; yes.
Q. You understood his testimony to be that none of those documents were authentic Social Security Administration cards; is that right?
A. Correct.
Q. You were here for the testimony of Evelyn Portinari; is that right?
A. Yes.
Q. And you were here for her testimony that she never saw any of these 39 people Mr. Crowther had hired for a special project to shred papers; is that right?

MS. WAID: Objection, Your Honor. Outside the scope.

THE COURT: Overruled.

A. I was here. I can't say that I can remember her testimony to the extent that I can agree with exactly what she said, but yes, along those lines, yes.

Q. Okay. Well, you realize that the government presented a case suggesting that the 39 individuals that were hired by Mr. Crowther to "shred paper" didn't exist; is that right?

A. Yes, that's why I removed them from my analysis.

Q. You removed them from your analysis because the government proved that at trial; is that right?

A. No, I removed them from my analysis because it's an allegation and I wanted to present the most conservative figures that I could.

Q. Okay. You're aware that Mr. Crowther is now a six-time convicted felon; is that right?

MS. WAID: Objection, Your Honor. Irrelevant.

THE COURT: Overruled.

Q. Is that right?

A. Yes.

Q. You're aware that two of his felonies relate to the creation of documents from whole cloth to trick a bank into committing loans; you realize that?

A. Are you asking me for a response?

Q. I'm asking you did you realize that two of his convictions relate to creating bank documents out of whole cloth in order to trick a financial institution into giving a loan?
A. I don't understand what you're asking me.
Q. Ma'am, did you understand that Casey Crowther cut and pasted false balances on a bank statement, sent them to a mortgage broker and lender to convince them to give him a loan that he otherwise wouldn't get?
A. I was here for trial so, yes, I understand the allegations and what occurred.
Q. How much have you been paid for your testimony, ma'am, so far?
A. I don't recall. I think it's around $40,000.
Q. $40,000 to date?
A. Yes.
Q. Have you earned any other money by being associated with this case or is it just the approximately $40,000?
A. How would I earn other money?
Q. Well, I said testimony, ma'am, so I didn't know if you did other types of work for the case in which you might have earned money. Counseling, advising work, for instance.
A. So the $40,000 was in totality.
Q. The total amount?
A. Yes.

Q. Okay. So the numbers on your various exhibits that have been introduced today, where did those come from?
A. The payroll reports of Target Roofing and the banking records of Target Roofing.
Q. Okay. So you took -- part of your analysis is based on records that were provided to you by Target Roofing; is that right?
A. They were records that came out of the trial exhibits.
Q. And some of those records are from Target Roofing or you just didn't check?
A. They would be Target Roofing's business records, yes, and banking records.
Q. Target Roofing's business records. Target Roofing's business records also included records that 39 people were hired to shred paper, didn't they?
A. Assumingly so, yes.
Q. Okay. Let's talk about your calculations here.
How much in total do you claim Target Roofing spent on forgivable expenses during the time period? What is it? Roughly. You don't have to look back to the number. What are we talking roughly here?
A. I think it was about 3.5 million that I was able to quantify.
Q. Okay. So you found $3.5 million that's forgivable

expenses; is that right? Roughly?

A. That I was able to quantify with the documents.

Q. So might even be more; right?

A. Correct.

Q. Okay. But the loan was $2.1 million; right?

A. Yes.

Q. Okay. So let's talk about the loan and what Mr. Crowther did with the loan.

Mr. Crowther used the loan to buy a boat; right?

MS. WAID: Objection. Outside the scope, Your Honor, of her testimony. She's a summary witness, Your Honor.

THE COURT: Sustained.

MR. LEEMAN: May I make a proffer for the record, Your Honor?

THE COURT: You may.

MR. LEEMAN: What the government intends to do here, Your Honor, is, as it relates to the use of the actual loan, is what Mr.-- we've charged intent to defraud the bank and part of that scheme is to use that loan to personally enrich himself.

To the extent we're talking about things that were done with not loan money, I think it's relevant to show what he did with loan money so that we can argue what the actual or intended loss was at the time.

THE COURT: It's my view that that information is set forth in the presentence report and has not been objected to.

Do you see that differently? I mean, there's paragraphs that I remember in the presentence report that talk about money going to the boat on a certain date, money going to pay off the promissory note on a certain date, money going into an account, I mean, you know, I think I had that.

MR. LEEMAN: Yes, Your Honor, I think with one exception, if the Court would indulge me and would want to strike it after, I believe there's one sum of money that is not in the presentence report that I do think is relevant.

THE COURT: Go ahead.

BY MR. LEEMAN:

Q. On May 7th -- you've reviewed Mr. Crowther's accounts, including all the discovery that's been provided by the government to Mr. Crowther in this case; is that right?

A. I'm not sure I reviewed it all in detail, particularly for today, but, at some point, I've seen it, yes.

Q. Okay. At some point, you've seen what's been referred to as the PPP account, an account that was set up and held only the loan proceeds of the PPP fund?

A. Yes.

Q. Okay. You've also reviewed his company's operating account for some period relevant to the indictment?

A. Yes.

Q. Okay. You remember that on May 7th, $800,000 was transferred from the PPP account to the operating account?

MS. WAID: Again, Your Honor, objection. Outside the scope of her testimony. She summarized trial exhibits.

THE COURT: Overruled. If she knows from the exhibits, she can testify.

A. There was a transfer, yes.

Q. Of $800,000?

A. Yes.

Q. And then that $800,000 in the operating account on the same day was used to pay off a line of credit; is that right? That was owed to Sanibel Captiva Bank?

A. I'm not sure you can say it's the same money. Cash is fungible.

Q. Fair enough. Fair enough. $800,000 of PPP funds was transferred into the operating account that day; is that right? May 7th?

A. Again, I'm not sure I agree with your classification of what's PPP funds and what's other funds because cash is fungible.

Q. Money from the account that held the proceeds of the loan that was funded by the proceeds of the PPP loan, $800,000 of it was transferred to the operating account on May 7th; correct?

A. There was a transfer of $800,000 on May 7th from one account, one business account to another business account.

Q. Understood.

A. Correct.
Q. And then $800,000, that same day, was used from the operating account to pay off an existing line of credit with Sanibel Captiva Bank; is that right?
A. You would have to show me documents at this point. I don't remember all these transactions.
Q. Oh. Well, you remembered before, but now you're saying you don't remember?
A. I remember the one transfer because it was the major point of your trial. I can't remember every transaction that occurred thereafter.
Q. So you were hired and paid $40,000 to help as a forensic accountant in this case, but you don't remember an $800,000 transfer involving potentially contested PPP funds; that's your testimony here today?
A. I can't remember. If you'd like to give me the statements, I can look at them.
Q. Okay.
MR. LEEMAN: Would the Court give me a moment?
THE COURT: Yes.
(Pause.)
MR. LEEMAN: Okay, Your Honor, thank you for the time. And I don't have any further questions.
THE COURT: Any redirect?
MS. WAID: Nothing, Your Honor.

THE COURT: Okay. You may stand down. Thank you.

(Witness is excused at 11:22 a.m.)

THE COURT: Ms. Waid, any additional testimony with regard to the amount of loss issue?

MS. WAID: Briefly, Your Honor.

Again, I know that the probation sees this as an intended loss, but I think that the fact that this continues to be a performing loan is a critical aspect of this analysis. I also think that Ms. Hollobaugh's testimony --

THE COURT: I'm sorry. Before argument, any additional witnesses?

MS. WAID: Oh, no, Your Honor. I'm sorry, I didn't hear you.

THE COURT: No, all right. Go ahead.

MS. WAID: Sorry.

I would also say that Ms. Hollobaugh's testimony today was actually very important towards intent because it showed that, one, money is fungible. And, two, that before the PPP loan, Target Roofing was having to reduce salaries and reduce employees. And, once the PPP loan came in, those salaries increased, and that was maintained throughout the covered period. The intent was to pay the employees and Mr. Crowther, in fact, paid his employees.

He also, again, as we stated earlier and, you know, not to break the point, Your Honor, but there is no evidence that he didn't intend to pay off Sanibel Captiva Bank. He's been working extremely closely with Sanibel Captiva Bank. He's paid off the line of credit already. He's paid off the mortgage to Target Building. He's working to pay off the PPP loan. He talks with them almost daily. He has spoken with them almost daily since the inception of this case and since, in fact, getting the PPP loan back in April. So I don't see any evidence whatsoever that there was any intent not to pay. And, again, as the Court knows, it's a subjective intent pursuant to the guidelines.

Thank you.

THE COURT: One question: Your reference to the fact that the defendant has paid off the Sanibel Captiva Bank line of credit, is that the $800,000 that Mr. Leeman was referring to in his examination?

MS. WAID: That's a great question. It was -- so there was -- I believe he was speaking about a $800,000. I believe, when it was paid off, there is an exhibit that we were going to show later that I can look to actually get out the exact amount of what was paid --

THE COURT: Sure.

MS. WAID: -- off.

THE COURT: If you have it handy.

MS. WAID: Sure.

(Pause.)

MS. WAID: So the $800,000, Your Honor, yes, that was the credit line. That was paid off. It was actually then extended again during the past year because Target Roofing took a hit for a variety of reasons when -- being this trial to being the pandemic and the shortage of supplies, but we would proffer Defense Exhibit F, which is the HUD statement for 8790 Loredo LLC. And, once that building was paid off, was actually sold by Loredo, one of Mr. Crowther's company, he paid off the entire line of credit and the mortgage to Sanibel in order to minimize their risk as a bank in order to, you know, preserve that relationship.

THE COURT: I'm sorry. Tell me, again, what your proposed Exhibit F is.

MS. WAID: It is a HUD statement. So Mr. Crowther actually sold the new building that Target Roofing had recently constructed in order to pay back that line of credit and minimize the risk to Sanibel Captiva Community Bank.

THE COURT: And is that something you're moving into evidence?

MS. WAID: We will be, yes, Your Honor. It really went more to his personal expenses and things of that nature within the PSR, but we can move it in now, if the Court would allow it.

THE COURT: Well, I don't mean to interrupt your flow of things, but any objections to F?

MR. LEEMAN: No, Your Honor.

THE COURT: All right. The Court will go ahead and admit Exhibit F.

(Defendant's Exhibit Number F admitted into evidence.)

THE COURT: Getting back to the amount of loss, any additional argument?

MS. WAID: No, Your Honor.

THE COURT: From the government, any argument you care to make?

MR. LEEMAN: Yes, Your Honor. Thank you.

So, again, starting where Mr. Reichling left off and also noting that no one here is moving under a government benefits analysis, Your Honor, Mr. Crowther applied for a loan that he was not entitled to. The bank testified quite clearly under oath that, had it known what Mr. Crowther had intended to do with the money, specifically the boat, it would not have provided him the loan. He got approximately $2.1 million because of that loan. Now, the threshold here to get to a level 16 is $1.5 million. So we're well over that with just the amount of loan.

What it sounds like the defense would like to do is earn some credits against that loss by doing appropriate things with the money because, again, the Court, under 2B1.1, is to take the larger of the actual or the intended loss. If the actual $2.1 million has gone out the door and really there's $30,000 only so far been repaid, which happened after Mr. Crowther was charged, that's the actual loss here, Your Honor. That's what was parted with because of the fraud and so we believe that results in the level 16.

Now, just sort of humoring some of the arguments made by Ms. Waid for a moment, there's no question that Mr. Crowther used PPP proceeds directly to buy $670,000 plus dollar boat. There's also no question that he used $100,000 directly to pay Steven Adkins on a promissory note that was improper. We also have this $800,000 payment on a preexisting debt principal, which was improper. You add those three things up, Your Honor, we're already over $1.5 million improperly, directly spent PPP money. So that's another way of getting there, another way of thinking about this.

There's this -- been this constant conflation of the idea that Mr. Crowther, because he was paying his employees, was doing everything he should have. No. In fact, you weren't supposed to get a PPP loan unless you needed it. If he was able to do everything he wanted to do in buying a boat, paying off $800,000 worth of credit with a PPP fund and still pay his employees, he should have never got the loan. Should have never got the loan.

So, our argument, Your Honor, is this $2.1 million, it sets the loss amount. You can think about it any other number of ways. You can just add up the boat, the $800,000 payoff of the line of credit, and the $100,000 Mr. Adkins, you still get above $1.5 million in directly spent, improper PPP money resulting in the same enhancement.

As it relates to sort of credits against the loss -- I know I'm not going to spend a lot of time on this. This is, I think, fairly well understood in white collar cases. If you do pay back things, you get credit for them before anyone knows you committed a crime. That's the way this works. But Mr. Crowther made no payments on this loan before he was charged or before he learned he was being investigated. In fact, Mr. Crowther -- we just heard Mr. Crowther's been paying off large mortgages, large mortgages right now on his Laredo property, but not paying off the debt due in this case. And I find that really illuminating, Your Honor, because, at the end of the day, guess who's on the hook if Mr. Crowther never pays in this case? The taxpayer; right? So Mr. Crowther wants to come up here and say oh, I intend to pay it back, I've always intended to pay it back, I'll do -- you know, there's no proof I didn't want to pay it back, yet, here he is paying off his other loans, which aren't backed by the American taxpayer, and coming in here and saying there's no loss yet. I think that really illuminates what Mr. Crowther's true intent is.

I also would note, Your Honor, the idea that he always intended to pay this back and never cause anybody a loss is completely contradicted by the 39 fake employees he hired. He wasn't going to pay anybody back. He was going to waltz off into the sunset. The whole thing was going to be forgiven and nobody knew the better. And Mr. Crowther's got a, you know, 40-foot catamaran, got a happy ex-business partner, and we know what he was doing with the checks for the fake employees until he got caught. He cashed one of them; right? Cashed one of them. The rest of them were going to be cashed, too. I think that's a fair inference.

So the $2,098,700 we believe, Your Honor, is the appropriate loss amount and the 16-level enhancement is appropriate in this case.

THE COURT: Let me ask you one thing about the May 7th 800,000 transfer to the operating account. I don't recall it being mentioned in the presentence report. Did I miss it or was it not mentioned?

MR. LEEMAN: It's not mentioned in the presentence report, Your Honor. It is something we discussed at length and I have the trial exhibit numbers here ready. I also have them marked as sentencing exhibits, if the Court would like me to admit both of those, but it is something Ms. Knott talked about at length, this $800,000 movement into the operating account and then the almost immediate payment -- well, the same day payment of $800,000 of the letter of credit.

THE COURT: I'd like to see those records --

MR. LEEMAN: Yes, Your Honor.

THE COURT: -- since it's not referred to in the presentence report.

(Pause.)

MR. LEEMAN: Your Honor, sentencing exhibits government would introduce 22 and 23 at this time. They were both trial exhibits as well. The trial exhibit for 22 was 158 and the trial exhibit for 23 was 153. And, if I may approach, I'll hand them to the courtroom deputy.

THE COURT: Do I have copies in here?

MR. LEEMAN: Oh. You do, Your Honor. Yes, you do.

(Pause.)

MR. LEEMAN: And, to orient the Court, Your Honor, Exhibit 22 is self-explanatory. It's a single page. Exhibit No. 23, I think I could speed the Court up by pointing you to page 30.

THE COURT: First of all, Ms. Waid, any objection to the receipt of Government's Exhibits 22 and 23?

MS. WAID: No, Your Honor.

THE COURT: All right. Those two exhibits will be admitted for sentencing purposes.

(Government's Exhibit Numbers 22 & 23 admitted into evidence.)

MS. WAID: Your Honor, could we post them?

THE COURT: Sure.

MS. WAID: I'm just not getting internet access at the moment.

(Pause.)

THE COURT: And, Mr. Leeman, if I can ask, with regard to Exhibit 22, which is now on the overhead projection, I don't literally see anything relating to $800,000. Is that a component of the $1.1 million and change transfer?

MR. LEEMAN: It is, Your Honor, it is.

So Government's Exhibit No. 22 is a complete listing. It's a summary exhibit that was created by Diane Knott from underlying other admissible evidence at trial showing the inflows and outflows -- all of the inflows and outflows from the PPP account of Target Roofing.

THE COURT: So is it more precise to say that, on May the 7th, there was, in general terms, a $1.179 million transfer to the operating account and then, on the same date, an $800,000 transfer to a line of credit?

MR. LEEMAN: Yes, Your Honor. Imprecisely, I was referring -- yes, what the government was referring to is an $800,000 transfer used to make an $800,000, but it actually was a slight -- approximately $300,000 more transferred and then $800,000 used directly to pay off the line of credit.

THE COURT: And there were a number of other payments on May 7th to other things that look to be expenses and various items.

MR. LEEMAN: Yes, that's correct, Your Honor, but if you look at the closing balance from May 6th, there was $200,000 in the account. So he --

THE COURT: I see. I gotcha.

MR. LEEMAN: So, in order to make the line of credit payment, that 800 -- that PPP loan deposit needed to be paid. Or at least that's the government's theory.

THE COURT: Okay. I understand that. Thank you.

MR. LEEMAN: And, Your Honor, if you have no further questions, I'm without further argument on the point.

THE COURT: Let me just see here.

(Pause.)

THE COURT: No, I think I'm good. Thank you.

MR. LEEMAN: Thank you, Your Honor.

MS. WAID: Your Honor, may I clarify a few things?

THE COURT: Yes.

MS. WAID: So there are a couple of things that we just wanted to make sure the Court knew.

One is that the trial testimony of Stephen Miller was that there was no requirement for a segregation of funds and, in fact, that money was, in fact, fungible. So, although there were two separate bank accounts, that was not a requirement and they were all considered corporate funds.

Prior to 5/7, Target Roofing had been paying allowable expenses pursuant to the charts that you have as

Exhibit C for those months. So those allowable expenses would have had to have been reimbursed regardless.

Third, the trial testimony of Kristen Dilorio was that, although they put it in a separate account originally, they decided to actually put all that money into the operating account because it was easier to actually pay the payroll instead of switching payroll to the new account. So those funds were commingled and the reality is is that there were many more funds coming in via the bank records at trial that were actually accounts receivable, working capital, all things that a business would be utilizing anyways and, but for the fact of that segregated PPP account, we probably wouldn't be here, even though that was not a requirement. So all those expenses were being paid prior and really just needed to be repaid at that point in time.

We would also just let Your Honor know that the credit line was cross-collateralized on the Laredo property. So it really wasn't a question of, you know, what was going to be paid off or who's going to be paid off. I think we can all agree that, you know, the victim should have a word in where payments are made or not made, but that LLC was actually a cross-collateralization so that, when that building was sold, that's why that line of credit was paid off instead of the PPP loan.

Court's indulgence.

(Pause.)

MS. WAID: We just wanted to clarify that for the Court. Thank you, Your Honor.

THE COURT: All right, thank you.

The next paragraph to which I understand there remains objections is paragraph 77, which is a two-level enhancement for sophisticated means.

Counsel, do you care to be heard and/or present testimony?

MR. REICHLING: Your Honor, the government does not intend to present testimony, but we would be intending to at least proffer exhibits to Your Honor that were admitted at trial and just, you know, make argument to Your Honor in reference to the testimony and/or evidence that was presented at trial.

THE COURT: All right, that would be fine.

Ms. Waid, do you want to proceed first since it's your objection?

MS. WAID: Yes, Your Honor.

For purpose of sophisticated means, Your Honor, we just don't believe that this actually falls within the definition. As the Court knows, sophisticated means means especially complex or essentially intricate offense conduct pertaining to the execution or concealment of an offense.

What the government and probation are actually stating is -- was never an offense. The offense that the defendant was charged with in the superseding indictment is making a false statement on the loan application and utilizing those loan proceeds to purchase a boat and make a promissory note payment. Yet, the conduct that they're assessing is a sophisticated means occurred months after the initial application, had nothing to do whatsoever with the loan application or the bailing or the payment of loan proceeds to Target Roofing and had no bearing on the execution or concealment of the offense that was actually charged within the superseding indictment. In fact, because Target Roofing actually never applied for forgiveness, the conduct is completely irrelevant to the offense conduct whatsoever. It's -- you know, I think they're maybe trying to say it's some type of pre-crime, but how can you have a sophisticated means on the execution of an offense when the crime actually never, in fact, occurred? And, for those reasons, we believe this enhancement just simply doesn't apply and it's overreaching.

THE COURT: All right, thank you.

From the government?

MR. REICHLING: Yes, Your Honor. I just wanted to get the appropriate trial exhibit number for these two exhibits so, for the record, I can state they've been previously admitted at trial.

THE COURT: Sure.

MS. WAID: Your Honor, may I ask, is there an objection -- I'm not exactly sure why we need exhibits. Was there an objection to the PSR on behalf of the government that we are needing additional exhibits for or -- the majority of the information is within the PSR.

THE COURT: I don't know how to answer your question. I don't know what the exhibit is other than --

MR. REICHLING: Your Honor --

THE COURT: -- apparently a copy of the trial exhibit is what my understanding is.

MR. REICHLING: That's correct, Your Honor. The government is in support of the sophisticated means enhancement and would refer to two particular exhibits admitted at trial, which were the Workforce Business Services new employment enrollment packets that had been submitted to them to add individuals to the payroll, which were also submitted to Evelyn Portinari, the head of human resources. Additionally, the government would refer to the exhibit which contained the copies of the Social Security cards and lawful permanent resident cards that had also been submitted to Evelyn Portinari by the defendant to add individuals to the payroll. And the government is seeking to at least highlight these particular exhibits to show the intricate, sophisticated nature of the defendant's scheme to defraud, which, although the indictment, speaking indictment itself does not refer to the addition of 39 employees, it does refer to a scheme to defraud. And the government's position on these 39 employees has always been that the addition of these employees was a scheme to defraud or a part of the scheme to defraud the lender in this case. And the government can certainly at least refer to the trial exhibits and/or trial testimony from two witnesses in particular, at least the government would like to highlight in support of the sophisticated means enhancement. And I could just proceed, Your Honor, now, of course, and get to the point pretty much. I'm sure that's what you want me to do. So let me get to it.

The testimony at trial was that -- from John Miller, was that, at the time the Paycheck Protection Program began, borrowers had an eight-week period of time in which they must use the Paycheck Protection funds towards allotted expenses. They had to use it towards payroll, rent, utilities, and mortgage interest.

After that eight-week period was over, a borrower would submit proof of payroll and other expenses to his lender to apply for forgiveness. Of course, the biggest draw to this loan not only being that it was a 1 percent loan, but that it was a forgivable loan, was certainly reasons why they had these particular eight-week, you know, eight-week payroll things and such.

So during the course of the -- after the defendant received the PPP funds on April 14, 2020, of course, we know that those funds were never used towards payroll. In early May, as Mr. DeCicco testified, Mr. DeCicco sent the defendant new guidance from the SBA indicating that the SBA was also going to take their own look and audit at PPP loans of $2 million or more to determine whether the borrower really needed the loan or not. So based on after receiving this particular email from Mr. DeCicco, which Mr. Crowther acknowledged and responded to, all of a sudden, individual -- there was a high influx of hiring of people to Mr. Crowther's payroll.

Now, all of these individuals, which included five family members and 39 individuals that were hired to shred paper, as evidenced from the trial testimony of Evelyn Portinari and others, were all fired on June 5, 2020. That is significant and important and is pertinent to the scheme to defraud because, during the course of these individuals' employment -- and I'm making quote motions for the record -- the Paycheck Protection Program was changed with the passing of the Paycheck Protection Flexibility Act, which John Miller testified to. That change in the Paycheck Protection Program was that, instead of using the money within eight weeks, you had to use the money -- you had up to 24 weeks to use the money and you didn't have to use 75 percent of the money on payroll, but you could use 60 percent of the money on payroll. That was signed into law on June 5, 2020, the same date that 39 individuals were fired that were the 39 paper shredders that were hired with the use of fake Social Security cards, fake lawful permanent resident cards, and applications submitted for hiring by Target Roofing to make it appear that these individuals were actually employees of Target Roofing. They all were issued paychecks for two- to three-week period of time. The defendant parted with over $100,000 that never went claimed in paychecks that were issued to these 39 people. This was all done as a means to ensure that the defendant would get forgiveness of this $2.1 million loan because he had to bump up his payroll numbers to ensure that, within that eight-week period of time, he could prove that I spent 75 percent on payroll. That is supported by the trial record because of the firing of these individuals all on June 5th, which is the same day the change in the law happened, and the government believes that these intricate means in which the defendant took to add people to the payroll had an unwitting participant in Ms. Portinari. Submitted to her applications that were purported to be filled out by these people, submitted I9 documents showing that they were eligible to work in the United States, Social Security cards, and lawful permanent resident cards all to Ms. Portinari to add these individuals to the payroll to make it appear as if they really worked at Target Roofing. It wasn't as simple as just saying hey, payroll company, can you just simply add these people to the payroll?

This was a great -- the defendant went to a great length and extent to add these people to the payroll to make it appear as if they were really employed by Target Roofing. Of course, the government believes that, based on the evidence provided at trial, these individuals never worked there. They were never seen by Ms. Portinari and none of them cashed their checks except one check was cashed and deposited into the defendant's account.

So that's why the government believes the sophisticated means enhancement applies because, a part of the scheme to defraud, the defendant created these fake employee files and documents to correspond with the hiring of these individuals as if they really worked for the company in furtherance of ensuring forgiveness up until, of course, the point in time that the PPP program changed from the eight weeks to 24 weeks.

THE COURT: The guideline requires the conduct to be -- I think the word is extraordinary. Did you find any cases where creating false employees constituted extraordinary conduct?

MR. REICHLING: Well, there has been case law that, of course, has stated that, you know, the creation of false documents in furtherance of a fraud is considered sophisticated means. Of course, those courts have also, you know, considered other steps the defendant has taken in furtherance of the scheme to defraud, but they have found, you know, the creation of fake or fraudulent documents. I'm not saying they're in the sense of employment documents, but, for instance, there's a case in which I believe someone created fake documents in furtherance of a check kiting scheme so that they could cash the checks written to these individuals and utilized fake identification documents in furtherance of a bank fraud scheme in a check kiting scheme, which it pretty much was, to further the scheme, and the Court found that the creation of these identification documents in furtherance of that scheme to defraud the bank, you know, make it seem as if these people were real or that these were their paychecks, the Court has found that that does qualify for sophisticated means, Judge.

THE COURT: Am I correct that, at the point in time when this conduct took place, the defendant had already been approved for the loan and had got the money?

MR. REICHLING: You are correct, Judge. That is true. He received -- he had been approved and issued the funds on April 14th. The addition of family members began on May 6th. And the hiring of the 39 fake employees, which the government believes qualifies as being sophisticated, happened on May 15th and May 22nd. But the government believes that this was in furtherance of the scheme to defraud. But for the change in the Paycheck Protection Program, the defendant would have likely applied for forgiveness and utilized these payroll numbers to get forgiveness of the loan, which, as I've said and the government has said, was really the draw to the Paycheck Protection Program loan, was that it's eligible for forgiveness. So yes, you are correct, though, Your Honor.

THE COURT: And am I also correct that your argument is based on the 39 employees; you're not saying it's sophisticated to hire your family members?

MR. REICHLING: I would say that the level in which the employees -- excuse me, the family members were added was not sophisticated because there was no need to, you know, manufacture documents or add them in the sense of, you know, creating fake documents to get them hired. They were hired through the normal hiring process, I imagine. Even though they were never seen at Target Roofing, their applications and informations were submitted to the HR director by the defendant or through a family member. But I believe that the 39 employees, though, given the level of sophistication in the creation of these documents and identities for these individuals and then issuing paychecks to them for this particular period of time does display a sophisticated means, Judge.

THE COURT: Thank you.

MR. REICHLING: Thanks.

THE COURT: Ms. Waid, any response to that particular issue?

MS. WAID: Yes, Your Honor.

We would just proffer to the Court I still just don't understand where the offense is. The government is saying that this was actually a scheme of this long scheme to defraud, but again, this actually occurred months after he received the loan. If he had applied for forgiveness, then I could see their point, but there has been no application for forgiveness whatsoever. And, in fact, those employees were paid by Target. Target lost that money. There's no offense here for there to be sophisticated means to execute. And, you know, again, we would argue, in addition to that, that what the government is saying kind of appears not to be accurate if you look at Government -- I mean, Defense Exhibit D1 of the payroll analysis, after the June 5th date, the actual payroll seems to steadily increase. So it doesn't really appear that what the government is arguing, one, ever came to fruition, and two, is accurate pursuant to the payroll expended by Target Roofing.

Thanks.

THE COURT: All right. Why don't you stay there and pick up with the next objection, which is paragraph 78, the means of identification enhancement.

MS. WAID: Okay. So we objected to the means of identification because it just does not fit the definition of means of identification pursuant to the sentencing guidelines. The entire purpose of means of identification was for aggravated identity theft and that's not at all, from what I can hear, the government is actually allocuting or that probation has actually stated.

Effective November 1, 2009, the Sentencing Commission amended the commentary to expand the definition of victim in cases involving aggravated identity theft. The definition requires that means of identification shall be an actual, not a fictitious individual, and the government's entire argument is that these were fake employees. That's their whole theory concerning the 39 employees, not that they were real employees, so I don't see how this could possibly fit within the definition whatsoever and it appears to be kind of an overreach and a stretch of what -- of the purpose of that sentencing enhancement that does not apply to the facts of this case.

It's also a dangerous slope to go on -- down if we're talking about certain industries in Southwest Florida where, you know, sometimes undocumented people who are responsible for providing information may provide some type of identification that may or may not be accurate, but the employee does that as well. But, in this one, it's just a simple, straightforward it doesn't fit within the definition. The government says they're fake employees, not real people, and the whole point of this enhancement was for real people in aggravated identity theft.

THE COURT: All right, thank you.

MS. WAID: Thank you.

THE COURT: Mr. Reichling.

MR. REICHLING: Thank you, Your Honor.

The defendant is correct in the sense that the government produced evidence that the people didn't work there and that the cards themself were fake cards, but the government never stated that these numbers themselves weren't real Social Security numbers and the government's belief and can proffer, and I've got a certified document from the Social Security Administration that is one of my -- the Government's Exhibits, which I would intend to introduce under Government's Exhibit 13 for the purpose of sentencing, which states that 19 of the 39 Social Security numbers that were contained on those 39 Social Security cards are assigned to real individuals. And 18 U.S.C. Section 1028(d)(7), which defines a means of identification, states that a Social Security number is a means of identification. So it's the government's position that 19 of these 39 Social Security numbers contained on these fake Social Security cards are real Social Security numbers belonging to real people. They just don't belong to the people stated on the Social Security card and name.

So the government does believe that the defendant -- the offense did involve the possession of five or more means of identification that were unlawfully produced or obtained regardless of the number of individuals whose name or other identifying information, the means of identification were so produced or so obtained.

The means of identification are the Social Security numbers which were used in furtherance of this scheme to defraud, which involved the hiring of these 39 people. Nineteen of them were real numbers. They have real implications on the 19 individuals whose numbers they really were. There were payroll documents generated, tax documents, more than likely, under these Social Security numbers for payroll paid to these individuals. So it's the government's position that this did involve five or more means of identification; a Social Security number is a means of identification; nineteen of the 39 are real Social Security numbers. So, for that reason, Judge, we do believe that enhancement applies.

I would move to enter into evidence the exhibit I referenced, which is Government's Exhibit 13, if it pleases the Court.

THE COURT: Any objection to Government's 13?

MS. WAID: No objection, Your Honor.

THE COURT: Government's 13 will be admitted.

(Government's Exhibit Number 13 admitted into evidence.)

MR. REICHLING: And Your Honor should have it up there in your copy.

THE COURT: Let me just take a look. See if I can find it.

(Pause.)

MR. REICHLING: And I also -- just for the record, Your Honor, I also believe the government's witness, Lee Lefkowitz with the Social Security Administration, also testified to the fact that some of these numbers were assigned to real people.

THE COURT: So let me see if I understand what your theory is. Are you saying that Mr. Crowther had 39 people lined up which were going to be employees?

MR. REICHLING: No, Judge.

THE COURT: That there was 39, or even 19, warm bodies?

MR. REICHLING: No, no. The government believes there's sufficient evidence that was offered at trial that shows that none of these people worked there. They were never really working there because none of them cashed or deposited their paychecks.

THE COURT: None of them even existed.

MR. REICHLING: Correct, Your Honor.

THE COURT: According to your theory, I mean, I think.

MR. REICHLING: That is my theory, Judge, but that doesn't excuse somebody from utilizing means of identification in furtherance of their scheme to defraud. Even -- you know, even if these particular cards did not belong to the people that the Social Security card was assigned to, the defendant set in motion adding individuals to a payroll which have complications or issues with regards to the Social Security numbers that those -- the real individuals assigned to those Social Security numbers when you, you know, issue paychecks and W2s and W4s and things of that nature.

So it's the government's belief that, while these individuals weren't -- did not work for Target Roofing, the means of identifications utilized belong to other individuals and, therefore, this enhancement should apply.

THE COURT: So just because whoever made up these cards got -- and made up the numbers, presumably, got 19 out of 39 hit as real people, that makes it fall within the adjustment?

MR. REICHLING: I mean, Your Honor, that's entirely what the government wants to punish, right, is the use of fake Social Security cards with Social Security numbers on there which, you know, are assigned to other individuals and adding them to some, you know, to a payroll.

THE COURT: But that's not what the provision provides in terms of the case law is pretty clear that it has to be real individuals. There has to be someone there using the false document. Here, your theory was just the opposite, that no one was there and that it was Mr. Crowther using 39 false documents.

MR. REICHLING: That is factually accurate, Your Honor, but, like the government has said, the 19 of the 39 numbers were real numbers assigned to real individuals. Even though they weren't the same individuals, this conduct has implications to these, you know, individuals whose numbers were really used or offered for payroll reasons. So, yes, the government does still believe the enhancement would apply.

Another fact to add, Judge, as my co-counsel pointed out, was that Mr. Crowther was the individual who received these paychecks from Evelyn Portinari once they were issued and there was evidence at trial that one of the paychecks that was issued to an Augustine Castillo under one of these, you know, fake Social Security cards was cashed and deposited into the defendant's personal account. So the government does believe that this use of fraudulent means of identification was in furtherance of the scheme to defraud.

THE COURT: Yeah. Anything else as to this particular issue from the defense?

MS. WAID: No, Your Honor.

THE COURT: All right. I think the final enhancement or guideline objection relates to obstruction of justice. So you may proceed with regard to that.

MR. LEEMAN: Thank you, Your Honor.

Your Honor, I would ask to introduce Government's

Exhibit No. 14, which is the underlying letter that was sent to the government which forms the basis of this that the -- that this letter exists, I think, is uncontested between the parties and I think it will be helpful for the Court to look, so I'd ask to enter Exhibit No. 14 at this time.

THE COURT: Any objection?

MS. WAID: No objection.

THE COURT: Government's Exhibit 14 will be admitted.

(Government's Exhibit Number 14 admitted into evidence.)

MR. LEEMAN: Thank you, Your Honor.

I'll start with the law, Your Honor. 3C1.1, the very first comment says, "The adjustment applies if the defendant's obstructive conduct occurred with respect to the investigation, prosecution, sentencing of the defendant's instant offense of conviction." Clearly, here, I think this relates to the prosecution of the offense, and I'll get into the facts here in a second.

Also, one of the -- the 3C1.1 provides sort of a list of examples that usually qualify for obstructive conduct and then examples of things that don't usually qualify as obstructive conduct. Those are found in comments four and five of the rule. I think what the government's really going to be hinging its argument on here is the example of when it does qualify as obstructive conduct found in comment 4G, which is providing materially false statement to a law enforcement officer that significantly obstructed or impeded the investigation or prosecution of the offense.

And so, if Exhibit No. 14 has been admitted, Your Honor, I want to ask the Court -- and I'm going to read into the record a paragraph that was included in this letter sort of setting the stage, Your Honor. This letter is sent on September 21, 2020, by Ms. Waid to the government and it is pre-indictment. It is post-complaint, but it is pre-indictment and so things are moving quickly. A charge -- well, a formal charge in an indictment has not been levied yet and so this is a letter in which not only certain documents were provided to the government as a response to a subpoena, but also, sort of unsolicited, Ms. Waid lays out the position of Mr. Crowther very specifically as to his thoughts about whether a fraud had been committed or not. At this time, the mortgage fraud hadn't been discovered so this is all related to the PPP fraud related counts.

And I would ask the Court to turn to page 4 of 10 of the letter. And I'm just going to begin reading on the very first line. And this is on April 10, 2020.

Kristen Dilorio, the vice president and office manager at Sanibel Captiva sent Mr. Crowther an email with information about the process for depositing PPP funds. Mr. Crowther responded to the email that same day and requested that Sanibel Captiva deposit the PPP funds into the company's operating account. This email is incorporated as attachment D.

Sanibel Captiva, unilaterally and without the specific direction from Mr. Crowther, established that the PPP account -- established the PPP account and deposited the funds into the account instead of the general operating account, as requested by Mr. Crowther.

On April 24, 2020, Mr. Crowther sent Kristen Dilorio an email requesting the wire transfer for the boat. He did not specify which account he wanted the money wired from when he was requesting the wire transfer to Sara Bay Marina. Sanibel Captiva took it upon themselves to wire the money from the PPP account. The timeline in email communications negate the government's theory that Mr. Crowther intended to utilize specific PPP funds to purchase the boat.

So I'll focus on that first sentence last, Your Honor. It sort of proves the material nature of this statement. If, in fact -- and I think everyone can agree on this -- if, in fact, the bank, Sanibel Captiva, had just picked what account it wanted to move money to buy this boat from, clearly, there would not be -- the government would be -- well, the government would be in a pretty tough spot proving Mr. Crowther intended to defraud the bank in connection with this PPP loan. So this is more or less a complete defense to the charge and this is laid out pre-indictment to the bank.

Turns out, Your Honor -- well, so a couple of things.

First of all, this type of a defense really was not on the government's radar. In a number of white collar cases, I don't know that I've ever seen, or Mr. Reichling has ever seen, the bank just sort of take it upon themselves to pick which account they want to move nearly $700,000 from. So, while there was no doubt the government was investigating things and would continue to investigating things, this is not a defense that the government had seen coming. And, from there, Your Honor, the government had to and did, in fact, have multiple interviews with the bank and multiple bank employees. That went all the way through trial, Your Honor, where both Kristen Dilorio and Jennifer Briggs testified about the procedure the bank uses in getting the account right for these transactions to disprove this idea that Mr. Crowther had just said wire some money and the bank messed up and picked the PPP account. So let me talk a little bit about this.

I would also note, Your Honor, this letter contains an email and it's listed as attachment D. And I think it's well near the back, of course. But the email is an email where Mr. Crowther tells Kristen Dilorio to deposit the PPP funds into the main operating account and let me know what else you need.

Well, also, as we found out during the trial, this email's cut short. There was another email in this chain that followed up and it said give me a call about it. And what did Ms. Dilorio testify happened when they had that call?

Your Honor, I have marked Government's Exhibit No. 21. It is the transcript of the direct examination of Ms. Dilorio. I'm happy to enter it into record, or I'm happy to attempt to enter it as a piece of evidence, but given that it's a trial transcript, I don't know if the Court wants the clutter.

THE COURT: We've had enough exhibits. I'm really not concerned about cluttering anymore. So if you'd like to move that in, it might be simpler to find it.

MR. LEEMAN: Yes, Your Honor. I'm going to ask, at this time, Government's Exhibit No. 21 be introduced into the record, which is a transcript of Kristen Dilorio's testimony at trial.

THE COURT: Any objection as to 21?

MS. WAID: No objection, Your Honor.

THE COURT: Government's 21 will be admitted.

(Government's Exhibit Number 21 admitted into evidence.)

MR. LEEMAN: And I'm going to move to page 16 of that exhibit. And we are referring to the email. And Ms. Dilorio is asked what was Mr. Crowther's response to your email -- and I'm going to Zoom in on it. And Ms. Dilorio answers he says to deposit it in the main operating accounts. Let me know what else you need and when to expect to close. And that's what we just saw. That's what we just saw attached to the letter, Your Honor.

Moving on to page 17 of the transcript, Mr. Reichling asks about another email. And, this time, he says -- the question is:

"Is that email that I have the portion that I have Zoomed in on?

"ANSWER: Yes.

"QUESTION: And what did he email you back again?

"ANSWER: Can you call me, please?

"QUESTION: And did you call him?

"ANSWER: I did.

"QUESTION: And do you recall what you all discussed?

"ANSWER: Yes. I was just about -- about if there was an option if we could open a separate account to put the PPP funds into.

"And could you continue to explain that conversation with me? Did he tell you that he wanted the money to remain in the operating account or did he want it to go somewhere else?

"ANSWER: He just asked if a separate account could be opened to put the funds into, which we were allowed to open a separate account to put the funds into. So he said he would just like to keep it from, you know, other staff from viewing the funds. So I went ahead, you know, and it was a quick conversation about it, if there's something we can do. We did it for a couple of other customers that requested it, so it wasn't anything out of the ordinary."

So, moving away from the transcript there, Your Honor, Ms. Dilorio, quite conclusively, testified that Mr. Crowther asked that these funds be put into a PPP segregated account. In fact, there's documents in the record drawn up from trial in which he opens the account. Account opening documents, okay? So that happened.

Regarding that, page 19 of the transcript, Mr. Reichling asks:

"And can you read what you wrote and also tell the jury and date and time that you sent that?

"ANSWER. Sure. The email was on September -- the email was September on Friday, April 10, 2020, at 3:49. It says, 'Hi, Casey. Please sign where highlighted on the new account. I have updated your SBA file to indicate that the funds will go into this account. Let me know if you need anything else. Thank you.'"

So we are well past bank just making it upland here in the testimony of Dilorio, when which was credence by the jury, Your Honor, because if, in fact, Ms. Dilorio had just randomly picked the account she wants to move money out of, or Ms. Briggs, there isn't a crime here. Or it becomes very difficult for the government to prove.

Just moving, I think, briefly on to some more of what the government had to do and what it introduced at trial to disprove this idea that the bank unilaterally did this is the numerous layers of review that these wires go through and, also, also the requirement that each account with a wire access have a passcode associated with it. And, in fact, the passcode associated with the PPP account was a unique one in this case.

So, moving to page 21 of the transcript, reading:

"QUESTION: I'd like you to sort of walk me through a scenario in which a customer submits a wire request via email. What is your typical standard of practice, if you receive a wire request via email from a customer?

"ANSWER: We have a couple of different methods to set customers up depending on how many wires they do. This request is pretty typical for a lot of our businesses. It would initiate us either receiving a signed request from them or based on what we have on file, which is called a wire agreement. Kind of sets the tone for whether we can just send wires based on an email and then with a call back verification or they might have to sign a request in an email to us in order that they send it. But, by receiving calls, this would prompt me to check and see if we have a wire agreement on file, which we do, and then to call the folks back listed as authorized confirmers and confirm the dollar amount and their codeword.

"QUESTION: What did you do in response to receiving this email from Mr. Crowther?

"ANSWER: I called Casey to confirm the dollar amount and the codeword and that was for a reason.

"Let me stop you there. Codeword. Did this particular account that Mr. Crowther was requesting the funds to be wired from have its own unique wire passcode?

"It did."

So that's it, Your Honor. It is this coming out of the box prior to the indictment and telling something that is so blatantly contradictory with the evidence at trial, I have seen -- in that way, it is very similar to any number of obstruction arguments that the government has made in front of this Court and others around the country. There are some significant differences that the government, obviously, acknowledges.

First, Ms. Waid has pointed out that this letter in its representations, which the government thinks it's proven are false, was made in some quote/unquote some type of an attempt to resolve the case. So the first point I'll make about that, which I don't believe is the most compelling, is the rule she cites is a rule of evidence, it's not a privilege, and the rules of evidence are not applicable at sentencings, according to the Federal Rule of Evidence 1101. So we start from there.

The second issue with the argument is she cites Rule

408 as this impediment to the government relying on this type of factual information, but Rule 408 contains a very big exception. I'm reading from 408(b).

"The Court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating an contention of undue delay, or proving an effort to obstruct a criminal investigation." So the rule she cites, Your Honor, has an exception for just this scenario.

And I anticipate the Court's going to ask me if we found any cases on this. And I have. It is not the -- it is not one of the most wordy opinions I've ever read, but *United States v. Bushert*, 997 F.2d 1343, and I'm quoting from the case here. This is the Eleventh Circuit 1993.

"Bushert's third claim that he should not have received an enhancement for obstruction of justice similarly is without merit especially because the District Court found that he lied during his plea negotiations and these lies impeded the investigation of the offense."

Now, wasn't exactly offering to plea for anything here, but I think that's, you know, analogous to what's going on. He's looking -- Mr. Crowther is looking for to us drop the charges and throwing stuff at the government to see if they'll bite. The Eleventh Circuit has found, when you're negotiating, if you're lying to the government, it, at least in that case, found that the enhancement was applicable. And that's a 3C1.1

case under the guidelines, albeit from 1993, but the principle seems to me to be the same.

So we have this falsity. We have this materiality. If true, what Mr. Crowther said would be nearly a complete defense. We have this -- well, I can tell the Court we had to meet with multiple witnesses on multiple occasions and introduce this evidence at trial to exclude this potential defense. So we have this serious impudence.

I want to just, maybe more to save time, but address a couple of arguments that Ms. Waid made, and I anticipate her making here shortly, is look, if we do this, what we're -- or if the Court does this, if the Court applies this enhancement, what it's really going to do is chill people from engaging in pre-plea -- or in negotiations with the government about the charges and I think that's half right, but I think it sort of chills the stuff we don't want people negotiating the government with. We want to chill people coming to the government and lying in order to get out of serious felony crimes. And that's what happened here. So, obviously, there's reason to be circumspect about applying because we don't want to chill people who are not lying to the government, but this is quite clearly false, Your Honor. This idea that the bank unilaterally decided and picked and chose to take money from the PPP account and buy Mr. Crowther's $700,000 boat without telling him.

And so, for those reasons, Your Honor, we think the enhancement applies and -- yeah. For those reasons, Your Honor, we think the enhancement applies and the two-point increase is appropriate.

If the Court would just give me one minute to confer with co-counsel?

THE COURT: Certainly.

(Pause.)

MR. LEEMAN: Thank you, Your Honor.

THE COURT: Don't go away so quick. I've got some questions for you.

MR. LEEMAN: Yes, sir.

THE COURT: Did you find any cases where it wasn't the defendant making the false statement but his or her lawyer?

MR. LEEMAN: I did not, Your Honor. And I tried.

THE COURT: Doesn't that make a difference?

MR. LEEMAN: I think it could make a difference, but I think why it doesn't make a difference here, Your Honor, I think when you read the paragraph here and understand sort of where we are in the case, this is -- information about who chose to do this is not coming from the bank, it's coming from Casey Crowther; right? We are a couple of weeks after the case has been charged. We're not even to indictment yet. Ms. Waid knows what she's saying. Government's saying nothing untoward about -- or hope it is not construed as saying anything about

Ms. Waid here. The letter is passing along information from Mr. Crowther. There's no way for Ms. Waid to know this. And I think, Your Honor and what I would say gives the government -- this is, essentially, a plea negotiation; right? This is something -- I think it's reasonable to infer -- in fact, it's ethically required to keep your client informed about how you plan to resolve a case. And so, given that this information has to come from Mr. Crowther and given sort of the status of the case, I think it's fair to impute, you know, this letter and the facts that are recited by the attorney, who is the agent of Mr. Crowther, no less, against Mr. Crowther. It's not -- this isn't a legal argument, I think, that -- at least, in this part, that the government is focusing on. These are facts.

THE COURT: Well, it's not immediately apparent to me that the source of the information has to be Mr. Crowther. I mean, the context of the letter, I gather, is that the government had issued a Grand Jury subpoena on the defendant's company, Target, and this letter was producing documents pursuant to that subpoena. And counsel then was making arguments as to why she thought there should be no charges and included her evaluation of what the records reflected. I mean, why can't this letter be written as Ms. Waid's interpretation of the documents was as follows? It may have been wrong, as it turned out at trial, but, certainly, at the early stages pre-indictment, she believed what she believed.

MR. LEEMAN: Well, Your Honor, because the documents provided, as I showed the letter to the Court, Your Honor, was a partial email. What they referred to here was this partial email where it was like put it in the main operating account. But when the government -- it wasn't until later that the government saw that the text chain continued, Your Honor, and it was give me a call back. And then -- well, with that in mind and with this letter in hand, the government had to start piecing together well exactly what happened here. Is it possible that the bank just unilaterally made a decision to move $700 out of a PPP account? So that's what I would say to that, Your Honor.

I understand the point, but I also would note here, you know, we are dealing with a preponderance of the evidence. You know, we are not required to prove beyond a reasonable doubt, at least at this stage, that it was Mr. Crowther, but I think that's a fair inference from what's going on here. Or at least the government submits it's a fair inference.

THE COURT: Even if you tag Mr. Crowther with it and assume that it was incorrect information and, from the government's perspective, knowingly false information, I guess I'm not sure I understand what the government was forced to do that it wouldn't have been required to do anyhow? I mean, in effect, as she gives you the outline of the defense, that helps the government because now, prior to the indictment, you know what they're going to say and, you know, you kind of got a head's up.

MR. LEEMAN: Well, to the last point first, Your Honor, I guess, any time the government's provided information, we kind of get a head's up, but I don't think that sort of makes it fair game to lie to the government.

THE COURT: I don't disagree with that, but you certainly have to prove and you had to -- presumably had to investigate before that indictment the very kind of things that she was talking about. I don't see where you had to do anything extra is my point.

MR. LEEMAN: Well, what I would have to proffer to the Court and what I thought I did proffer, Mr. Reichling and I had to sit down with bank witnesses on multiple occasions hashing this out. The wires --

THE COURT: Wouldn't you have done that anyhow?

MR. LEEMAN: Well, I think it's this specific issue. You know, what is it, bank employees, that you can tell us that would exclude this possibility that the bank just unilaterally moved the money from this account? Well, then you're looking to see was there enough money in the operating account at the time to cover it because the bank -- you're looking are there unique passwords that would have to -- you're looking at does the bank have some internal procedure or layers of review. And so we're dealing with that with Mr. Cheffer on an initial basis to gather an understanding of it. We're dealing with it with Kristen Dilorio, who handled the wire related to Mr. Adkins. She was also involved in the boat wire, although, that was finalized by Jennifer Briggs. We're dealing with it with Lana Hollier, who's involved in this sort of chain of record keeping of documents. So I don't know what to say, Your Honor, other than it was -- this particular issue was put into play by Mr. Crowther and the government had to respond.

THE COURT: All right. I may come back after hearing from counsel.

MR. LEEMAN: Thank you.

THE COURT: Ms. Waid.

MS. WAID: Thank you, Your Honor.

Pursuant to the enhancement for the obstruction of justice, I truly do not understand how the statements of defense counsel can be imputed on the defendant.

Second, Target was actually -- Target Roofing produced the emails that then went to the government so I'm not exactly sure where their argument about an obstruction comes in.

I also want to put on the record that they claim that this was knowingly false; however, you know, people's memories differ and we're talking about six months past the PPP loan application and there is this extremely confusing evidence in the trial record of a bank account that was opened on March 23, 2020, by Diane Jefferson. It's Government's Exhibit 100. And then, a few weeks later, Ms. Dilorio opens the bank account that is now being called by the government the PPP account. So I can understand where there would be confusion about why are we opening another account when the first account, which had no money in it pursuant to the evidence at trial, already exists three-and-a-half to four weeks earlier.

I also don't understand how having to actually interview your witnesses is an obstruction of justice. Frankly, it's the government's job. They should be interviewing their witnesses if there's a discrepancy. Honestly, if it had been me and I had been a prosecutor for 14 years, you would have called me up and said hey, I think that there might be something else going on here. Let's discuss that. That's the purpose of Rule 408, is to have some type of negotiations, a little bit of professional courtesy. If I got something wrong, that's on me and they should be telling me that instead of having to say that there's some type of obstruction because they now had to go investigate the case that they, frankly, should have been investigating anyways, had to speak to witnesses who they would have been preparing for trial anyways. I just don't see how this was an obstruction of justice in any way, shape, or form. I also think, because Target was the one that did provide them with the emails, that it kind of negates any type of somebody was trying to hide the truth. Memories differ. And I -- this is the furthest thing from an obstruction of justice. Of all the things that I've said today was an overreach, this is the enhancement that I believe completely overreaches.

Thank you.

THE COURT: Let me ask -- well, maybe I'll ask Mr. Leeman.

I gathered from your argument, or I inferred from your argument, that the government's position was the defendant did not produce the entire email chain.

MR. LEEMAN: That's right, Your Honor. And the government received the entire email chain not pursuant -- not in connection -- let me try to explain this letter, Your Honor.

This letter had a number of attachments to it, which sort of like talked about things in the letter, but it also was sort of the cover letter for a discovery production. And so the email that we're referring to, the whole email wasn't farther down in the discovery production. The whole email that we got, we got from the bank later. So it's not sort of like oh, well, if you would have just looked harder down in the discovery, you know, you would have found the whole email.

THE COURT: All right.

And, Ms. Waid, I understood your argument a moment ago to be that the defendant produced the entire email chain.

MS. WAID: It was my understanding that this was produced in discovery, yeah. Whenever we got the Grand Jury subpoena, in response to that Grand Jury subpoena, Your Honor. I mean, I think the only part of it was the call me part, which could have been interpreted any way, anyways, but it was my understanding that that was actually produced.

THE COURT: Is that what was missing, the call me?

MR. LEEMAN: The call me, part. Yeah, there's no smoking part in the email, Your Honor.

MS. WAID: Right. And call me can be interpreted any way to next Tuesday.

THE COURT: Okay, thank you.

MS. WAID: Thank you.

THE COURT: All right, Counsel, is there any other factual matter that the Court needs to resolve or any other issue with regard to the calculation of the guidelines that we need to discuss?

MR. LEEMAN: Do we have an -- I believe there might be some issue with acceptance of responsibility, Your Honor.

THE COURT: You're right, and I did miss that. Let's see where.

(Pause.)

THE COURT: All right. Someone help me. What's that paragraph number?

PROBATION OFFICER: It begins on paragraph 66.

THE COURT: Sixty-six. Thank you.

All right, Ms. Waid, is there still an objection with regard to the lack of acceptance of responsibility under the guidelines?

MS. WAID: Yes, Your Honor.

THE COURT: I'll be happy to hear from you as to that.

MS. WAID: Your Honor, Mr. Crowther pled straight up to the mortgage fraud and he did so before this Court. He should -- he deserves acceptance of responsibility for that.

Again, the obstruction, my statements should not be imputed upon Mr. Crowther and he should not be punished for that, some type of obstruction of justice for that type of thing. I believe he deserves credit for his plea. I would also ask the Court to take into consideration that, again, this trial was a legal issue. It's been a legal issue from the beginning. We've believed that there is no violation of the CARES Act. We respect the Court's order and the jury's decision, but Mr. Crowther felt like he had no other choice but to go to trial, and we ask that that not be held against him. He should receive some acceptance of responsibility.

THE COURT: What do you suggest? You verbally underlined some acceptance. What --

MS. WAID: Well, there's three; right? So, you know, a two-level acceptance of responsibility for his mortgage fraud plea.

THE COURT: All right.

MS. WAID: Thank you.

THE COURT: When I say all right, I'm not saying I'm doing it, but I understand the argument.

MS. WAID: I get you.

THE COURT: From the government?

MR. LEEMAN: Your Honor, the government doesn't believe any level of acceptance of responsibility is here. I acknowledge the fact that there was a guilty plea here, but I think there's sort of more at play that's more important as it relates to the analysis of this and I hope I'll be able to walk the Court through what the government believes.

I just want to note first from the commentary note 2 of 31.1, I'm quoting here:

"This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. In rare situations, a defendant may clearly demonstrate acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to trial. This may occur, for example, where a defendant goes on to trial to assert and preserve issues that do not relate to factual guilt. Eg., to make a constitutional challenge to a statute or challenge to the applicability of the statute to his conduct."

So that's sort of the framework here. I think that's well known probably -- certainly to the Court, to all the parties. And the government's argument, this isn't a rare case. This is a white collar case. It's higher profile than some, but it's garden variety fraud. That the plaintiff didn't -- or that the defendant didn't contest a lot of facts in a white collar case is how almost all of them go. The issue is usually intent. I mean, the bank records prove what happened. There really wasn't any denying that Mr. Crowther bought a boat. There's a bank account that shows he moved $670,000 to go buy a boat. I mean, that's white collar crimes 101. So the idea that they agreed to a lot of the facts is somehow evidence that they accepted responsibility, I think, is sort of a -- is not really apt, especially as it relates to white collar cases.

So that being said, you know, we have even here, even in his most recent sentencing memo, you see example after example where Mr. Crowther is not accepting responsibility. Remember, the government proved that Mr. Crowther had an intent to conduct a scheme or artifice to defraud. We had to prove that. And Mr. Crowther, in his sentencing memo, document 156, says he deeply regrets his decision to buy a boat during this timeframe and is remorseful about his poor accounting decisions. That doesn't sound to me like someone who's accepting he had an intent to defraud a bank. He's passing it off on poor accounting decisions like, if he had just taken another class at the community college, this would have all been okay. No, this is a crime. It was a purposefully conducted crime and he's still not accepting responsibility for it. Now, there might be good reasons for not accepting responsibility. He might want to preserve some issues for appeal, but that's a different thing. If he gets a -- we're talking now whether he's here accepting responsibility for his crime, and his sentencing memorandum is absolutely not bearing that out.

Sentencing memorandum as well, again, not taking responsibility for himself, but pawning it off on the government. Page 3, the government inserted itself into a performing loan. There are no loss amounts and there's no evidence that Casey Crowther ever intended to default on his loans. Mr. Crowther's here painting the government as the wrongdoer. The government here prosecutes an individual, convicts him of six felonies and, you know, it's the government that's the bad guy here. If the government would have just left him alone, that would have been more fair. These six felonies weren't, apparently, that big of a deal. That sort of idea that someone else is at fault is the height of not accepting responsibility.

Goes on to -- this from the sentencing memorandum as well, and I'm quoting here, also, from page 3, as stated in his letter to the Court, "Mr. Crowther takes full responsibility for the mortgage fraud and deeply regrets his actions," then he guess on to talk at that time PPP fraud. Doesn't say he takes full responsibility. He says, "He respects the verdict of the jury in the PPP fraud case." So he's not -- he's willing to take full responsibility for what he's pled to, but he's not taking full responsibility for what he was convicted of. And that's normal, but that's not acceptance of responsibility. That's normal in a trial case.

And it's not even clear that Mr. Crowther's really all that gung ho about taking excited -- or taking responsibility for the charge he pled to. This is, again, from the sentencing memo. This time, at page 6. "Even in light of his poor decision, it's clear that Mr. Crowther never intended to defraud the lender. He put down a 50 percent down payment on his home. Someone having the intent to walk away from a mortgage would never provide that." I think there's ways to quibble with that language, but here's an individual who pled guilty to mortgage fraud, or defrauding a mortgage lender, saying Mr. Crowther never intended to defraud the lender. I mean, so we are right on the -- we are right on the dividing line between whether he's even accepting responsibility for this mortgage fraud or not.

I would also just remind the Court, Your Honor, the mortgage fraud case, at least in the government's estimation, he -- Mr. Crowther was caught redhanded. The documents don't match the bank documents and the emails come from Mr. Crowther. They are doctored. And Mr. Crowther waited until the eve of trial to plead guilty to it. This isn't someone who ran in and -- so you don't have to run in to get acceptance of responsibility, but it's certainly a consideration when a person is being sentenced.

So, moving on, page -- well, I'm just going to skip. There's more examples in the sentencing memo. This isn't a person who's really coming to court and falling on his sword and said I did it; I committed PPP fraud; it was a bad idea and a crime, but I'm here to tell the Court I deserve, you know, some leniency. That's not him. He's not taking responsibility for the PPP fraud. It's an accounting error, according to him.

More pertinently, I think, or more illuminating is their conduct at trial. I would first note that every single witness was cross-examined at trial. So we had nearly a five-day trial in this case. It's hard to have a five-day trial on solely a legal issue, I would say, especially considering legal issues aren't usually settled by a jury, but we had a five-day trial. Every one of the witnesses was cross-examined and there were factual arguments raised. There's sort of these blended sounding legal/factual arguments about the PPP program and what interim final rules say and the government's always said that's sort of background noise. The real question is whether this individual lied to a bank and whether he did these other things that prove he lied to the bank. And they took a lot of stabs at disproving that. So we have the fake 39 employees. The government put that on to prove that Mr. Crowther intended to get this money and be able to walk away with all of it, never have to pay any of that back. Put that on. Well, that was not uncontested. That was not this example that the guidelines give of uncontested conduct but we're going to go up and see if it actually is a crime as a legal matter. No, they contested it. How did they do that? Evelyn Portinari. Evelyn Portinari during trial -- I have, actually, Your Honor, I'd like to introduce Government's Exhibit No. 29, which is a portion of the trial testimony. It's volume II of her -- the trial testimony of Evelyn Portinari.

THE COURT: Any objection to 29?

MS. WAID: No objection, Your Honor.

THE COURT: It may be admitted.

(Government's Exhibit Number 29 admitted into evidence.)

MR. LEEMAN: Thank you, Your Honor.

Ms. Portinari is asked, and this is on page 34 of that exhibit:

"QUESTION: And, like many of us during the pandemic, did Target decide to actually take on tasks they hadn't done before and do some kind of spring cleaning?

"ANSWER: Yes.

"QUESTION: And were these workers hired to kind of clean out all of the old documents and things of that nature from those trailers at the time?

"ANSWER: They had already been moved from the trailers out to the house, but yes."

So this is Ms. Portinari. This is elicited during her cross-examination by Ms. Waid testifying about these fake employees being hired to remove and shred old documents from a house on the Target Roofing property. Now, the problem was she was testifying what these people were hired for, but she never saw any of them. So Ms. Waid spent more time eliciting testimony -- Mr. Crowther spent more time eliciting testimony from Evelyn Portinari that really distanced herself from knowing whether these people existed or not. This is on page 9 of Exhibit 29:

"QUESTION: What time do the crew members usually get to work?

"ANSWER: About 5:30.

"QUESTION: 5:30 in the morning?

"ANSWER: Yes.

"And what time do you usually get to work?

"ANSWER: 8:30 a.m."

So, again, these are factual arguments, these are factual things the defendant is raising to try and undermine the prosecution's case. Perfectly normal, but not accepting responsibility.

Page 12, it goes on. She's asked a question about how many people she can identify at Target Roofing. She says is she able to identify all 170 to 180 employees?

"No.

"Would you be able to identify 100 of those employees?

"No."

She was also asked a series of questions about COVID protocols that were introduced at the Target Roofing business. That's on page 14. Page 28 as well. She was -- she testified about being required to stay in her office, being told not to mingle with other coworkers. Page 28, there's a discussion of certain roofers becoming sick with coronavirus and being hospitalized, something akin to an outbreak at Target. This really forced everybody to be less around. Again, they're introducing all of this stuff to create distance to explain why the director of human resources, who is in charge of hiring for the company, hasn't seen these people. All factual in nature again.

And then Ms. Portinari, in redirect examination, also noted well, I didn't even see people when I was going to the bathroom or, you know, it's not like I was absent. I just, you know, these 39 people and these five family members, they never showed up ever. They asked Ms. Portinari questions directly addressing Mr. Crowther's criminal intent. Page 32:

"And because the intent of getting the PPP money was for what reason?

"ANSWER: To employ our employees and make sure that they were paid.

"QUESTION: And that's exactly what happened; correct?

"ANSWER: Yes."

I mean, that's not -- that's them saying they spent the money appropriately on employees, which is definitively disproven by a very large portion of the money being spent directly on a boat; so...

MS. WAID: Your Honor -- oh, I'm sorry. I just -- I wanted to make sure that I was clear because I had asked for acceptance of responsibility for his mortgage fraud plea and that it not be held against him that he went to trial, but this seems like we're asking for acceptance of responsibility for the PPP and that's not what was -- not that I thought that I had actually articulated on the record.

THE COURT: Okay.

MR. LEEMAN: Well, if that's the case, if they're withdrawing it, Your Honor, I had believed I had read that they were arguing that this was really a legal issue and he went to trial just to preserve that legal issue. If they're withdrawing that, I don't have much of an argument. If they're saying he does not get acceptance of responsibility, I'll certainly end my argument for the PPP fraud stuff and then I can address what I think the interplay is between pleading guilty.

THE COURT: You've heard what she said as well as I did. So proceed.

MR. LEEMAN: Your Honor, the issue of whether, with respect to the mortgage fraud related counts, Mr. Crowther gets acceptance of responsibility, he doesn't. And that may sound harsh, but that's because his sentence is almost entirely based on the conduct and enhancements, if the Court grants them, stemming from the PPP fraud. The mortgage fraud is driving almost nothing as it relates to the sentence. The loss amount is being largely driven, if the government is correct, is being largely driven by the PPP fraud, if not solely driven by the PPP fraud. Obstruction of justice, PPP fraud related. Sophisticated means, PPP fraud related. And the plus one enhancements for money laundering, PPP fraud related. So that, Your Honor, there isn't something to really reward. If he hadn't been charged with the mortgage fraud, I guess -- it's funny in some ways because Mr. Crowther is asking for a -- if he hadn't been charged with the mortgage fraud, he'd be worse off. They're asking for some benefit because he pled guilty to it when his sentence is being driven completely by the PPP fraud. I think it would be perverse to give him some time off in this case because he pled guilty to that when he didn't plead guilty to the more serious fraud in the government's eyes and wouldn't get any credit for pleading guilty if he hadn't been charged with the mortgage fraud.

So the Court, obviously, is free to consider his guilty plea in fashioning a variance, but as to whether he technically qualifies for it, the government believes he clearly doesn't and would not support the reduction.

THE COURT: Where is the burden in this situation?

MR. LEEMAN: The burden on a reduction is on the defendant, Your Honor.

THE COURT: All right.

MR. LEEMAN: Yes.

THE COURT: Ms. Waid, anything else as to this particular issue?

MS. WAID: Just briefly, Your Honor.

I guess I didn't really understand the last argument. Mr. Crowther has absolutely no control of what probation does in their PSR. He came in. He pled straight up to the mortgage fraud. If you recall correctly, there was actually a money laundering that had been attached to that that, months before, we had actually said to the government was legally insufficient. That wasn't dismissed until right before the trial as well. He did what he had to do. He accepted responsibility. And the sentencing memorandum that was actually discussed, that was talking about loss amounts and the intended loss. And, if somebody puts down 50 percent on a house and they pay their mortgage payments timely, that was the argument that was, in fact, being made. So I think that argument the government was trying to put was a little disingenuous. He's done nothing but accept responsibility for that.

As far as the PPP stuff, like I said, I just ask that he not be held -- that be held against him that he actually went to trial because we still do believe that there is a legal issue involved and we continue to believe that and I'm sure that Mr. Crowther will appeal that. And that's his right to do that. But he, knowing that he did wrong in the mortgage fraud case, came and pled guilty to this Court and he exercised his constitutional right to a trial, which is all his right to do. He should get acceptance of responsibility for what he, in fact, pled guilty to, and I think that's pretty clear on the record.

Thank you.

THE COURT: All right, thank you.

All right, Counsel, is there any other issue I've missed in terms of either factual objections that need to be resolved or relating to the calculation of the sentencing guidelines?

MR. REICHLING: Your Honor, I just want to make sure there's -- I know this was never objected to in the -- by the defense in their objections, but I want to make sure that, on the record, that this particular enhancement still is in play and it was not objected to, and that is under paragraph 79 of the presentence report. That is the enhancement under 2B1.1 sub (b)(17)(a), which is the deriving more than $1 million in gross receipts from one or more financial institutions as a result of the offense. So I just wanted to verify for the record that the defense, even though they never objected to this enhancement, continue to maintain that they're not objecting to this enhancement because it's the government's belief that this is -- this particular enhancement applies to the guideline calculation.

THE COURT: All right. I don't believe I've ever seen any objection from the defense; is that accurate?

MS. WAID: That's accurate.

THE COURT: Okay. All right. The restitution amount, let's see. I think the parties agree that it's the $2,098,700 less the $30,000 that have now been paid and that's the figure I mentioned earlier; is that correct? Everyone agrees that's the restitution amount?

MR. LEEMAN: That's the government's position, Your

Honor.

THE COURT: Ms. Waid?

MS. WAID: Well, it was our position, Your Honor, that, because it's a performing loan, there really shouldn't be any restitution because he's still paying off on that loan.

THE COURT: Okay.

All right, Counsel, is there anything anyone wishes to discuss other than the pending motion for a variance and the actual sentence the Court should impose? What I propose to do is take our lunch recess, come back, I'm going to give you my decisions with regard to what we talked about for the last three hours, calculate the guidelines, then have oral argument with regard to the motion and what sentence should be imposed.

Anyone have a different proposal?

MR. REICHLING: That sounds good to the government, Judge.

MS. WAID: That's fine, Your Honor. We still do have to make that one correction regarding the financial condition of the defendant.

THE COURT: You did mention that.

MS. WAID: I think there's a mathematical error that we can probably get through pretty quickly.

THE COURT: Why don't you tell me what it is and we'll see if we need something more formal.

MS. WAID: Court's indulgence here.

(Pause.)

MS. WAID: Your Honor, the probation was provided profit and loss statements for the -- from Mr. Crowther for Target Roofing and for his, also, for his personal income and there appeared to be a -- Ms. Hollobaugh was supposed to testify to this. But there appear to be a monthly income of total of 1.834, and what we believe probation did was they actually took the amount of income that was coming out of Target Roofing and they applied that as personal income to Mr. Crowther, 'however, it was miscalculated and it was actually a net loss of $200,000 for Target Roofing's monthly income at this point in time. And they applied that kind of as a $200,000 just expense instead of what the net income was, which is leaving Mr. Crowther's net -- total monthly income at 1.834 on page 27 of the PSR, which is substantially over what it, in fact, is. And, in fact, Target has a negative income at this point in time and Mr. Crowther's, I think, his net personal cash flow comes to about $5,973.

THE COURT: Well, I was going to be really impressed with the $1.8 million per month income.

MS. WAID: Right. Us as well.

THE COURT: So what do you want changed?

MS. WAID: Well, I believe she just transcribed it wrong to make a -- let's see. Essentially, the 1.834 total monthly income actually comes down to $5,973. So we have -- I have a PSR and kind of Mr. Crowther's objections here where we compare what she put in the PSR and what we believe the errors are as Exhibit B that I'm happy to -- I mean, G, which I'm happy to provide for the Court for your review, and the government already has it, as to what we think actually the problem was.

The other thing was that the Ortiz property was sold on May 21st, so we also allocate that in this Exhibit G as to what the actual amounts should be.

THE COURT: Does the government have objections to the changes proposed in their Exhibit G, I think she said?

MS. WAID: Yes, sir.

MR. REICHLING: Your Honor, the government would just defer to probation's calculation of his income. I mean, all we've gotten is a profit/loss statement. We have not done any independent investigation concerning what his current financial status is. That was a part of probation's creation of the presentence report. So the government would just defer to probation on the calculation of his income.

MS. WAID: And, again, Your Honor, I think it was a mathematical error. It wasn't so much as I needed to give you different information. We utilized the profit and loss statements that were given to probation and it was actually a mathematical error with numbers that she had included incorrectly from Target and also what the actual loss amounts were per Target monthly and then allocated 1.8 to Mr. Crowther, which I can tell you right now it's completely inaccurate.

We also have those profit and loss statements utilized by probation as Exhibit E and as Exhibit E1 that I can also proffer to the Court. So, I think, essentially, what had happened was the revenue was 1.8, but the expenses are actually 2.138 to Target, which makes it a net loss of 208. Whereas, probation did 1.8, took the expenses out as part of Mr. Crowther's personal income, and the net income then became 1.6. So, really, it's the same exact information that was provided to probation, but just calculated mathematically incorrectly.

THE COURT: Let me do this: Let me suggest that, over the recess, you and the probation officer compare your Exhibit G with the presentence report and see if you can come to an agreement as to what the situation is and either we can attach G as a addendum to the presentence report or substitute it or do some such thing and then I'll address it after lunch.

MS. WAID: Absolutely.

THE COURT: All right. Anything else before we recess?

MR. REICHLING: No, Judge.

MS. WAID: Nothing from the defense, Your Honor.

THE COURT: All right. It's five after 1. Does an hour do it for everyone?

MS. WAID: Yes, Your Honor.

MR. REICHLING: That's fine, Judge. Thank you.

THE COURT: All right, 2:05 we'll see you back here.

(Luncheon recess taken at 1:04 p.m.)

AFTERNOON SESSION

(Time noted: 2:08 p.m.)

THE COURT: All right, looks like everyone is back that we need.

All right, Counsel, I've been handed an updated three-page document related to the defendant's assets and liabilities. I assume this is the product of discussions with the probation office over the lunch hour and it reflects changes in the numbers set forth in the presentence report.

First of all, do both sides accept the updated report for purposes of the presentence report?

MS. WAID: Yes, Your Honor.

MR. REICHLING: Yes, Your Honor.

THE COURT: All right. I would simply direct the probation office then to include these figures either as an attachment or as a correction to the figures set forth in the current version of the presentence report.

All right, anything else before the Court announces its decisions with regard to the sentencing guidelines?

MR. REICHLING: No, Judge.

MS. WAID: No, Your Honor.

THE COURT: All right. I'll try and address the arguments as it relates to the paragraphs in the order in which they are set forth in the presentence report.

The first objection relates to the lack of any acceptance of responsibility given in the calculation of the guidelines. Generally, that relates to paragraphs 66 through 71. The defendant, obviously, pled guilty to two of the counts in this case, counts five and six, and he went to trial as to four of the counts and was convicted. A plea of guilty does not authorize a defendant, as a matter of right, to obtain an acceptance of responsibility, although, certainly, that is the most common situation. The burden is upon the defendant to show that he's entitled to acceptance of responsibility.

In this particular case, the Court finds that the fact that the defendant went to trial as to counts one through four indicate that he has not accepted responsibility. That's not because you went to trial, which the Court understands is, certainly, any defendant's rights, but the issue in this case, despite the defendant's attempts to make it into a PPP issue, the charges were bank fraud and related bank fraud and money laundering allegations. The Court finds that going to trial as to those theories does not justify his acceptance of responsibility, even given his pleas of guilty as to counts five and six.

I do think, however, that the defendant is entitled to consideration for his pleas of guilty as to the partial version of the second superseding indictment. I think the government got it right and the way the Court handles that is to consider acceptance of responsibility as a component of any variance that the Court may give in connection with the motion that has been filed.

Bottom line, as to the acceptance of responsibility, the Court overrules the objections that have been made to the failure to give an acceptance of responsibility.

The next paragraph and the next set of objections relate to the loss amount. The loss amount is set forth in paragraph 66 as it impacts the sentencing guidelines. Essentially, the Court does not agree with anyone's calculation of the guidelines loss amount. It's clear that there is no loss resulting from the mortgage fraud. I don't think anyone has argued to the contrary. The issue is as to the loss amount from the loan. The amount of the loan was a little bit in excess of $2 million and that's the amount the government contends is the intended loss. The guideline provision section 2B1.1 is pretty clear. I've not heard any legal dispute as to the law to be applied. The government has the burden of proving that the loss amount is a certain amount. That burden is by a preponderance of the evidence. The loss amount that's appropriate is either the actual loss or the intended loss. The government argues that the amount of the loan is the actual loss. Actual loss is defined by the sentencing guidelines as a reasonably foreseeable pecuniary harm that resulted from the offense. The Court finds that the amount of the loan is not necessarily the amount of the actual loss and, in this case, is not the amount of the actual loss.

The other alternative is the amount of the intended loss. The intended loss is defined by the guidelines as a pecuniary harm that was intended to result from the offense. Again, the burden is on the government.

The third alternative would be, if the Court couldn't otherwise determine the loss, to use the gains of the defendant from the offense. No one argues that the third alternative applies so the Court will not go there.

In calculating the loss amount, the Court concludes that the intended loss is a proper calculation. The Court rejects the defendant's argument that the intended loss in this case was zero. The Court views the evidence to reflect that the intended loss is as follows:

The Court has looked to the fact that the loan amount was deposited into the defendant's account at the bank on April the 14th. That was the amount in excess of $2 million. The presentence report reports that, shortly thereafter, two days thereafter, the defendant withdrew $126,000 and that was transferred to the Target main operating account. I can't tell from the records with any degree of certainty that that was not money used for proper purposes and, therefore, the Court does not count that $126,000.

Several days later, on April the 21st, the defendant wired $100,000 to Mr. Adkins to pay a promissory note. That clearly came from the loan proceeds. That clearly was not a permitted use of the money, and the Court will include the $100,000 as a component of the amount of loss.

The next deduction was $3,300. There's virtually no information in the presentence report as to what that is all about, therefore, the Court does not consider that.

The next amount is $689,417 that was transferred on April the 24th that was used to buy the catamaran. Obviously, that is not a proper use of the PPP funds, and the Court will include that as a component of the intended amount of loss.

Finally, on May the 7th of 2020, in excess of $1.1 million was transferred to the main operating account. Of that, based upon the evidence this morning, $800,000 was used to pay off or to pay off or pay down a line of credit. That clearly was not a proper purpose under the PPP, and the Court will include that $800,000 as part of the intended loss.

In sum, the Court finds that the defendant intended loss to the bank based upon the PPP loan of the following amounts: The $100,000, the $689,417 and the $800,000. If my math is correct, that totals 1. -- well, $1,589,417. While that's a different calculation than the amount set forth in the presentence report, that does still fall within the plus 16 category and, therefore, although I arrive at that figure a little bit differently than anyone else, the Court overrules the objection and will adopt the plus 16 as set forth in paragraph 76.

Paragraph 77 relates to sophisticated means. Here, the allegation of sophisticated means relates to the 39 identification cards for alleged employees that was obtained after the defendant obtained the loan from the bank. The requirement for a sophisticated means talks about extraordinary conduct in furtherance of the offense and that the defendant intentionally engaged in the conduct.

The false identification cards representing what I find to be fictitious employees, I think, was certainly relevant to the case, but I do not find that it was sophisticated conduct within the meaning of the sentencing guidelines. So, therefore, the Court finds that the government has not established the sophisticated means and would deduct the plus two from the sentencing guidelines in paragraph 77 of the presentence report.

Paragraph 78 is related. It increased the guidelines by two based upon five or more means of identification. The identification are the 39 fraudulent Social Security or resident cards here. The obligation of the government is to prove, among other things, that these were actual people and not fictitious individuals. Also, the government has to prove that the documents were unlawfully made from another means of identification.

The Court finds the government has not established either of those requirements. It's clear to the Court that the government's theory and that the evidence shows these were fictitious people. They are not real. The application required the persons to be actual persons. The Court finds that this enhancement simply does not apply under the facts of this case. Accordingly, the Court would sustain the objection to paragraph 78 and would delete the plus two set forth in the guidelines.

The final one is paragraph 84, the obstruction of justice enhancement, which is currently a plus two. The government must show that a defendant wilfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice in order for this enhancement to be applied. The basis for the enhancement that is currently before the Court are the two statements made in the letter of September 21st of 2020 from defense counsel to the government responding to a Grand Jury subpoena.

The Court has difficulty in this particular case imputing the contents of the letter to the defendant. That's not to say that the statement of attorney is never or can never be imputed to his or her client, but in this case, the Court does not find sufficient evidence to impute the letter by the attorney and the contents of the letter to the defendant and, obviously, the obstruction of justice requires that the defendant personally and wilfully obstruct justice. The Court finds that that has not been shown here.

Also, the Court is not satisfied that the government has established by a preponderance of the evidence that the statements, even if they are, indeed, false, as the government contends, cause the government to take any significant extra steps in investigating. Obviously, the posture of the case at the time was that a complaint had been filed against the defendant, he had been arrested, but the investigation was not over, as we know, because the letter was in response to a Grand Jury subpoena and was pre-indictment. The Court accepts the proffer of the government attorneys as to what they did thereafter. The Court finds, however, that they have not satisfied the preponderance of the evidence standard suggesting that their investigation was actually obstructed or it was done with the intent to obstruct. The Court, therefore, will delete the plus two from paragraph 84 of the presentence report.

All right. Based upon that, the Court's calculation of the guidelines is as follows:

The base offense level remains at seven. The loss amount is increased by a plus 16. The plus two for the $1 million in gross receipts in paragraph 79 remains and the plus one in paragraph 81 also remains. Again, if my math is correct, that creates a total offense level of 26. The defendant's criminal history remains a category I. That results in what range?

PROBATION OFFICER: Sixty-three to 78 months.

THE COURT: Is there is any change in supervised release?

PROBATION OFFICER: No, Your Honor.

THE COURT: And how about fine range?

PROBATION OFFICER: The fine would change to $25,000 to $4,250,000.

THE COURT: All right, Mr. Waid and -- Mr. Waid.

MS. WAID: No offense taken.

THE COURT: I'm looking at your client. But, anyhow, Mr. Crowther and Ms. Waid, if you'd come on back to the podium for me, please?

Mr. Crowther, you've heard the sentencing guidelines range that I computed. Let me go through it and summarize it once again for the record.

The total offense level is 26. The criminal history calculation is category I. The range of imprisonment is 63 to 78 months. The range of supervised release is two to five years as to count one, two, five, and six and is one to three years as to counts three and four. The restitution is $2,068,700. The fine range is $25,000 to $4.25 million and the special assessments, which are mandatory, total $600.

Is there any victim present in the courtroom who wishes to address the Court? Does the government know?

MR. REICHLING: I don't believe so, Your Honor.

THE COURT: I'm sorry, you say you do or you don't?

MR. REICHLING: I said I do not believe so, Your Honor.

THE COURT: All right. I know we had someone from the bank here that is still here from this morning.

Anything you'd like to address the Court about?

MR. CHEFFER: No, Your Honor.

THE COURT: Thank you.

All right. Ms. Waid, I'd be happy to hear from you or your client or anyone else with regard to the sentencing. This would also be the time to discuss your motion that was filed for a variance.

MS. WAID: Yes, Your Honor.

At the time, we would move for a motion for variance. Mr. Crowther has actually prepared a statement that we would like to provide to the Court, if the Court would allow.

THE COURT: Say that again.

MS. WAID: I said we -- Mr. Crowther has prepared a statement --

THE COURT: Oh.

MS. WAID: -- for the Court, if the Court would allow him to say -- speak.

THE COURT: Surely.

Mr. Crowther, I'd be happy to hear anything you have to say, as you or anyone else may address the Court.

I should say I have received a number of letters of recommendation. I think 13 at last count, but I'm not sure. I have read all of those as well. And Mr. Crowther also sent a letter, which I have read.

MS. WAID: And, Your Honor, if we may submit a final exhibit, which is just a psychiatric report regarding substance abuse issues that Mr. Crowther has been going to counseling for.

THE COURT: Sure.

MS. WAID: For the record. Thank you.

THE COURT: Have you shown it to government counsel?

MS. WAID: We have.

THE COURT: All right. And did you want that just read by the Court or as an exhibit?

MS. WAID: Just read by the Court is fine, Your Honor.

THE COURT: Do you want me to read it first or listen first?

THE DEFENDANT: You can read it first, Your Honor.

THE COURT: I'm sorry?

THE DEFENDANT: You can read it first, Your Honor.

THE COURT: All right, thank you. Give me a minute then.

(Pause.)

THE COURT: All right, thank you. I've read the report by Dr. Bryant.

THE DEFENDANT: Thank you, Your Honor.

Your Honor, I have drafted a statement. I've spent a couple days drafting this. I'd like to talk to the Court openly. And then, afterwards, if I could speak to the employees of Target Roofing and address them specifically, if I could walk away from the stand and address them, would you allow that?

THE COURT: Briefly.

THE DEFENDANT: Okay.

THE COURT: Go ahead.

THE DEFENDANT: Thank you.

Your Honor, thank you for letting me address this Court. In the interest of this Court's time, I will be brief and follow my notes.

Before my trial, I pled guilty to mortgage fraud charges and I accepted full responsibility for giving false statements to a lending institution. I had a duty to provide accurate information when providing documentation to Angel Oak Mortgage Company. Instead, I manipulated bank statements in order to expedite the process. I apologize for making such a rash and reckless decision. It was wrong and I am beyond ashamed of my actions and will never make these same mistakes again.

Later, a jury of my peers found me guilty of misusing PPP program money during the COVID-19 pandemic. I have spent many hours reflecting on what I should have done differently to avoid this outcome. I had a duty and an obligation to take care of my employees and carefully consider their concerns and their survival of the company. I've recognized now that it was a privilege to own that company and an opportunity, as well as a duty, to ensure their livelihoods. Together, as a team, we've moved mountains to build a successful and respectable company we could be proud of. However, I alone am responsible for my actions and the eventual results. I will use my time during the consequences mandated by this Court to improve myself so that, one day, I may, again, move mountains and make things right for the people of Target Roofing, this community, and any potential victims who have felt impact from my actions.

I am a proud American citizen, and I understand that I am to obey the law. I respect the jury service and humbly submit to the judgment of this Court. I will do whatever it takes to make amends and fulfill my obligations to the United States judicial system. My family, employees, and community trusted me to use good judgment and make wise choices. As I stand here today, it proves that I failed them. The consequences of my actions will follow me, my family, and my employees for the rest of our lives. I wish that I could undo the past and I've spent many sleepless nights dwelling on how my actions impacted so many lives, but if I am to make amends, I must face the future and the ramifications it holds. I am deeply sorry to all those lives who have been affected because of my poor decisions. I will never forget the lessons I've learned during this legal process. I am proud that this country offers a second chance to those who earn it. I've always been a believer in second chances, and many of the Target Roofing employees were benefactors of that philosophy.

I now humbly ask this Court to now offer me a second chance and I am determined to prove worthy of that second chance. In business, I learned it was very important to accept responsibility. Further, I stand here today also ready to accept my consequences. People will remember you not for your mistakes, but for how you make good on them. In the years ahead, I'm committed to using my story to help other people avoid having to stand here before you in my shoes.

To close, Your Honor, I wish to thank you and this Court for an opportunity to address you, and I want to assure that I will never, ever return to another courtroom as a defendant again.

At this time, would you mind if I address the Target Roofing employees?

THE COURT: As I said, you may do so briefly.

THE DEFENDANT: Thank you.

I appreciate every one of you coming here today and supporting me. I have not always deserved that. You guys are just as much part of my family as my wife and children. Some of you I've worked with for over 20 years. The most painful thing I've ever felt in my entire life is the suffering that I have caused this Target Roofing family. I remember sitting at each of your offices talking about how we were going to build the greatest roofing company ever. I remember the dreams each one of you had, the conversations each one of us had, the camaraderie, the team. I could not have done any of this without this team, without many of you.

As a team, we came up with core values that we all strived to live. We knew if we lived by these values, it would make Target Roofing great. Those values were we work hard, we care, and we always do the right thing. I didn't always do those things. I made serious mistakes. I apologize I let this Target Roofing family down. I love you guys. Thank you.

MS. WAID: Your Honor, I think Casey said everything that was the most important, but I would just like to reiterate a few of the points regarding this case.

I was struck by the letters of support that were submitted on Casey Crowther's behalf. It showed that he's a good husband, a good father, a great boss, a really good friend, and a phenomenal businessman. He didn't lead the easiest of lives, and that's something that I think is extremely important because the perception is that he did lead a pretty gifted life, but he had a very, very difficult childhood and he overcame that with hard work. Since the day he was 14, he's taken a job. And with sweat and guts and tears, he has actually built a company that had over 200 employees by the age of 35 and that's pretty, pretty impressive. And, by all accounts, he's a good businessperson. And, by all accounts, the employees needed this job.

We would ask to move for a variance of time served with some type of work release and home detention in order to help his business survive. Mr. Crowther moved Target Roofing to his home residence. He works out of there. His employees work out of there. He wants the ability to make Target as successful as it was in years prior. He wants the ability to pay back restitution and he wants the ability to make it up to his employees.

The other thing that I would like to point out to the Court is that, not only in the letters of support was Casey actually depicted as a good person well before that, but he continues to strive to be a better person. He's always been on charity boards, the volunteer work as a football coach and a baseball coach. He actually helps this community. He is an asset to this community. And, even after his arrest, he continued to do those things. It really impressed me the letter of support from the 28 football parents who actually stood behind Casey and said that these charges don't matter, you motivate our kids, you're good for our kids, you're a great role model for our kids, and I think that made a really lasting impression on me. I hope it made a lasting impression on the Court.

Casey's continued to try to better himself during this time of thoughtfulness. He's actually seeking counseling for alcohol abuse treatment. He's worked daily with the bank in order to mitigate the risk by selling off his -- by selling off his building and paying down that line of credit and paying off mortgages. He continues to work with the bank to mitigate any further risk.

He also took a proactive stance, and I think that goes directly to his moral character of what we were discussing before. He's a fighter and, against all odds, he continues to actually become a better person and be introspective. And one of the things he did proactively after being arrested was to actually figure out how he could assist other people in the Bureau of Prisons. And I had this in my sentencing memorandum. I'm not sure if the Court was able to see that, but there is actually a website where Casey actually went and he made educational forums in order to help prisoners gain critical skills that they will need upon their release from prison.

And, again, I think that speaks to his proactive character, but it also speaks to the person that he is. It's not everybody who would take that upon themselves and do that for the betterment of others and not just himself. But the letters of support and the testimony that we actually heard at trial, actually, that is who Casey is. When there's a hurricane, he is proactive. He's not a person who just sits back and donates money. He gets in his truck and he drives and he puts roofs on houses and helps people whose homes were completely destroyed. He helps veterans who can't afford to get new housing. When the Bahamas hurricane struck, I know, yeah, I actually volunteered and put -- you know, gave water and food. Casey actually got a plane and went to the Bahamas and he actually delivered those supplies. And then he opened his home to a person in the Bahamas whose house had been destroyed and made her part of his family because that is who he is.

During this global pandemic, Target Roofing actually did employ the family members on to come and they actually gathered food, pallets of food, to feed this community because he loves this community. He's an integral part of this community and he's an asset to this community. They fed so many people from food banks and beyond during a pandemic because that's what he wanted to do because that's actually the core person that he is. He's a good person.

I also think I need to talk a little bit about kind of the disparities and the difficult -- or the stark contrast between this case and the other PPP cases that we've seen. In stark contrast, in this case, Mr. Crowther actually had a legitimate business, legitimate employees. Target Roofing qualified. He actually worked during the entire pandemic. They put in COVID regulations, they put in different safety measures, but they worked this entire time and they actually would reduce the project prices in order to be able to hire more people and to put people back to work in this community.

They also paid their employees, and that is in stark contrast to the majority of the other PPP loan cases where they were just straw companies, blatantly fraudulent, fake employees, there was no work, it really, truly was -- the only cases that I've been found that have been charged have been cases where they're so egregious. Eighteen loan applications, PPP loan applications, in *United States v. Tarik Jaafar* in the Eastern District of Virginia, he received 12 months. He submitted 18 PPP loan applications all on fraudulent premises. There was no companies; there was no employees; and then he tried to flee. He got 12 months for that.

And the list goes on in the sentencing memorandum, but 24 months for two PPP loan applications seeking $10 million and $3 million respectively, 250 fake employees. The defendant did not pay payroll with funds received.

Latoya Stanley and Johnny Philus, Southern District of Florida, 18 and 30 months respectively. They filed four PPP and EIDL loan applications. They resurrected defunct corporations. They had over 70 credit cards in fake people's names. They did not pay any payroll.

Julio Lugo received 42 months. He submitted at least 70 false and fraudulent loan applications seeking PPP and EIDL funds, requested more than $5.8 million. They, again, spent that on luxury vehicles, casinos, and other personal purposes. They did not have any real employees. They did not pay any payroll with those funds.

And Nadine Consuelo Jackson from the Southern District of Ohio who received 24 months. She applied for two different loans, 1.3 and 1.2, as well as an EIDL. Submitted false wage and tax reports. False tax returns to the bank.

Everything that was submitted on behalf of Target Roofing in order to get this PPP loan was actually legitimate payroll, was legitimate numbers based upon different calculations. Target Roofing was eligible for this PPP loan. That is in stark contrast to the other PPP cases that I've been seeing charged nationwide. And the fact that Mr. Crowther actually cares about his employees, paid his employees, continues to try to keep his business afloat is in stark contrast to all these other cases, which received no more than I could find 24 months or below.

We would ask the Court for a variance. We'd move this Court for a variance. We're asking for time served with some type of home release so that Mr. Crowther can continue to grow Target Roofing; he can continue to try to move those mountains; he can pay his employees; he can pay his vendors; he can pay his suppliers; he can pay back the bank. And we think that that is the most important thing for Mr. Crowther to do so that he can continue to be a valuable member of society, one that his family needs, one that his employees need, but also, the kids who he mentors.

We request that and respectfully ask for it. Thank you for your time, Your Honor.

THE COURT: All right, thank you.

From the government?

MR. REICHLING: Yes, Your Honor.

Your Honor, the government would certainly oppose any granting of a variance, especially a variance that would incorporate a sentence in this case that would include time served.

I'd like to at least address the cases that the defense points to in support of what they're asking for in a sentence in this case in assessing the disparate sentences throughout the country. I think it's important to just note a few of these differences between the cases that are cited in the defendant's sentencing memorandum and what these cases were about.

The four cases, I believe, that the defendant includes -- it may be actually five, but I know that, for all four to five of these cases, all of these defendants waived indictment and cooperated with the government and entered plea agreements after they were arrested. None of these individuals contested the facts of the case nor did any of them go to trial. They all accepted responsibility close thereafter being arrested.

The one case that I just would like to correct for the record, and this may have been a mistake on behalf of Ms. Waid, but the United States versus Julio Lugo and Rosenide Venant case that's highlighted on page 16 of the sentencing memorandum is actually a case that hasn't been formally charged yet. It was -- it involved -- it hasn't been indicted or there hasn't been a waiver of indictment yet in that case. It's simply a case that's pending under a criminal complaint. There has not been a sentence in that case. That is a Middle District case out of Tampa. That was a recent arrest. I don't know where the 42 months of imprisonment came from, but those individuals have not been sentenced in that case.

I would like to at least bring to your attention, Your Honor's attention to other PPP fraud cases, one of which that was recently sentenced in the Southern District of Florida in May of this year, on May 12th of 2021, that did involve an individual who did plead guilty, that did waive indictment, and did enter a plea agreement, and that was *United States v. David Hines*. And the case number in the Southern District of Florida is 1:21-cr-20011. This case got a lot of media attention because the defendant purchased a Lamborghini with PPP funds and, while he did not have a business that had the amount of employees that warranted the amount of PPP funds in that case, he was given a term of imprisonment of 78 months as well as three years of supervised release. I think that is a recent sentence regarding Paycheck Protection Program and fraud regarding that program that the government believes the Court should take into consideration.

There's also a case out of the Eastern District of Virginia, *United States v. Joseph Cherry*, where, again, a defendant pled guilty, entered into a plea agreement, and was given 51 months of imprisonment. And that was back in 2020, I believe.

So there are other instances in which other defendants who have pled guilty, have not gone to trial, have cooperated with the government, and have received sentences that total, you know, more than 40 or 50 months. The government does believe a guideline sentence is warranted here. It believes that the facts of this case, as Your Honor heard enough of in trial, specifically with the PPP fraud counts, warrants a guideline sentence.

This was an instance -- and Your Honor has presided over a ton of cases and certainly plenty of white collar cases, but fraudsters take advantage of vulnerable situations, and that's really what the defendant did here. He exploited a program that was created to get businesses out of a global pandemic and it was a program intended to keep American workers employed. It wasn't a program intended to go into the pockets or to line the pockets of wealthy business owners. And I think this was a situation here, Your Honor, where the defendant did just that.

Now, government does not -- agrees with the defense. There's no evidence that the defendant created a fictitious company. But, on the other side of the coin, Your Honor, is it's the government's belief that the defendant took advantage of the resource he had, which was payroll with a company to qualify for a loan. None of those loan funds ever went to, at least 18 -- you know, 17 -- 1.7 and $1.8 million of that money never went to the intended recipients of the Paycheck Protection Program, which were the employees of Target Roofing. This wasn't a loan made to Casey Crowther. This was a loan, a forgivable loan, made to Target Roofing. And, while the government certainly respects the fact that the defendant is now thinking over his actions and what those actions have led to with this company, those are things that Mr. Crowther should have been considering when he wired over $600,000 to Sara Bay Marina to buy a 40-foot catamaran boat. There are certainly consequences for those actions that the defendant took and the government believes that a guideline sentence is appropriate given the actions of the defendant.

Not to mention, of course, the -- in furtherance of the fraud, as we've gone over again and again here today, addition of fake employees, adding family members to the payroll, paying them just under the $100,000 a year annual prorated salary. And the evidence at trial was they were never seen, they never worked there. These are things that the defendant did and decisions that he made which furthered his scheme to defraud that the government believes warrants a guideline sentence.

Now, Your Honor did not hear much of any evidence about the mortgage fraud case. And, although the focal point of this sentencing is likely the PPP fraud, it's important for Your Honor to at least consider that the defendant engaged in two separate fraud schemes. The first, of course, was the PPP fraud. The second was this mortgage fraud scheme. That was almost prompted by the PPP fraud. The defendant got the PPP loan funds in the middle of April. He entered into a contract to purchase a $1.3 million house in the middle of May. And he then falsified numerous bank statements and a screenshot printout from his online account records to hide the fact that the defendant did not have liquid assets to cover the down payment of a home in hiding the fact that he had to borrow or pull from $150,000 line of credit, $150,000 from his Target Roofing line of credit, to fund his purchase of his own personal house. Not for Target Roofing but for himself, a $1.3 million house. These are two separate fraud schemes that I believe should factor in this Court's decision in fashioning the appropriate sentence.

Certainly, the government respects the fact that the defendant has -- is on charity boards or that he volunteers his time coaching football, but that doesn't preclude someone from committing a crime. As Your Honor knows, I'm sure, over the course of your time as a judge, you've seen plenty of individuals who do good things for the community but also commit crime as well.

For those reasons, Judge, we believe that the appropriate sentence in this case is a guideline sentence. I believe it reflects the seriousness of the offense. This was a, like I said, like the government has said, this is a government program intended to benefit small businesses that needed to handle shutdowns implemented by local governments and couldn't allow services to be provided and needed to fund payroll and that's -- and that's really -- that's a serious offense in the government's mind because John Miller in the SBA testified that banks were given the -- greenlighted to begin loaning money under the Paycheck Protection Program on April 3, 2020. By April 16, 2020, the $349 billion that congress allocated under the CARES Act for the PPP program was gone. Within two weeks, that money was gone. $2 million of that money went into the defendant's pocket and was spent on boats, paying off debts, paying down lines of credit. None of that went to the true intent of this government program, which was to weather -- allow businesses to weather themselves during a global pandemic.

So the government does believe a guideline sentence is warranted here. We'd also ask Your Honor impose a term of supervised release of three years. We have discussed restitution. We ask that restitution be a condition of his supervised release or be incorporated in Your Honor's sentence. And we would also ask that Your Honor incorporate your preliminary and final orders of forfeiture in your judgment and sentence.

Thank you.

THE COURT: Two questions, if I may.

MR. REICHLING: Yes, Your Honor.

THE COURT: What do you propose the Court do with regard to the variance motion in light of the defendant's guilty plea to two of the counts? I think Mr. Leeman had said the Court has the authority to handle the acceptance in a variance as opposed to a sentencing guideline adjustment. What do you suggest the Court do here?

MR. REICHLING: While Your Honor can, obviously, take it under consideration, and I agree with Mr. Leeman's position on that, I really do not believe, given the fact that there were two fraud schemes here that were committed close in time with one another, that even a two-level variance for acceptance of responsibility on the mortgage fraud is warranted given the defendant's criminal conduct. I'm not saying Your Honor can't do it, of course. Your Honor can do whatever Your Honor wishes to do, of course. But the government believes that the current guideline range, which is 63 to 78 months, a sentence within that range would be appropriate given the offenses committed by the defendant.

THE COURT: The other thing is the restitution. Talk to me a little bit about restitution. I know I've stated the amount --

MR. REICHLING: Yeah, uh-huh.

THE COURT: -- several times now. And it seems to me I remember either reading or hearing at trial that the amount wasn't due yet to the bank and --

MR. REICHLING: That's correct. I mean, the Paycheck Protection Program, which, of course, the repayment periods and things of that nature have been amended subsequent to the defendant's indictment. He has not been -- what am I trying -- the word I'm looking for?

The bank has not sought action regarding his ability to pay the loan at all yet. It hasn't technically come due or the determined period of time in which it needs to be paid has not begun.

The government's concern, Judge, is that, you know, the defendant is looking at a significant period of incarceration and we -- the government doesn't know or even believe that the defendant will repay a large portion of that loan amount to the bank. Given that concern, if the bank were to, say, seek the honoring of the agreement with the SBA to pay for the loan because the defendant's in default perhaps, then the SBA or the government has to fund or repay or pay the bank its loss in this case. So we believe that ordering restitution, even though the loan is technically not due yet or he's not been defaulted on the loan, is appropriate because, at the end of the day, if the bank is not made whole, the government has to come in and honor the loan agreement between -- or the arrangement between the SBA and the bank to cover that loss. And so that's why we believe restitution is warranted here.

THE COURT: And how do I do that? Do I impose restitution to begin at the same time it's due to the bank?

MR. REICHLING: If you can give me one moment, Judge. Let me ask brighter minds than mine and ask what the best response to that question would be just so I can make sure.

THE COURT: Sure.

(Pause.)

MR. REICHLING: Your Honor, we believe that the restitution should be ordered now. If the defendant were to begin to make payments towards the loan, say, now, he can notify the Court and get credit towards his restitution obligation as a part of his sentence. So that's sort of the government's thoughts on how to proceed on the restitution issue.

THE COURT: When is he scheduled to start payments to the bank, everything else being equal?

MR. REICHLING: I do not know that answer.

Maybe Mr. Cheffer can chime in.

MR. CHEFFER: October, Your Honor.

MS. WAID: Your Honor, that's our understanding, too. It's October 2021 is when the loan payments actually become due.

THE COURT: All right. And how long do the payments continue for?

MR. CHEFFER: Well, there's an option to extend it either over five years or two years. And it's from the inception of the loan. So it's only going to be about a four-year payout, which he won't be able to do if he's not here. And we've been working with the SBA, Your Honor.

THE COURT: Thank you.

All right, thank you.

MR. REICHLING: Yes, Judge.

THE COURT: Ms. Waid, anything further?

MS. WAID: Nothing, Your Honor.

THE COURT: If you and your client would come on back to the podium for me, please?

(Pause.)

THE COURT: Mr. Crowther, is there anything else you'd like to say?

THE DEFENDANT: No, Your Honor.

THE COURT: Let me ask you just a few questions. Stop losing my microphone, that might help.

I've read, as I said, the report from the doctor and that deals largely with some alcohol and drug issues. Are you currently under the influence of any drugs or alcohol?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you understood what's happened here today?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Mr. Crowther, the Court is required to consider all the factors in Title 18 United States Code Section 3553 in determining what sentence is appropriate. Your attorney has filed a substantial memorandum in which she sets forth her analysis of each of the factors. I've read that and accept that as her view.

Deciding the sentence to impose on a person is, in my view, one of the hardest things a judge has to do. It's, obviously, personal and, in fact, affects not only the defendant, but other persons. And your situation is no different.

The factors that the Court has to consider and has considered, I've considered all of them, but I don't intend to discuss all of them because they're not really material in your case, but almost all of the factors are favorable. You have no criminal history to speak of; you have substantial ties to the community; you have a history of employment. The problem in your case is the facts of the case and whether it's an aberration or not. You know, in connection with the mortgage loan and the PPP, you did some things that either you admit were wrong or a jury has found to be wrong. I concur with both the jury's verdict and your plea of guilty, and there has to be consequences to that.

As I suggested earlier, while I do not find that you've accepted responsibility within the meaning of the sentencing guidelines, I do find that you should be given consideration in connection with the variance for your plea of guilty. I do intend to grant your attorney's motion for a variance, although, I do not intend to grant it to the extent that she has requested.

After considering all the factors, all the letters that I've written as well as what you've said in addition to the facts of the case that I heard at trial, it's the judgment of the Court that you be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 36 months. As to each count, those terms will run concurrently with one another. You will also be placed on a term of supervised release for three years as to each count. Those terms also will be served concurrently with one another. You will be required to pay restitution in the amount of $2,068,700.

With regard to a fine range, the Court is, based upon your financial condition and the restitution obligations, not going to impose a fine in the case. You will be required to pay the mandatory special assessments. Those total $600. The Court will include in the sentencing judgment the restitution. I'm sorry, the forfeiture consistent with the preliminary order of forfeiture that I entered within the last several days.

With regard to recommendations, the Court would recommend that you be allowed to participate in any and all drug programs while in custody of the Bureau of Prisons. They have what's generally referred to as a 500-hour program. The Court would specifically recommend that you be allowed to participate in that program if and when you're eligible to do so.

Counsel, any other conditions or recommendations anyone wants me to consider?

MS. WAID: Yes, Your Honor. The defendant was actually asking if he could be housed in Pensacola. He's got family up there.

THE COURT: I don't control where you get housed. I'll hear from the government. I don't have any objection to making recommendation of that.

Any reason from the government or any objection to that?

MR. REICHLING: No objection, Your Honor.

THE COURT: The Court would recommend that the defendant be housed in the federal facility in the Pensacola, Florida area to be close to relatives in that area.

MS. WAID: Thank you, Your Honor.

Mr. Crowther just wanted to take one minute, Your Honor, to -- he had to look something up, if that's possible.

THE COURT: Sure.

THE DEFENDANT: Thank you, Your Honor.

(Pause.)

THE COURT: I do need to add some special conditions to the supervised release I've imposed, but we'll give you a chance to read whatever it is you're looking at.

MS. WAID: Thank you, Your Honor.

(Pause.)

MS. WAID: Your Honor, I'm just -- I apologize for delay. I was just reading a memorandum from the program RDAP, and they're actually asking for the 37-month sentence instead of a 36-month sentence.

THE COURT: I'm sorry, say that again.

MS. WAID: They're stating that a 37-month sentence would actually be more beneficial via the RDAP program instead of a 36-month sentence. That's what Mr. Crowther has just provided me.

THE COURT: Oh. So --

MS. WAID: Are you requesting 37 months?

THE COURT: So you want me to increase the sentence I've imposed to 37 months?

MS. WAID: Yes, please, Your Honor.

Sure about that?

THE COURT: Mr. Crowther, is that what you want?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I mean, I don't know what memorandum you're looking at, but I've only had one other defendant ask for a longer sentence, which I granted, but --

THE DEFENDANT: Your Honor, I discussed with the gentleman who received the RDAP program who is in the same counseling class as myself and he told me that the RDAP program, based off of how long you're in there, is how the program ends up working out and he gave me only a few words of advice and one of them was that, if you get a 36-month sentence, that the RDAP program becomes more beneficial for a alcoholic than a 36-month sentence, Your Honor.

THE COURT: Well, I'm tentatively willing to do that, but you need to understand if, for some reason, that person's advice is wrong, don't be coming back to me and asking for a lesser sentence.

THE DEFENDANT: Your Honor, I understand.

THE COURT: Okay.

Any objection from the government?

MR. LEEMAN: I have had this situation happen before, Your Honor. It didn't turn out well. I do think it's prudent to advise him. I don't even believe it's necessarily ensured he will qualify for the RDAP program. It may be. It may not be. That's up to the Bureau of Prisons. And we also had this issue -- I know the government has requested a sentence which was over the 36 months, but it strikes me -- I don't know how we get around we're, essentially, making a sentence up not advising the 3553(a) factors and that gives me some pause.

So, obviously, the government's not trying to limit any programs that Mr. Crowther could get into, but it's really not something the government feels comfortable with, increasing someone's sentence because they ask for it in the hopes they get some type of a program that they heard from someone may be better, so we don't support it, Your Honor.

THE COURT: So you wanted me to give him 63 months, but you object now to 37?

MR. LEEMAN: Yeah. Not trying to be funny, Your Honor, but I just -- the government's not comfortable with the idea of playing with the time of a sentence to -- not playing with, but moving the time of a sentence to potentially get Mr. Crowther into a program that none of us are very capable of speaking of. And, even if we can speak, it's up to the Bureau of Prisons whether he gets placed into it or not. And so we don't support it. If it's 37 months, it's 37 months, but we're not in support of it.

THE COURT: All right.

MS. WAID: Mr. Crowther's comfortable with his decision, Your Honor, and he would request 37 months.

THE COURT: All right.

Mr. Crowther, you heard -- I mean, Mr. Leeman is right, in large regard, that nothing I do can guarantee that you're going to be accepted in the program. You may or may not be. And, also, changing your sentence from 36 to 37 months may or may not help your situation. If you think it's helpful, so be it. But like -- as I think I said, if you're wrong, you're going to do an extra month and I'm not going to change that.

THE DEFENDANT: I understand, Your Honor. Thank you.

THE COURT: All right.

All right, the Court will change the sentence from 36 to 37 months. The term of supervised release of three years remains the same. Both the terms of imprisonment and the supervised release terms will be served concurrently with one another. I've made my recommendation with regard to the prison portion, but I also will add special conditions to the supervised release as follows:

You will be required to participate in a substance abuse program, which may be either inpatient or outpatient, and to follow the instructions of the probation officer with regard to that condition.

You will be required to contribute to the costs of that to the extent it's determined you're able to do so and you will be required to submit to random drug testing not to exceed 104 tests per year.

You will be required also to participate in a mental health treatment program. Again, that may be the inpatient or outpatient. And you will be required to follow the instructions of your probation officer with regard to that condition. You will also be required to contribute to the costs of that program.

You will be required to provide the probation officer with any requested financial information. You will be required to cooperate with the probation officer in the collection of DNA. You will be required, as I said, like I said -- I didn't say it, but you will be required to refrain from the unlawful use of any controlled substance and will be required to submit to one drug test within 15 days of placement on supervised release and at least two periodic drug tests thereafter as directed by the probation officer. As I indicated, you will be required to submit to random drug testing not to exceed 104 tests per year.

You will be required to pay restitution in the amount, as I said, $2,068,700 to the Sanibel Captiva Community Bank. That restitution will be paid through the normal process via payments to the Clerk of the Court for distribution to the victim.

All right. I may have asked, but is there any additional condition or recommendation either in connection with the imprisonment or the supervised release anyone wants the Court to consider?

MR. REICHLING: Nothing from the government, Judge.

MS. WAID: When would he be required to report, Your Honor?

THE COURT: Well, that's the next issue. Actually, it's not the next issue, but we'll get to it.

MS. WAID: Okay.

THE COURT: Counsel, having heard the sentence the Court has imposed and the manner in which it has been imposed, are there any objections, first, from the government?

MR. LEEMAN: To the substantive reasonableness of the sentence, Your Honor, for preservation purposes.

THE COURT: Substantive unreasonableness, I guess, is what you mean.

MR. LEEMAN: Substantive unreasonableness, yes, Your

Honor.

THE COURT: All right.

From the defense?

MS. WAID: No, Your Honor. Just so the Court knows, Mr. Crowther has hired Bill Kent as his appellate attorney, and I believe he is going to file a motion for release on bond pending appeal.

THE COURT: All right.

All right, with regard to the defendant's surrender, any objection from the government to a voluntary surrender in this case?

MR. REICHLING: No, Your Honor.

THE COURT: The Court will require the defendant to surrender to the designated facility on or before -- let's see. I don't have a calendar. What is July 30th, is that a --

(Pause.)

THE COURT: On or before July 30th at noon.

Mr. Crowther, when I say on or before, the Bureau of Prisons will notify you of the facility. If they set an earlier date, that's the date you're required to be there. So it may be some time before July 30th. If for some reason they have not determined a facility for you by the 30th, your attorney will know how to get an extension of that surrender date. I suspect that that will be enough time, but maybe not. Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In the meantime, between now and the date of your surrender, whatever the terms of your conditions are will still apply. So whatever you're doing in connection with Pretrial Services, you need to keep doing between now and then. Do you understand that?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: All right. Now, Mr. Crowther, I gather you know this, but let me tell you anyhow. You do have a right to appeal both the judgment and the sentence in the case. To do that, you have to file what's called a Notice of Appeal within 14 days of the entry of the judgment. If you fail to file a notice of appeal within that 14-day period, you waive or give up your right to take an appeal. If you wish to appeal, you have the right to be represented by an attorney and, if you cannot afford an attorney, the Court will appoint one to represent you at no cost or obligation to yourself. Ms. Waid will consult with you within that 14-day period, although it sounds like she has already. Do you understand what I've said about your right to appeal?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Any questions about that?

THE DEFENDANT: No, Your Honor.

THE COURT: All right.

Counsel, anything further from anyone?

MR. REICHLING: Nothing further from the United States, Judge.

MS. WAID: Nothing from the defense, Your Honor.

THE COURT: All right.

Mr. Crowther, I recommend you check with probation just to make sure you're all on the same page as to your requirements between now and then. Good luck.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: And we'll be in recess.

(Proceedings were concluded at 3:19 p.m.)

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CERTIFICATE OF REPORTER

UNITED STATES DISTRICT COURT)
MIDDLE DISTRICT OF FLORIDA)

I, Stacey E. Raikes, RMR, CRR, Official Court Reporter for the United States District Court, Middle District of Florida, do hereby certify, pursuant to Section 753, Title 28, United States Code, that I was authorized to and did stenographically report the foregoing proceedings; and that the foregoing pages constitute a true and complete computer-aided transcription of my original stenographic notes taken by the undersigned in the above-entitled matter to the best of my knowledge, skill, and ability.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand at Fort Myers, Lee County, Florida, this 12th day of August 2021.

Stacey E. Raikes

STACEY E. RAIKES, RMR, CRR
Official Court Reporter