Case Nos. 23-1008 & 23-1069

In the United States Court of Appeals
for the Tenth Circuit

United States of America,
Plaintiff-Appellee,

v.

Megan Hess,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Christine M. Arguello, District Judge
D.C. Case No. 20-cr-00098-CMA-GPG

Appellant's Consolidated Opening Brief

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Oral argument is requested.

September 22, 2023

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Prior or Related Appeals

Megan Hess's co-defendant Shirley Koch is appealing her sentence and restitution order in this Court in case numbers 23-1009 and 23-1078.

Jurisdiction

The district court had jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The district court entered judgment on January 5, 2023, but deferred the determination of restitution until a later date. R. vol. 1 at 474.[1] Mr. Hess timely filed a notice of appeal on January 8, 2023. *Id.* at 481. The district court held a restitution hearing on March 6, 2023, and ordered that the judgment be amended to add restitution. R. vol. 7 at 4. Ms. Hess filed a notice of appeal on March 12, 2023. R. vol. 6 at 16. After the district court entered the amended judgment on March 15, 2023, Ms. Hess filed an amended notice of appeal. *Id.* at 17, 24. This Court consolidated the appeals sua sponte. This Court has appellate jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Issues Presented

I. Whether the district court's method for calculating loss under U.S.S.G. § 2B1.1(b)(1) was erroneous because it:

> (1) failed to consider whether the medical research companies actually suffered an economic harm as a result of the fraudulent transactions; and (2) categorically refused to provide credits against loss, as mandated by application note 3(E).

II. Whether the restitution order, which was premised on the loss amount, was likewise erroneous.

III. Whether this Court should order reassignment to another judge upon remand.

[1] Record citations are to the volume filed in this Court and the page number in the bottom, right-hand corner of each page.

Statement of the Case

Megan Hess was the owner and operator of Sunset Mesa Funeral Directors (SMFD), a funeral home providing burial and cremation services in Montrose, Colorado. R. vol. 1 at 155-56. She also organized a nonprofit corporation known as Donor Services, a so-called body-broker service that provided human body parts to various companies for scientific, medical, or educational purposes. *Id.* at 155. Ms. Hess offered customers of the funeral home discounts on funeral services, namely cremation, if they consented to donating body parts to Donor Services. Some customers consented, the body parts were donated, and the customers received a discount. *Id.* at 6. Though some might find it macabre, such business was entirely legitimate, part of a large and legal industry in the United States. *See* R. vol. 3 at 105.

What was not legitimate, and what formed the basis of Ms. Hess's conviction, was that she often sold remains without consent and without applying any discount, effectively stealing the remains. R. vol. 1 at 156-57. In such cases, she falsely represented to the purchasing medical companies that the body parts had been donated with consent. *Id.* at 157. She further represented that the donated body parts were free of any disease, yet in some cases she knew the remains had been infected with a blood disorder, i.e., Hepatitis or HIV. *Id.* at 158-59. In order to perpetuate the scheme, Ms. Hess falsified donor authorization forms and lab reports. *Id.*

Ms. Hess ultimately pled guilty to one count of mail fraud in violation of 18 U.S.C. § 1341. *Id.* at 150. The district court, Judge Arguello, sentenced Ms. Hess to the

statutory maximum term of 20 years of imprisonment, well above the top of the guidelines range. *Id.* at 475. The district court also ordered restitution of more than $400,000 to the next of kin of those whose remains were sold without consent. *See* R. vol. 6 at 23. Ms. Hess now appeals her sentence and restitution order.

I. Ms. Hess pleads guilty to one count of mail fraud.

A grand jury indicted Ms. Hess and her mother Shirley Koch on six counts of mail fraud in violation of 18 U.S.C. § 1341 and three counts of transporting biohazardous materials in violation of 49 U.S.C. § 46312. R. vol. 1 at 21. Specifically, Counts One through Six alleged that, between April 2015 and June 2017, Ms. Hess mailed six shipments of body parts in furtherance of her fraudulent scheme. *Id.* at 26-27. Counts Seven through Nine alleged that three of those shipments contained infected remains in violation of various air transportation regulations. *Id.* at 27-29.

Pursuant to a plea agreement, the parties agreed Ms. Hess would plead guilty to one count of mail fraud, which carried a statutory range of 0-20 years of imprisonment, and in exchange the government would dismiss the remaining counts. *Id.* at 153-54.

The parties stipulated to a comprehensive factual basis for the offense, including that Ms. Hess's scheme spanned approximately eight years and involved the misappropriation of the remains of hundreds of individuals. *Id.* at 156-57. It also specifically detailed the fraud as to twelve individuals whose remains were mailed in April 2015. *Id.* at 159-165. For example, and perhaps most egregiously, the plea

agreement details that after one R.D. died, her daughter contacted SMFD to make funeral arrangements. *Id.* at 164-65. R.D.'s daughter consented to donating the body for scientific purposes. *Id.* at 165. However, after laboratory testing revealed that R.D. had hepatitis, Ms. Hess told the daughter R.D.'s remains could not be donated. *Id.* Nevertheless, Ms. Hess falsified a lab report to indicate that R.D. was disease-free, and she shipped R.D.'s head to a medical facility in Chicago. *Id.*

Although the parties stipulated to all the relevant facts, they significantly diverged on the appropriate guidelines calculation. They agreed that Ms. Hess was entitled to a three-level reduction for acceptance of responsibility under § 3E1.1 and that the offense involved more than 10 victims (a two-level enhancement under § 2B1.1(b)(2)), but they disagreed on the amount of loss involved in the offense, as well as the applicability of a slew of other enhancements. *Id.* at 171. The government maintained that all money paid to SMFD or Donor Services by any "confirmed" or "likely" victim—including over $700,000 for next of kin (NOK) victims and over $500,000 for medical companies who purchased remains—constituted "loss" under U.S.S.G. § 2B1.1(b), mandating a 14-level enhancement. *Id.* at 167, 171. The government asserted that eight other enhancements also applied, adding another 14 levels. *Id.* at 171.[2] According to the government's calculation, Ms. Hess's guidelines range was 151-188 months of imprisonment. *Id.*

[2] The other disputed enhancements were: a two-level enhancement for a "conscious risk of death or serious bodily injury" under § 2B1.1(b)(16); a four-level enhancement

II. The PSR adopts the government's loss calculation and other enhancements.

Following her guilty plea, a probation officer prepared a presentence investigation report (PSR). R. vol. 3 at 94. The PSR agreed with the government's guidelines calculation in full. *Id.* at 110-12. It also confirmed the parties' expectation that Ms. Hess had no criminal history whatsoever, and her criminal history category was therefore I. *Id.* at 112.

As for restitution, the PSR determined that all "confirmed" NOK victims were entitled to restitution for all money paid. *Id.* at 109. Tellingly, however, the PSR determined that no restitution should be paid to the medical companies:

> It was determined restitution should not be awarded to the companies that profited from the instant offense and no requests for restitution were received from the identified companies. While the companies purchased full bodies or body parts under false pretenses, the companies received a product as negotiated and also derived an economic benefit from the transaction.

Id.

Ms. Hess filed numerous objections to the PSR. R. vol. 1 at 193. As to the loss calculation, she asserted that the only actual loss suffered by any medical research company was the $13,575 one company paid for remains that the government seized

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for a large number of vulnerable victims under § 3B1.1(c); a two-level increase for a misrepresentation that the defendant was acting on behalf of a charitable or educational organization under § 2B1.1(b)(9)(A); a two-level enhancement for sophisticated means under § 2B1.1(b)(10)(C); a two-level aggravating role adjustment under § 3B1.1(c); and a two-level increase for abuse of public trust under § 3B1.3.

as evidence. *Id.* at 194. The other purchasers did not suffer any monetary harm because they actually received the body parts and derived an economic value therefrom. *Id.*

As for the NOK victims, Ms. Hess maintained the actual loss to them was not *all* money they paid, as the government and PSR maintained. An application note specifically provides that loss must be reduced by the value of services provided by a defendant. *Id.* at 199 (citing U.S.S.G. § 2B1.1, cmt. n.3(E)(i)). Here, Ms. Hess asserted, the PSR's loss calculation had to be offset by legitimate goods and services the NOK victims in fact received—for example, flowers, food, and death certificates. *Id.* at 204.[3] Using itemized receipts from the year 2015 as a guide, Ms. Hess estimated that 29% of the PSR's estimated loss amount was for goods provided and services rendered. *Id.* at 205; *see, e.g.*, *id.* at 221 (itemized statement showing cost of cremation, death certificates, etc.). Reducing the PSR's loss estimate by 29% would result in a loss to NOK victims of approximately $520,000.

[3] The complete list of legitimate goods and services was "urns, memorial folders, register books, floral, memorial service, reception/food/catering, video production, professional service fee, keepsakes, death certificates, mailing fees, fees to open and close graves, disaster pouches, visitation events, vaults, headstone foundations, setting foundation, obituaries, grave markers, custodian at church, musicians and clergy." *Id.* The proposed offsets did not include the cost of cremation. *Id.*

Accordingly, the total loss was not "more than $550,000" as required for the 14-level enhancement under § 2B1.1(b)(1)(H). At most, a 12-level enhancement was warranted. *See* § 2B1.1(b)(1)(G) (12-level enhancement for loss more than $250,000).[4]

In response, the government defended its loss calculation and the application of the enhancements. It maintained that the actual loss to the NOK victims was all money paid for funeral-related expenses and that this amount should not be offset by any credits against loss. The government's overarching theory was that all money paid by any confirmed or likely victim constituted loss because the victims would not have paid Ms. Hess any money had they known about the fraud. That is, "the victim NOK would never have paid Sunset Mesa a single dollar for funeral expenses if they had known the truth about defendant's business." *Id.* at 403. Likewise, "the medical company buyers made clear that they 'would not have purchased the remains had they known the remains were not, in fact, donated and were instead stolen.'" *Id.* at 402 (quoting plea agreement).

III. The district court sentences Ms. Hess to the statutory maximum sentence of 20 years in prison.

At the sentencing hearing, each party presented one witness in support of their loss calculation. R. vol. 5 at 15, 56. The government presented the testimony of an

[4] Ms. Hess also argued for additional offsets that would bring down the total loss below $250,000, in which case only a 10-level enhancement would apply. *See* R. vol. 1 at 205-208, 291. However, for present purposes, it is enough that the district court's loss calculation methodology erroneously increased the loss amount above $550,000.

FBI agent who explained that based on his investigation, including reviewing Ms. Hess's records and interviewing hundreds of potential victims, he determined there were over 500 confirmed and likely NOK victims. *Id.* at 19, 23. For the majority of victims, the government was able to determine the total amount of money they paid Ms. Hess. *Id.* at 26. For the minority of victims whose records were not available, the government estimated their loss by using the average amount that all customers paid Ms. Hess for funeral services. *Id.* at 27-28. In total, the agent estimated that NOK victims suffered losses of $727,148.21. *Id.* at 28. Utilizing a similar methodology—confirmed and likely victims with known or averaged payments—the government determined that the medical companies suffered losses of $527,145.70. *Id.* at 25. The total estimated loss for all victims was $1,254,293.90. *Id.* at 28.

Ms. Hess presented the testimony of a paralegal who reviewed all business records provided in discovery to determine appropriate credits against loss. *Id.* at 56-57. Looking at 2015 statements as a representative year, she "looked at all the goods and services that were actually provided to the next of kin," including "urns, memorial folders, video productions, catering, that kind of thing, and we came up with a percentage of 29.12 percent." *Id.* at 58.

The district court agreed with the government's loss calculation and overruled Ms. Hess's objection to the PSR. *Id.* at 77. Parroting the government's theory of loss, the district court found the "medical research companies . . . would not have done business with [SMFD] or defendant Hess had they known that the body parts and

bodies they received were stolen." *Id.* at 74. Thus, the district court determined that "the money paid to defendant Hess by the medical research companies" constituted loss. *Id.*

The district court applied a "similar rationale" to money paid by the NOK victims. *Id.* The district court noted that the NOK victims "would not have paid the defendant for these funeral services had they known the truth." *Id.* at 74. That is, "had they known about the fraud being perpetrated on them and their deceased love one by defendants . . . they would not have done any business [them]." *Id.* at 74-75. Thus, the district court concluded that "the monies paid by the next of kin" constituted the actual loss. *Id.* at 75.

Moreover, the district court declined to offset the loss amounts by goods and services provided. The district court acknowledged that loss "should be reduced, however, by the credits against loss which accounts for the value of any services defendant rendered." *Id.* at 72. "However," according to the district court, it "may decline to offset the loss calculation if the defendant's business dealings were [']systematically tainted with fraud.[']" *Id.* (quoting *United States v. Miell*, 661 F.3d 995, 1001 (8th Cir. 2008)). Here, it found the business was "systematically tainted with fraud such that all services were affected by fraud in some way." *Id.* According to the district court, "to allow defendant Hess and Koch to detract the price of services and tangible items legitimizes the profits that she fraudulently made. As such, the Court rejects Hess' calculation of loss." *Id.* at 76.

Accordingly, the district court held the 14-level enhancement applied. *Id.* at 74. After overruling every one of Ms. Hess's objections to the guideline enhancements, the district court determined Ms. Hess's total offense level was 34 and, based on a criminal history category I, her guidelines range was 151-188 months of imprisonment. *Id.* at 112. Applying an upward departure and an upward variance, the district court sentenced Ms. Hess to the statutory maximum term of 20 years of imprisonment. *Id.* at 213.

Ms. Hess timely appealed. R. vol. 1 at 481.

IV. The district court orders restitution.

At the government's request, the district court agreed to determine restitution at a separate proceeding. *See* R. vol. 5 at 10. Before the restitution hearing, Ms. Hess filed a supplemental objection to the PSR specifically addressing restitution. R. vol. 6 at 5. In it she reiterated that the district court should offset the NOK victims' loss in the same manner and for the same reasons set forth in her objection to the loss calculation under § 2B1.1(b)(1). *Id.* at 8. In a response, the government maintained that the district court should reject Ms. Hess's arguments as to credits against loss for the same reasons it did in calculating loss under § 2B1.1(b)(1). *Id.* at 13.

At the restitution hearing, the district court overruled Ms. Hess's objection for the same reasons articulated at the sentencing hearing:

> As to Defendant Hess's argument that restitution should be offset in the same manner and for the same reasons set forth in her earlier objection to loss, the Court has already ruled on that issue. The Court included in loss the amounts . . .

> the total amounts paid by next of kin for all services rendered by the defendants whether known or estimated. The Court declined to offset loss with credits for services provided. The Court adopts that same reasoning with respect to calculating restitution. In other words, none of the victims in this case would have sought funeral services from the defendants had they known what would be done to their loved ones.

Id. at 25.

Accordingly, the district court ordered restitution to NOK victims with known losses, which totaled over $400,000. *Id.* at 26. Ms. Hess timely appealed. *See* R. vol. 6 at 16, 35.

Summary of Argument

I. The district court's methodology for calculating loss under § 2B1.1(b)(1) was erroneous in two ways. First, the district court's rationale that all money the medical research companies paid to Ms. Hess constituted loss because they would not have done business with her had they known the truth is fundamentally flawed. The question for purposes of § 2B1.1(b)(1) is not whether the alleged victims *spent money* as a result of the fraud—it is whether they suffered an economic loss as a result of the fraud. Second, the district court erred in refusing to offset the NOK victims' loss by the value of legitimate goods and services provided. The guidelines expressly mandate credits against loss for goods and services. § 2B1.1 cmt. n.3(E). The district court's categorical refusal to apply any credits is plainly contrary to the guidelines and finds no support in the case law. Because the district court's flawed loss methodology

affected the guidelines range, the government will be unable to meet its burden to show the error was harmless.

II. The district court's restitution order similarly failed to account for the goods and services Ms. Hess provided to the NOK victims. Accordingly, the restitution order is likewise erroneous.

III. Upon remand, this Court should reassign Ms. Hess's case to another district court judge. First, it is likely that Judge Arguello will have substantial difficulty setting aside her belief that Ms. Hess must be held accountable for all money paid to her by all alleged victims regardless of whether it constitutes loss under § 2B1.1(b)(1). Second, throughout the sentencing hearing, Judge Arguello failed to maintain the appearance of impartiality by putting herself in the victims' shoes and ordering everyone, including Ms. Hess, to bow their heads for a moment of silence for the victims.

Argument

I. The district court's loss calculation was based on an erroneous methodology.

Under the Guidelines, the base offense level for a fraud offense is six or seven, but more than twenty enhancements can potentially apply. U.S.S.G. § 2B1.1(a), (b). One such enhancement is based on the amount of "loss" involved. § 2B1.1(b)(1). This Court reviews a "district court's loss calculation methodology de novo." *United States v. Evans (Evans I)*, 744 F.3d 1192, 1196 (10th Cir. 2014).

Here, the district court's loss methodology was erroneous in two ways. First, the district court's theory—that all money the medical research companies paid to Ms. Hess constituted loss because they would not have done business with her had they known the truth—is fundamentally flawed. The question for purposes of § 2B1.1(b)(1) is not whether the alleged victims *spent money* as a result of the fraud—it is whether they suffered an economic loss as a result of the fraud.

Second, the district court erred in refusing to offset the NOK victims' loss by the value of legitimate goods provided and services rendered. The guidelines expressly mandate credits against loss for services rendered. § 2B1.1 cmt. n.3(E). The district court's categorical refusal to apply any credits is plainly contrary to the guidelines and finds no support in the case law.

Because the district court's flawed loss methodology affected the guidelines range, the government will be unable to meet its burden to show the error was harmless. *United States v. Kieffer*, 681 F.3d 1143, 1169 (10th Cir. 2012).

A. The district court failed to consider whether the medical research companies suffered an economic harm.

The district court determined that "the money paid by the medical research companies was actual loss" because they "would not have done business with [SMFD] or defendant Hess had they known that the body parts and bodies they received were stolen." R. vol. 5 at 74. In other words, "[h]ad defendant Hess not falsely represented that the bodies and body parts were donated by means of legitimate informed

consent, the medical research companies would not have paid any money to the defendants." *Id.* The district court's reasoning completely missed the mark. Under § 2B1.1(b)(1), the question is not whether the victim *paid* money as a result of the fraud, it's whether the victim *lost* money as a result of the fraud. Because the district court failed to consider whether the medical research companies actually lost money as a result of the transactions, its loss methodology was incomplete and erroneous.

Although the guideline itself does not define "loss," a series of application notes clarifies its meaning. For purposes of § 2B1.1(b)(1), "loss is the greater of actual loss or intended loss." *Id.* cmt. n.3(A). Here, the district court's loss calculation was based on actual loss. "'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* cmt. n.3(A)(i). "'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money." *Id.* cmt. n.3(A)(iii). "Accordingly, pecuniary harm does not include emotional distress . . . or other non-economic harm." *Id.* Thus, as the term "loss" itself clearly implies, it is not enough that an alleged victim paid money or purchased something as a result the fraud. They must have suffered an actual loss, i.e., a pecuniary/monetary/economic harm, as well. The district court erred in determining that all money the medical research companies paid constituted "loss" without considering whether they suffered an economic harm.

Below, the government argued that the medical research companies "did not receive the benefit of the bargain they entered into with Hess, since the items they purchased were, in fact, stolen. Moreover, the defendants were unjustly enriched by

these fraudulent sales." R. vol. 1 at 402. The government then analogized this case to those involving stolen goods, citing *United States v. Wasz*, 450 F.3d 720, 727 (7th Cir. 2006). *Id.* However, none of this indicates that the medical research companies suffered an economic loss. It is certainly true that the medical research companies were deceived, and Ms. Hess made money off the transactions. But it does not necessarily follow that the medical research companies were the ones who suffered a loss.

The government's analogy to stolen goods cases helps demonstrate this point. In *Wasz*, for example, the defendants' scheme was stealing goods from home improvement stores and selling them on the internet. *Wasz*, 450 F.3d at 721. Significantly, the victims in *Wasz*, as in stolen goods cases generally, were the retailers from whom the goods were stolen, and the total loss was the value of the goods to the retailer-victims, i.e., the retail price. *Id.* at 729. Notably absent from the loss calculation is whatever the internet purchasers paid for the stolen goods. That's because the purchasers actually received the goods they paid for. Therefore, they did not suffer any economic harm, and they are not even considered victims under § 2B1.1. *See* cmt. n.1 (defining "victim" as "any person who sustained any part of the actual loss determined under subsection (b)(1)).

The same is true here. As the PSR recognized, while "the companies purchased full bodies or body parts under false pretenses, the companies received a product as negotiated and also derived an economic benefit from the transaction." R. vol. 3 at

109. Indeed, the PSR found the medical companies "profited from the instant offense." *Id.* Thus, absent some indication in the record that the medical research companies were forced to discard the remains or were otherwise unable to use the remains for their intended purposes, they simply did not suffer an economic harm as a result of the fraud.

To be sure, the parties did stipulate that the medical research companies would not have purchased the remains had they known they were stolen. Of course they wouldn't have. But the mere fact that they would not have knowingly purchased stolen remains does not mean that they automatically lost money as a result of the transactions.

Accordingly, the district court erroneously determined the medical research companies suffered a "loss" within the meaning of § 2B1.1(b)(1).

B. The district court erred in refusing to apply credits against loss to the NOK victims for goods received and services rendered.

Unlike the medical research companies, the NOK victims did suffer harm measurable in money.[5] However, the district court's loss calculation methodology was flawed for a different reason: it categorically refused to apply offsets for legitimate goods and services provided as required by the guidelines.

[5] At a minimum, the NOK victims were overcharged for cremations. SMFD offered free cremations where a whole body was donated and discounted cremations where parts were donated. *See* R. vol. 1 at 470. However, Ms. Hess charged NOK victims full price for cremations when remains were harvested and sold to the medical research companies. Thus, the NOK victims clearly suffered a monetary harm.

In addition to clarifying what constitutes "loss," the application notes also mandate "credits against loss." § 2B1.1 cmt. n.3(E). "Loss shall be reduced by . . . the fair market value of the property returned and the services rendered[] by the defendant or persons acting jointly with the defendant, to the victim before the offense was detected." *Id.* cmt. n.3(E). "Thus," this Court has said, "if we were to state the method for determining 'loss' for purposes of § 2B1.1(b)(1) as a mathematical equation, it would be loss equals actual loss (or intended loss) minus credits against loss." *United States v. Crowe*, 735 F.3d 1229 (10th Cir. 2013). The district court's refusal to follow this command was error.

The district court declined to apply any credits against loss because it found that the business was "systematically tainted with fraud such that all services were affected by fraud in some way." R. vol. 5 at 75. However, nothing in the application notes suggests that credits against loss are applied only when the goods and services are somehow independent of the fraud, nor that a district court has discretion to refuse credits against loss in such cases. On the contrary, the language of the application note is mandatory: "Loss shall be reduced by . . . services rendered." § 2B1.1 cmt. n.3(E)(i). As Ms. Hess demonstrated below, she did in fact provide goods and services to the NOK victims, and the district court was required to offset the value of those goods and services from the total loss amount under § 2B1.1(b)(1).

The district court again seemed to be hung up on the notion that if a victim would not have done business with the defendant had they known about the fraud,

then all payments necessarily constitute loss. (Indeed, at the subsequent restitution hearing, it expressly stated this as its rationale for refusing to apply credits against loss.) As discussed above, that is fundamentally incorrect as to the initial loss calculation. But it makes even less sense as basis for refusing to apply credits against loss. Presumably every fraud victim would say, with the benefit of hindsight, they would not have done business with the fraudster had they known about the fraud. If that were enough to negate the "credits against loss" mandate, then it would never apply.

In addition to being logically unsound, the district court's approach is also unsupported by any legal authority. In attempting to justify its decision to refuse credits against loss, the district court cited only two cases: *United States v. Miell*, 661 F.3d 995, 1001 (8th Cir. 2008), and *United States v. Jarvis*, No. 13-cr-2379, 2015 WL 7873740 (D.N.M. Nov. 16, 2015). Neither case supports the categorical denial of credits against loss—indeed, in both cases the district court *did* apply credits against loss. To the extent they suggest that some credits need not be applied under certain circumstances, those circumstances are not present here.

First, the district court's "systematically tainted with fraud" language comes from *Miell*. There, the defendant was a landlord who perpetuated a scheme to retain tenants' damage deposits. *Miell*, 661 F.3d at 997. Using "intended loss," the district court found that the defendant intended to fraudulently deprive all tenants of the entirety of their damage deposits. *Id.* at 1000-01. However, the district court also

subtracted the amount of deposits actually returned to tenants. *Id.* at 1001. Evidently, the district court did not further account for any damage deposit claims that may have legitimately been for repairs. Nevertheless, the Eighth Circuit held this total loss amount was reasonable based on "the government's evidence that [the defendant's] claims against damage deposits were 'systematically tainted with fraud,' leading the district court to conclude that it was 'difficult, if not impossible, to give him any credit for parts of his claims that might have been legitimate, if he had tried to assert those claims by legitimate means.'" *Id.* In other words, while it might be reasonable to assume that some of the defendant-landlord's damage claims were legitimately needed for repairs, it was "difficult, if not impossible" to determine which ones were valid. Thus, in the absence of any evidence the claims were legitimate, it was reasonable not to apply credits against loss.

That is not the case here. In presentencing filings and testimony at the sentencing hearing, Ms. Hess presented detailed invoices and identified 23 categories of goods and services she actually provided and the NOK victims actually received—e.g., flowers, food, and death certificates. Thus, unlike in *Miell*, it was not difficult or impossible to determine whether these goods and services were actually provided. It was uncontested that they were. Accordingly, *Miell* offers no support for the district court's decision to categorically refuse to apply any credits against loss here.

The only other case the district court relied on was *Jarvis*, an unpublished order from the District of New Mexico. There, the defendant was a marketing director for a

therapeutic tape company who was tasked with finding a new supplier. *Jarvis*, 2015 WL 7873740 at *1. The defendant identified a cheap supplier of low-quality tape and then formed a sham brokerage company to act as a middleman between the companies, greatly inflating the price his employer was paying for the new tape. *Id.* In determining loss under § 2B1.1(b)(1), the district court calculated intended loss as the full price of the contract. It then applied two credits against loss: (1) the true value of the low-quality tape; and (2) the services the defendant rendered, which was estimated as 15% above the manufacturing price, an average brokerage fee. *Id.* at *8. Accordingly, *Jarvis* clearly supports Ms. Hess's position that she is entitled to credits against loss for the goods and services she provided the NOK victims, and indeed she relied on *Jarvis* for that proposition below.

The district court, however, cherry-picked two statements from *Jarvis* in support of her wholesale denial of any offsets. First, the district court pointed out that the *Jarvis* court "noted that credits for services rendered may be limited when such services conferred no value on the fraud victim." R. vol. 5 at 73. And, the district court stated, "Similar to *Jarvis*, to allow defendant Hess and Koch to detract the price of services and tangible items legitimizes the profits that she fraudulently made." *Id.* at 76.

In context, these statements from *Jarvis* do not support the district court's decision in the slightest. The *Jarvis* court made these statements in declining to adopt the defendant's position that his services should be valued based on what the

company paid a later legitimate broker, including a 19% fee. *Jarvis*, 2015 WL 7873740 at *8. The district court rejected this valuation because the legitimate broker "provided both superior products and superior services." *Id.* Additionally, it believed that crediting the defendant as equivalent to the legitimate broker would allow the defendant to offset a significant profit margin, but that fraudulent "profit margin conferred no value upon" the victim. *Id.* at *9. "To allow the Defendants to subtract the full price that an honest broker would charge legitimizes some of the profit they fraudulently made." *Id.*

Whether the *Jarvis* court was correct that credits against lost should not include any profit margin is debatable. The application note requires credits for the "market value" of goods and services, and "market value" necessarily includes profit margins. But that's beside the point, because the district court did not rely on *Jarvis* to merely reduce the amount of credit for goods and services to account for fraudulent profits. It relied on *Jarvis* to refuse *any* credits against loss, which it clearly does not support. As in *Jarvis*, the district court here was required to offset the total loss amount by the value of goods and services provided. Its failure to do so was error.

In short, the district court's categorical refusal to apply any credits against loss for the goods and services Ms. Hess provided has no support in the guidelines text or relevant case law. Indeed, it is directly contrary to the plain language of the guidelines, which mandates credits against loss for the market value of goods and services

provided. Accordingly, the district court employed an erroneous loss calculation methodology.

C. The district court's erroneous loss methodology was not harmless.

The government bears the burden of proving that the district court's loss-calculation error was harmless. *United States v. Kieffer*, 681 F.3d 1143, 1169 (10th Cir. 2012). It cannot meet that burden here.

As demonstrated above, except for one medical company who paid $13,575 for remains that were seized by the government, there is no record evidence that any of the medical research companies suffered an economic loss as a result of the offense. Tellingly, none of them even asked for restitution. As to the NOK victims, Ms. Hess presented evidence that at least 29.12% of the NOK victims' loss amount was for goods and services provided and should have been credited against loss. Properly crediting this amount, the total loss to NOK victims is $515,402.65.

Adding the two loss amounts yields a total loss of $528,977.65, which is less than the $550,000 required for the 14-level enhancement. With a 12-level enhancement, Ms. Hess's guidelines range is 121-151 months, significantly lower than the 151–188-month range on which her sentenced was based. Accordingly, the district court's error was not harmless. *See Molina-Martinez v. United States*, 578 U.S. 189, 204 (2016) (holding that an error that affects the guidelines range is presumptively prejudicial).

II. The district court's restitution order suffered from the same error as its guidelines loss calculation.

The district court ordered restitution to the NOK victims under the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A. Ms. Hess objected to the amount of restitution on the ground that the loss amount must be reduced by the value of goods and services she provided, incorporating her argument as to the loss calculation under § 2B1.1(b)(1). The district court overruled her objection for the same reasons she overruled her objection to loss under § 2B1.1(b)(1). This Court "review[s] the restitution order for an abuse of discretion, which requires [it] to review factual findings for clear error and application of the MVRA de novo." *United States v. Howard*, 784 F.3d 745, 750 (10th Cir. 2015).

"The MVRA requires that a defendant convicted of an offense against property, including any offense committed by fraud or deceit, be ordered to pay restitution to victims of the offense." *Id.* at 749 (citing 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii)). "Payment is to be made to 'an identifiable victim or victims [who] suffered . . . pecuniary loss." *Id.* (quoting § 3663A(c)(1)(A)(ii), (B)). A "district court may not order restitution in an amount that exceeds the actual loss caused by the defendant's conduct, which would amount to an illegal sentence." *United States v. Ferdman*, 779 F.3d 1129, 1132 (10th Cir. 2015).

For the same reasons discussed above, a portion of the money NOK victims paid to Ms. Hess was for goods and services they actually received. Thus, that money

is not actual loss for which restitution may be ordered. Accordingly, the district court's restitution order is erroneous.

III. This Court should remand to a different judge.

This Court has "an inherent power to remand cases for reassignment to different judges." *United States v. Evans (Evans II)*, 677 F. App'x 469, 475 (10th Cir. 2017) (citing *O'Rourke v. City of Norman*, 875 F.2d 1465, 1475 (10th Cir. 1989)). In the absence of proof of personal bias, this Court looks to three factors to determine whether reassignment to another judge is appropriate:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,
> (2) whether reassignment is advisable to preserve the appearance of justice, and
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Slinkard, 61 F.4th 1290, 1296-97 (10th Cir. 2023). Although this Court "rarely exercises this power," *Evans II*, 677 F. App'x at 475, it is appropriate to do so here.

A. It will be substantially difficult for the district court to set aside her belief that all money victims paid Ms. Hess constitutes loss.

It is reasonable to expect it will be substantially difficult to disabuse the district court of the notion that all money paid by the victims necessarily constitutes loss because they would not have done business with Ms. Hess had they known about her fraud. Her commitment to this idea caused her to not only miscalculate the initial loss

amount, it drove her decision to categorically refuse any credits against loss despite no legal support for doing so.

It would not be the first time that Judge Arguello had difficulty setting aside her original views regarding the appropriate loss amount following a remand from this Court. *See Evans II*, 677 F. App'x 469. In *Evans I*, Judge Arguello determined that the victims' entire investments constituted loss. *Evans I*, 744 F.3d at 1195. However, this Court remanded because the district court failed to account for (1) the fact that the initial investments were not induced by fraud (the fraud occurred much later, only after the venture was not successful) and (2) the effect of unforeseeable market conditions (namely, the 2007-08 financial crisis). *Id.* at 1196-98. On remand, the government conceded it could not prove loss under the methodology required by this Court. Undeterred, the district court sua sponte recalculated loss under a novel theory and reapplied the same loss enhancement, in violation of this Court's mandate. Remanding again, this Court reassigned the case to a different judge based on her unwavering beliefs that the defendant "stole" $12 million and that "Americans do not take white collar crime seriously enough." *Evans II*, 677 F. App'x at 475-76.

It is reasonable to expect a similar situation to play out here. The district court was adamant that all money the victims paid to the defendant constituted loss under § 2B1.1(b)(1) notwithstanding that the medical research companies did not suffer any economic harm and the NOK victims received goods and services. On remand, it would be substantially difficult for Judge Arguello to set these views aside. Moreover,

as in *Evans II*, she reiterated her long and firmly held belief "that with respect to white collar fraud cases, the sentencing guidelines are quite lenient" and do "not adequately account for the seriousness of the offense, provide adequate deterrence, or sufficiently protect the public and their innocent victims from infliction of further harm at the defendants' hands." R. vol. 5 at 193. "Thus," she acknowledged, "in white collar fraud cases, I am usually inclined to impose a sentence that upward departs from the guidelines range." *Id.* at 193-94. Accordingly, as in *Evans*, it is reasonable to expect that Judge Arguello will have substantial difficulty setting aside her view that Ms. Hess must be accountable for all money paid by any purported victim, regardless of whether it accurately reflects "loss" under § 2B1.1(b)(1).

B. Reassignment is advisable to preserve the appearance of justice.

"[I]t is not solely the reality of actual bias or prejudice but also the appearance of impropriety that [this Court] must guard against." *See Slinkard*, 61 F.4th at 1296. Here, reassignment is necessary to avoid the appearance of bias because, at times, the district court appeared to blur and even cross the line separating neutral arbiter and victim advocate.

The sentencing hearing was understandably a difficult one for everyone. Thirty next-of-kin victims spoke, describing the immense pain they felt when they lost a loved one, a pain they had to relive when they found out what happenned to their loved ones' remains. R. vol. 5 at 113-185. Most of them asked the court to impose the maximum possible sentence. *See, e.g.*, *id.* at 116. Several asked for additional

punishments such as immediate remand to custody, that Ms. Hess and her mother serve time in different prisons, and that they not be eligible for parole or even good-time credits. *See, e.g.*, *id.* at 127, 131. Additional victims and members of the public appeared by VTC from which there were multiple outbursts throughout the hearing. For example, one unidentified VTC speaker called out, "she's a damn bitch." *Id.* at 86. Judge Arguello called it the "most emotionally draining case I have handled on my time on the bench." *Id.* at 189.

Under these circumstances, it was all the more important that the judge steadfastly remain neutral and avoid any appearance of bias. Yet, on two occasions in particular, the district court failed to do so.

First, in ruling on the vulnerable-victim enhancement, Judge Arguello unnecessarily injected her own personal experience grieving the unexpected loss of a loved one, discussed it in significant detail, and expressly relied on it in finding that the NOK victims were vulnerable.[6] Typically, the vulnerable-victim enhancement requires specific findings that particular victims were in fact unusually vulnerable—

[6] "And I will tell you just a personal anecdote. I know that when my husband of 45 years died unexpectedly four years ago, I found myself operating in a daze. My mind was running 100 miles an hour, but there was no thought. I was aimlessly going around in circles, unable to focus. I couldn't sleep, but I didn't want medication to make me sleep. Completely routine and simple tasks seemed overwhelming and impossible. The efficient way that I was able to juggle my work and my home life prior to the death of my husband suddenly disappeared, along with my ability to cope and manage the stress. I was essentially on autopilot. And when I did go back to work, I told my staff they had to watch me, because while I was working, I wasn't all there. And so they needed to review all the work that I did." R. vol. 5 at 91-92.

generalizations do not suffice. *See United States v. Tissnolthtos*, 115 F.3d 759, 726 (10th Cir. 1997). Thus, Judge Arguello's personal experience grieving the loss of a loved one in her own unique circumstances was largely irrelevant to the analysis. In gratuitously sharing such a deeply personal story, Judge Arguello appeared to take herself out of the role of neutral arbiter and place herself into the shoes of the victims. It was inappropriate to do so and gave the appearance of bias.

Second, clearly crossing the line between neutral arbiter and victim advocate, Judge Arguello sua sponte ordered everyone in the courtroom, including Ms. Hess, to bow their heads and hold a moment of silence for the victims:

> At this time, I would like us to take a minute of silence to honor all of the deceased victims and their families. So, if you would just bow your head and think whatever you want to think, but I think we just need to have this moment of silence.

R. vol. 5 at 190.

To be sure, there is nothing inherently inappropriate about a moment of silence for victims. Had the government requested one on its own time, it would have been a respectful gesture and wholly unobjectionable. That's because in our adversarial system of justice, the role of victim advocate at sentencing is thrust upon the government. The district court, on the other hand, must steadfastly remain neutral. By sua sponte ordering everyone to bow their heads in a moment of silence for the victims, Judge Arguello appeared to abandon that neutrality.

Finally, it certainly did not help the appearance of bias that the district court overruled Ms. Hess's objections to the PSR on every conceivable ground[7]; sua sponte applied an upward departure provision without the requisite notice[8]; gave short shrift to Ms. Hess's extensive and well-reasoned sentencing statement and variance request[9]; and upwardly varied to the statutory maximum sentence of 20 years of imprisonment, as requested by the victims, instead of the guideline sentence the government requested.[10]

Under these circumstances, the district court failed to maintain the appearance of neutrality. Indeed, the district court seemed to view this case solely through the

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[7] For example, as an additional ground supporting the vulnerable victim enhancement, the district court also determined that the dead bodies themselves qualified as vulnerable victims. R. vol. 5 at 90. This plainly contradicts common sense and this Court's precedent. *United States v. Shumway*, 112 F.3d 1413 (10th Cir. 1997) ("[W]e hold the skeletal remains in this case could not constitute a 'vulnerable victim' for purposes of sentencing enhancement under § 3A1.1(b).").

[8] Rule 32(h) requires a district court provide reasonable notice if it is contemplating a departure on a ground not identified in the PSR or in the parties prehearing submissions. Fed. R. Crim. P. 32(h). Without notice, the district court expressly based the sentence in part on a departure for substantial non-monetary harm under § 2B1.1 cmt. n.21(A). R. vol. 5 at 194; R. vol. 4 at 582.

[9] Ms. Hess presented a 45-page sentencing statement that was thorough, thoughtful, and compelling, as well as a mitigation memo prepared by a forensic social worker. R. vol. 1 at 415-459. The district court summarily denied her variance request over two pages of transcript. R. vol. 5 at 192-93. The district court found she was "attempting to justify her conduct by arguing that she was mentally impaired" and that she "refuses to assume any responsibility." *Id.* at 93. Of course, Ms. Hess never said her conduct was "justified," and she accepted responsibility by pleading guilty, for which she received a three-level reduction for acceptance of responsibility.

[10] While Ms. Hess asserts the issues discussed *supra* nn.7-9 were errors, she has not asserted that they satisfy all four elements of plain error. Nevertheless, these errors contribute to the appearance that the district court was biased against Ms. Hess.

lens of the NOK victims at the expense of appearing to take a measured, impartial approach to sentencing.

C. Reassignment will not entail waste and duplication out of proportion to the gain in preserving the appearance of fairness.

Much of what the district court will be tasked to do on remand is what Judge Arguello did *not* do at the initial sentencing, i.e., determine whether the medical companies suffered any economic harm and what credits must be applied against the NOK victims' loss totals. Thus, there will be no duplication in that regard. To the extent another judge will have to get up to speed on the rest of the case in order to impose a fair and impartial sentence, that effort is more than justified to preserve the appearance of fairness in this case. Accordingly, reassignment is appropriate.

Conclusion

This Court should vacate the judgment and remand for resentencing before a different judge.

Statement Concerning Oral Argument

Oral argument is requested because counsel believes it will aid the court's resolution of the issues raised in this appeal.

Respectfully submitted,

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