NOS. 23-1008 & 23-1069

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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**UNITED STATES OF AMERICA**,
PLAINTIFF-APPELLEE,

V.

**MEGAN HESS**,
DEFENDANT-APPELLANT.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE CHRISTINE M. ARGUELLO
D.C. NO. 20-CR-00098-CMA-GPG

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# ANSWER BRIEF OF THE UNITED STATES

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COLE FINEGAN
United States Attorney

ELIZABETH S. FORD MILANI
Assistant U.S. Attorney
1801 California Street
Suite 1600
Denver, CO 80202
Telephone: (303) 454-0100

Attorneys for Appellee

**ORAL ARGUMENT IS NOT REQUESTED**

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## STATEMENT OF RELATED CASES

Hess's co-defendant, Shirley Koch, is also appealing her sentence. *See United States v. Koch*, Nos. 23-1009 & 23-1078 (10th Cir.). Koch separately appealed the district court's ruling on a protection order in this case. Koch's counsel has filed an *Anders* brief in that matter. *See United States v. Koch*, No. 23-1259 (10th Cir.).

## STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. Final judgment was entered on January 5, 2023. I:474. Hess filed a timely notice of appeal three days later. I:481.

The amended judgment, which included the restitution amount, was entered on March 15, 2023. VI:18, 23. Hess filed an amended notice of appeal the next day. VI:35-36.

This Court consolidated the cases and has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

## STATEMENT OF THE ISSUES

Hess, the former owner of a funeral home, stole human bodies and body parts to sell for profit instead of cremating them and returning the remains to the decedents' families. She pleaded guilty to one count of wire fraud. She challenges her 20-year sentence.

**I.** In discerning loss under the U.S. Sentencing Guidelines, did the district court correctly conclude that:

**(A)** the unwitting buyers of the stolen human remains suffered financial harm in the amount they paid to Hess for a product she did not deliver; and

**(B)** Hess was not entitled to reduce the loss amount to account for the various goods and services she provided to victims, because those goods and services were inseparable from the fraudulent scheme and had no value?

**(C)** Even if the district court incorrectly calculated either category of loss (which it did not), was such error harmless because the remaining loss amount would still support the court's Guidelines enhancement? Moreover, was any

Guidelines error harmless because the record shows the court based Hess's sentence on factors *other than* the Guidelines?

**II.** Did the district court properly calculate the restitution amount owed to the next-of-kin victims such that the victims were returned to their financial positions before the offense occurred?

**III.** If this Court remands for resentencing—which is not warranted—should it reassign this matter to a different judge, even though:

**(A)** the record provides no reason to believe the district court here would have substantial difficulty applying a remand order,

**(B)** the record shows no appearance of partiality, and

**(C)** reassigning this matter would result in waste and duplication of resources out of proportion to any gain in the appearance of fairness?

## STATEMENT OF THE CASE

### I. In her position as a funeral home director, Hess steals hundreds of bodies and body parts instead of cremating them, then sells them for profit.

This consolidated appeal stems from a grisly scheme to defraud that spanned eight years. Hess owned and operated Sunset Mesa Funeral Directors between 2011 and 2018. I:155-56. Hess's mother and co-defendant, Koch, worked at Sunset Mesa under Hess's direction. I:156. Hess frequently promised grieving families (the next-of-kin victims) that the funeral home would cremate their loved ones and return their loved ones' cremated remains (cremains) to them. I:156.

Those assurances were lies. Hess operated a second business out of the funeral home, Donor Services, which sold whole bodies and body parts to buyers. Those buyers used the human remains for educational, medical, or scientific purposes. *E.g.*, I:155-57. The sales inventory for Donor Services came from decedents that Hess and Koch had promised to cremate or prepare for burial. *E.g.*, I:156-57, 159-65. Hess was guaranteed "a constant supply of bodies for her

scheme" by advertising the lowest price in the area for cremations. I:166.

In some instances, Hess or Koch persuaded next-of-kin victims seeking cremation services to donate small portions of their loved ones' bodies, assuring those victims that the donations would be used for research or to help living recipients. I:157; *see also* V:17-18. Koch and Hess sold those "donated" body parts, as well as other body parts beyond those that the next-of-kin victims had authorized, for purposes to which the next-of-kin victims had not agreed. I:157.

In other instances, next-of-kin victims would explicitly tell Hess or Koch that they did *not* want to donate any portion of their loved ones' bodies, but Hess and Koch sold those bodies or body parts anyway. I:156-57. Other times, Hess and Koch said nothing at all about "donation" to grieving families before selling the remains of those next-of-kin victims' loved ones. I:156. In *no* instance did the next-of-kin victims (corresponding to 560 decedents) agree that Hess and Koch could sell their loved ones' bodies or body parts for profit. I:157.

The lies did not end there. Hess handled the advertising for Donor Services and marketed to buyers that the bodies had been "legitimately and freely donated." I:156-57. To bolster those claims, Hess and others created donor authorization forms for some of the decedents. I:157; *see also* V:21. Some of those forms were signed by next-of-kin victims (who had been misled about "donation"). V:18. Other forms had fake signatures. I:158; V:18, 21-22.

Many of the Donor Services buyers required that the human remains they purchased be free of infectious diseases like HIV and hepatitis. I:158. Hess forged dozens of laboratory results to purport that the decedents were not infected with various diseases when that was not true. I:158-59. The Donor Services buyers would never have purchased those human remains from Hess—and would not have paid her anything—had they known the human remains were infected with disease. I:159.

To hide the fact that whole bodies or body parts had been sold instead of cremated, the funeral home returned cremains to decedents' loved ones that had been supplemented with the cremains of other people. I:166. One former employee recounted how Hess

and Koch used a "large bag of ashes" to "fill up small keepsake containers for family members." IV:16. Some next-of-kin victims received cremains that did not come from their loved ones at all. *E.g.*, V:164-65.

Hess was the leader of the scheme. I:156. She handled most meetings with next-of-kin victims, advertised the body parts for sale, and interacted with the Donor Services buyers. I:156. She arranged for bodies and body parts to be shipped to buyers. I:159. And she combined her two businesses to duck governmental oversight, which allowed "her to continue her scheme for nearly a decade unabated." I:168.

## II. Hess pleads guilty. The Probation Office agrees with the government that she is responsible for more than $1.2 million in loss.

The government charged Hess and Koch with six counts of aiding and abetting mail fraud (18 U.S.C. §§ 1341 and 2) and three counts of aiding and abetting transporting hazardous materials (49 U.S.C. § 46312 and § 2). I:21-31. Hess (and Koch) pleaded guilty to one count of aiding and abetting mail fraud. I:153-73. The government agreed to dismiss the remaining counts. I:153-54.

The parties disagreed about the loss attributable to Hess's criminal conduct, as well as the applicability of other Guidelines enhancements. *E.g.*, I:167-70. Those disputes led to vastly different advisory Guidelines sentencing ranges: The government calculated a range of 151 to 188 months, and Hess calculated a range of 21 to 27 months. I:172. Nevertheless, Hess acknowledged in the plea agreement that the court could impose any sentence up to the statutory maximum of 20 years in prison. I:154, 172-73.

The Probation Office agreed with the government's Guidelines calculation for Hess. IV:28. The PSR asserted that the "loss" amount, the key to discerning the wire fraud base offense level under the Guidelines, totaled more than $1.2 million. That sum came from two categories of loss: about $527,000 arising from the sale of stolen body parts to the Donor Services buyers and about $727,000 arising from the next-of-kin victims' payments to the funeral home for services with respect to 560 decedents. IV:17, 19; *see also* I:166-67. Because that total loss exceeded $550,000, but not $1.5 million, the PSR added 14 levels to Hess's base offense level under U.S.S.G. § 2B1.1(b)(1)(H).

The PSR also concluded that Hess should pay restitution to the next-of-kin victims in an amount matching their Guidelines loss amount, plus any additional restitution requests from those victims. IV:18-19, 29, 32, 39; IV:40-56 (breakdown of requested restitution). The PSR asserted that the Donor Services buyers should not receive restitution. IV:18.

### III. At sentencing, the district court rejects Hess's objections to loss and finds that the applicable Guidelines range is 151 to 188 months in prison.

Hess objected to both categories of loss. I:193-208. She contended that the Donor Services buyers suffered no loss at all because they received what they paid for, with the exception of one medical research company that never received the human remains it purchased for $13,575. I:193-94, 196. She also claimed that the next-of-kin victims suffered no financial loss at all, only an emotional loss. I:196.

Alternatively, Hess argued that if the court accepted the PSR's and the government's loss assertions with respect to the next-of-kin victims, the court had to offset that loss amount to account for the "legitimate" goods and services she provided, for example, urns,

printed materials, flowers, and headstones. I:197-205. According to Hess, about 29% of the money each next-of-kin victim paid to Sunset Mesa was used for those legitimate goods and services. I:205; *see also* V:58-60, 65. So, she argued, the loss attributed to the next-of-kin victims had to be reduced by that percentage. I:205.

At sentencing, the court rejected Hess's objections to loss. V:77. Beginning with the Donor Services buyers, the court explained those victims relied upon Hess's representations that the decedents were freely donated (and, in some cases, disease-free), and the buyers would not have purchased those remains from Hess at all if they had known the truth. V:73-74. Therefore, the court continued, all the money those buyers paid to Hess (about $527,000) was the "reasonably foreseeable pecuniary harm resulting directly from fraud[.]" V:74.

Similarly, the court rejected Hess's claim that the next-of-kin victims suffered no financial harm at all. Again, the court relied on Hess's stipulation that those victims would not have paid Hess anything for cremation and funeral services if they had known the truth, so the money those victims paid to Hess was the "reasonably

foreseeable pecuniary harm resulting directly from the fraud[.]" V:74-75.

Nor was Hess entitled to offset the next-of-kin victims' loss amount (about $727,000) for the purportedly legitimate goods and services Hess provided to them. V:75. The court reasoned that all of Hess's interactions with those victims were steeped in fraud in furtherance of her scheme, and that permitting Hess to offset the loss would "legitimize[]" the profit she fraudulently made. V:75-76.

After resolving other Guidelines objections, the court agreed with the government and the PSR that the applicable advisory sentencing range was 151 to 188 months in prison. V:77, 112, 191.

## IV. The court sentences Hess to the statutory maximum and orders her to pay restitution.

After more than two-dozen next-of-kin victims addressed the court about how they had been traumatized by Hess's and her co-defendant's conduct, V:113-85, the court turned to sentencing Hess. It examined her history and characteristics, concluding those factors did not outweigh the nature of Hess's offense. V:191-93. The court opined that, generally, the Guidelines ranges for white-collar fraud offenses inadequately address statutory sentencing factors under 18

U.S.C. § 3553(a), like the seriousness of the offense or the necessity of deterring future criminal conduct and protecting the public. V:193.

The court continued that, in this case, the Guidelines were inadequate to properly address the "incredibly heinous" facts. V:194. Accordingly, the court both varied and departed upward, sentencing Hess to the statutory maximum term of 20 years in prison. V:213; *see also* IV:582 (statement of reasons).

At a later hearing, the court found that Hess was not entitled to offset restitution owed to the next-of-kin victims. IV:14-16, 25. Thus, the court ordered Hess to pay about $435,000 in restitution to them. IV:25-26; VI:24.

## SUMMARY OF ARGUMENT

**I.** The district court properly calculated the loss amount under the Guidelines and increased Hess's base offense level in accord with that amount.

To start, the Donor Services buyers suffered pecuniary harm because they did not receive what they paid for: freely donated and

disease-free human remains. As Hess stipulated, those buyers would not have paid Donor Services anything if they had known how Hess obtained the human remains that she then sold. And at least one district court in this Circuit has concluded that a victim suffers economic harm when the nature of the good or service they purchase is so different from what they were promised that they never would have done business with the defendant if they had known the truth.

Next, the district court properly declined to reduce the next-of-kin victims' loss amount to account for the so-called legitimate goods and services Hess provided to those grieving families, like urns, flowers, and headstones. The Guidelines direct the court to offset the loss amount to reflect the fair market value of the goods and services conferred on the victims. But where no value is provided, a defendant is not entitled to an offset. The record and common sense here show that the goods and services Hess provided had no value to the next-of-kin victims because those goods and services were all permeated with, and inseparable from, Hess's fraud.

Given all this, the district court properly concluded that the loss attributable to Hess's criminal offense was more than $1.2

million. Because that amount was more than $550,000, but less than $1.5 million, the court properly applied the 14-level base offense enhancement under § 2B1.1(b)(1)(H).

But even if this Court accepts one of Hess's loss arguments and not the other—the Donor Services buyers suffered no economic harm or that the court should have reduced the loss attributable to the next-of-kin victims to reflect the goods and services Hess provided—any error is harmless. The resulting loss under either scenario would still exceed $550,000, the threshold for the Guidelines enhancement the district court applied.

Moreover, even if the Court miscalculated the applicable Guidelines range—which it did not—that error was still harmless. The district court relied on factors other than the Guidelines in imposing sentence: the statutory maximum and the sentencing factors in § 3553(a). Indeed, the court explained that the Guidelines range was inadequate here. And the court provided a thorough and reasoned basis to impose the statutory-maximum sentence it selected, relying on the egregiousness of the criminal conduct, the

serious trauma the offense inflicted on the victims, and the needs to protect the public and deter future criminal activity.

Thus, even if this Court remanded this case for the district court to recalculate the Guidelines range, the record shows that the court would impose the same sentence.

**II.** For a similar reason that the district court properly declined to offset the next-of-kin victims' loss, the court also properly declined to reduce the restitution amount to account for goods and services Hess provided. Hess returned no value to the next-of-kin victims because her interactions with them, and the goods and services she provided to them, were inseparable from and steeped in fraud. Moreover, the goal of restitution is to return victims to their position before the offense conduct. The restitution order here did exactly that.

**III.** This Court committed no error in sentencing Hess. But even if it did, this Court should not reassign this case to a different judge for resentencing.

The record in this case provides no reason to believe that the sentencing court would have substantial difficulty applying a remand order. The district court disagreed with Hess's objections on loss, but

it did not state that it believed, or wished, the loss amount was higher than what it found. And while the court opined that the Guidelines ranges for white-collar offenses are typically too low to address the purposes of sentencing, that doesn't mean that the court would be unable to apply a remand order resulting in an even lower loss amount.

Nor does the record show an appearance of partiality. The court illustrated a point about human nature—pertinent to a different Guidelines enhancement—using a personal anecdote, and it honored the 560 decedent victims before sentencing Hess. A judge is not required to ignore its own experiences in coming to common-sense conclusions; nor is it precluded from showing empathy or sympathy toward victims. Hess's other passages that she claims raise an appearance of partiality are no more than adverse rulings, which do not give rise to an appearance of bias.

No reversible error occurred. Regardless, reassignment to a different judge is not warranted.

## ARGUMENT

### I. The district court properly calculated loss under the Guidelines and increased Hess's base offense level accordingly.

**Issue raised and ruled upon:** Hess contended in the district court that she was responsible for only around $13,000 in loss: the amount one Donor Services buyer paid to her without receiving any human remains in return because those remains were seized as evidence. I:196; *see also* V:67-68. Hess argued that the next-of-kin victims suffered no financial loss, but even if they did, their loss had to be offset to account for the goods and services Hess provided to them. I:196-205; *see also* V:68.

The district court rejected each argument and concluded that the loss was more than $1.2 million. It therefore added 14 levels to Hess's base offense level under § 2B1.1(b)(1)(H). V:74-77.

**Standard of review:** Because the "sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence[,]" the court's ultimate "loss determination is entitled to appropriate deference." § 2B1.1 cmt. n.3(C). This Court "may disturb the district court's loss determination—and consequent

Guidelines enhancement"—only if the district court's conclusion was clearly erroneous. *United States v. Mullins*, 613 F.3d 1273, 1292 (10th Cir. 2010).

An error is clearly erroneous if it lacks any support in the record or leaves this Court with the "definite and firm conviction that a mistake has been made." *Id.* (citation omitted). "To be clearly erroneous, 'a finding must be more than possibly or even probably wrong; the error must be pellucid to any objective observer.'" *Id.* (citation omitted).

Hess contends her challenges to loss are reviewed de novo. Opening Br. at 12. To be sure, this Court reviews de novo the loss calculation methodology. *E.g.*, *United States v. Washington*, 634 F.3d 1180, 1184 (10th Cir. 2011). But Hess does not appear to challenge the methodology the court adopted here: Where records existed, the government tallied up prices that Donor Services buyers and next-of-kin victims paid to Hess; where records did not exist, the government used existing records to create an average price the buyers and victims paid per decedent; and then the government added all those amounts to account for 560 total decedents. *E.g.*, I:166-67; V:23-28,

69-70. Instead, Hess challenges the court's factual conclusions underlying the court's loss calculation: The Donor Services buyers and next-of-kin victims suffered pecuniary harm, those victims received nothing of value from Hess, and the victims' pecuniary harm was the amount they paid to Hess.

Regardless, Hess's claims fail under any standard of review.

**Argument:** In wire fraud cases, the Guidelines direct the district court to increase the defendant's base offense level according to the amount of "loss" the defendant causes. § 2B1.1(b)(1). "Loss" is the greater of the actual or intended loss. § 2B1.1 cmt. n.3(A). "Actual loss" is the "reasonably foreseeable pecuniary harm that resulted from the offense." § 2B1.1 cmt. n.3(A)(i). "Pecuniary harm" means harm that's monetary or "readily measurable in money." § 2B1.1 cmt. n.3(A)(iii).

If the loss attributable to the defendant is more than $250,000, the Guidelines direct the court to add 12 levels to the defendant's base offense level. § 2B1.1(b)(1)(G). If the loss is more than $550,000, the Guidelines direct the court to add 14 levels. § 2B1.1(b)(1)(H). The district court "need only make a reasonable

estimate of the loss[,]" § 2B1.1 cmt. n.3(C), not "a perfect accounting[,]" *Mullins*, 613 F.3d at 1292.

Hess contends that the total loss was less than $550,000, so the court should have added 12 levels, not 14, to her base offense level. *Compare* Opening Br. at 7 n.4, 22, *with* V:77. But the district court properly calculated the loss. Regardless, any error is harmless.

### A. The court properly concluded that the Donor Services buyers suffered pecuniary harm in the amount they paid to Hess for freely donated and disease-free remains.

The district court concluded that the loss attributable to the Donor Services buyers was $527,145.70, the total amount those buyers paid to Hess for what they believed were freely donated and disease-free human remains.[1] V:70, 73-74. On appeal, Hess contends the district court never properly analyzed whether the Donor Services buyers suffered pecuniary harm. Opening Br. at 14.

[1] The government's estimated loss for the Donor Services buyers was conservative. Bank records showed that Hess took in more than $1.2 million just with respect to Donor Services. I:166. Because of poor record keeping, however, law enforcement officers "were often only able to determine the amounts charged for a portion of" the decedents' remains, and those known amounts were used to determine the average price for remains. I:167.

She continues they did not because they got what they paid for (human remains), just like other unwitting buyers in stolen goods cases. Opening Br. at 14-16. This Court should reject her claims.

Contrary to Hess's contention, the district court *did* find that the Donor Services buyers suffered pecuniary harm. The court explained that those buyers relied upon Hess's assurances that the human remains were legitimately donated and disease-free, and they never would have paid Hess anything if they knew the truth. V:73-74. Thus, the court found, the money those buyers paid to Hess amounted to the "reasonably foreseeable pecuniary harm resulting directly from fraud," amounting to loss under § 2B1.1(b)(1). V:74.[2] That conclusion was correct.

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[2] To the extent Hess argues these findings was insufficiently detailed, the time to object to an allegedly inadequate finding was when the court made it. *United States v. Gantt*, 679 F.3d 1240, 1247 (10th Cir. 2012). Hess raised no objection. V:74-77. Had she done so, the district court could have "cure[d] any error by offering the necessary explanation." *Gantt*, 679 F.3d at 1247.

Nor does Hess assert plain error on appeal. *Cf.* Opening Br. at 13-16. So any challenge to the adequacy of the court's findings is waived. *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (noting that failure to make a plain-error argument on appeal "surely marks the end of the road" for that claim (citation omitted)).

As the district court recognized, similar cases are few because the "goods" that comprised the fraudulent scheme here were human remains. V:72. But by analogy, at least one district court in this Circuit has concluded that victims suffer pecuniary harm where, because of the fraud, they did not know the truth about the character of what they were purchasing, and those victims would not have done business with the defendants if they had known the truth.

In *United States v. Executive Recycling, Inc.*, the defendants promised to recycle its customers' electronic material domestically, but instead shipped off those electronics to be processed overseas. 953 F. Supp. 2d 1138, 1147, 1149-50 (D. Colo. 2013). So important was the domestic processing to some customers that they would not have hired the defendants at all if they had known about the international processing. *Id.* at 1149-50. The district court found that those customers had suffered pecuniary harm, because absent the fraudulent description of how the defendants would recycle the

material, the victim customers would never have paid the defendants *any* money. *See id.* So it is here.[3]

Hess contends the Donor Services buyers couldn't have been economically harmed absent proof they were "forced to discard the remains or were otherwise unable to use the remains for their intended purposes[.]" Opening Br. at 16. This argument appears to assume that the Donor Services buyers received what they paid for, or that the court should have applied an offset to the buyers' loss amount based on the value of what those buyers *did* receive. On the latter point, any offset was Hess's burden to prove, *see United States*

[3] Other illustrations of this concept are easy to imagine. For example, a victim believes he or she is purchasing a conflict-free diamond, but instead receives a conflict diamond. In that instance, the fundamental character of the product is so different than what was promised, what was delivered is worthless to the victim.

It's also easy to understand why it would be imperative to purchasers of human remains, and the entire industry, for those remains to be legitimately donated. Death and dying are serious and culturally significant events. Death and dying are also the crux of the legitimate industry that relies on persons to donate their bodies to advance science. To maintain that legitimacy, the human remains must be treated with respect and in accord with the decedents', and their loved ones', wishes. When that doesn't happen, the character of the purchased remains is so different than what the industry requires that the remains have zero (or even negative) value.

*v. Shulick*, 18 F.4th 91, 114 (3d Cir. 2021), and she did not do so in the district court.

On the former point, implicit in the court's conclusion on pecuniary harm is a finding that the Donor Services buyers did *not* "receive the benefit of the bargain they had entered into with Hess[.]" I:402 (government making this point in the district court). That finding was not clearly wrong. Hess advertised to the Donor Services buyers that the company's inventory was legitimately and freely donated and free of infectious diseases. I:157-58. That's not what Hess delivered—instead, the human remains she sold were stolen and, in some cases, infected with disease. I:156-59. Crucially, the Donor Services buyers would never have purchased human remains from Hess if they knew the truth about the circumstances under which Hess obtained those remains. I:158-59.

To be sure, the PSR—in its discussion of restitution, not loss—noted that the Donor Services buyers "received a product as negotiated and also derived an economic benefit from the transaction." IV:18; Opening Br. at 15. That observation makes sense in the restitution context because restitution should not permit

windfalls for victims. *E.g.*, *United States v. Howard*, 784 F.3d 745, 750 (10th Cir. 2015). But the PSR does not make this same assertion with respect to loss under the Guidelines. That omission tracks the purpose of loss: measuring the magnitude of the crime, *see United States v. Merriman*, 647 F.3d 1002, 1005 (10th Cir. 2011), not the amount of money that would make the victim whole.

The record supports the district court's finding that the Donor Services buyers did not receive the human remains they purchased. Further, and to the extent Hess contends otherwise, the district court properly found that the *amount* of pecuniary harm was the price those buyers paid to Hess.

The "fair market value" of stolen property is an appropriate consideration when determining the loss amount. § 2B1.1 cmt. n.3(C)(i). The fair market value is "'the price a willing buyer would pay a willing seller' at the time of the crime." *United States v. Simpson*, 538 F.3d 459, 463 (6th Cir. 2008) (citation omitted); *accord United States v. Williams*, 50 F.3d 863, 864 (10th Cir. 1995) (using this definition as the "general test" for discerning "market value"). Where goods are stolen from retailers and then sold to unwitting

buyers, the proper measure of loss to the victim retailers is the price they would have charged buyers had the goods not been stolen. *See United States v. Wasz*, 450 F.3d 720, 721-22, 727-29 (7th Cir. 2006); *see also Williams*, 50 F.3d at 864 (explaining that retail price of stolen jewelry equaled the loss for purposes of the Guidelines). By analogy, the fair market value to the Donor Services buyers was the price they paid to Hess, thinking they were buying legitimately donated and disease-free human remains.[4] The district court properly found that the loss arising from the Donor Services buyers was more than $527,000.

Hess maintains that stolen-goods cases prove her earlier (incorrect) point that the Donor Services buyers suffered no economic harm at all because *Wasz* did not assess the pecuniary harm to the unwitting buyers of stolen goods. Opening Br. at 15.

[4] Alternatively, to the extent the stolen (and sometimes infected) bodies had some value to the Donor Services buyers, it's difficult to imagine what that value would be. The Guidelines direct the court to use "the gain that resulted from the offense" if "there is a loss but it reasonably cannot be determined." § 2B1.1 cmt. n.3(B).

But *Wasz* did not hold that the unwitting buyers suffered no pecuniary harm; it observed that the retail value of the stolen items was "*a* reasonable measure of the loss" to the retailers. *Wasz*, 450 F.3d at 729 (emphasis added). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *United States v. Wolfname*, 835 F.3d 1214, 1219 (10th Cir. 2016) (citations omitted); *cf. United States v. Crowe*, 735 F.3d 1229, 1240 (10th Cir. 2013) (explaining that even where a conclusion in prior case rests on an implicit assumption, because that implicit assumption was not decided, it's not a holding entitled to deference).

Even if the district court wrongly concluded that the Donor Services buyers suffered pecuniary harm (they did), any error is harmless. As explained below, the loss corresponding to the next-of-kin victims was about $727,000—an amount sufficient by itself to trigger the 14-level enhancement the district court applied here. *See* § 2B1.1(b)(1)(H); *see also, e.g.*, *United States v. Hamilton*, 37 F.4th 246, 266 (5th Cir. 2022) (deeming error harmless where proper loss amount still met the threshold for applicable enhancement).

### B. The district court properly declined to offset the next-of-kin victims' loss for allegedly legitimate services Hess provided to them.

Hess next challenges the loss amount attributable to the next-of-kin victims (about $727,000).[5] She complains that the court wrongly declined to apply an offset to that amount. *See* Opening Br. at 16-22; *see also* I:197, 204-05 (arguments on this point in the district court). Again, she's wrong.

The district court found that that amount was reasonably foreseeable pecuniary harm because the next-of-kin victims would not have entrusted their loved ones to Hess if they had known the truth about her fraudulent scheme. V:74-75.[6] The district court declined to offset that amount to account for the so-called legitimate goods and services Hess provided to those victims. Hess's "business

[5] The record contains slightly different iterations of this amount. *Compare, e.g.*, I:198 ($727,148.21), 372 (same), *with* IV:17 ($727,148.20), *and* V:70 ($727,148.15).

[6] Hess appears to contend that the court wrongly declined to apply an offset because the victims would not have entrusted their loved ones to Sunset Mesa if they knew about Hess's fraudulent scheme. *See* Opening Br. at 17-18. But this was the basis for discerning the reasonably foreseeable pecuniary harm, not declining to apply an offset.

dealings were systematically tainted with fraud[,]" and Hess and her Koch defrauded the victims in every step of the process "in furtherance of this scheme." V:75-76. So, the court reasoned, reducing the loss amount in these circumstances would "legitimize[]" the profits Hess "fraudulently made." V:76. The court properly declined to apply an offset.

After determining the loss amount, the district court must subtract from that amount "the fair market value" of the property and services rendered to the victims before the fraud was detected. § 2B1.1 cmt. n.3(E)(i) (emphasis added); *see also Crowe*, 735 F.3d at 1237 ("[L]oss equals actual loss . . . minus credits against loss."). That does not mean, though, that a defendant is entitled to offset any loss amount arising from legitimate expenditures. The defendant must have conferred some value or benefit on the victim. *See United States v. Byors*, 586 F.3d 222, 226 (2d Cir. 2009).

Fair market value is assessed from the victim's perspective. *See United States v. Kraus*, 656 F. App'x 736, 741 (6th Cir. 2016) (unpublished). So if the defendant did not confer anything of value or benefit to the victim, the defendant is not entitled to offset the

loss. *See Byors*, 586 F.3d at 226; V:73 (discussing this principle); *see also, generally*, *United States v. Jones*, 664 F.3d 966, 984 (5th Cir. 2011) (discerning no value, and therefore upholding court's decision not to apply an offset, regarding medical treatments that did not meet Medicare's standards).

And where all interactions between a victim and a defendant are systematically tainted with fraud, it follows that, from the victim's perspective, that defendant conferred nothing of value on the victim. Relatedly, at least one court of appeals has upheld a district court's conclusion that it was impossible to credit a defendant for legitimate services provided to the victims where the entire enterprise was "systematically tainted with fraud[.]" *United States v. Miell*, 661 F.3d 995, 997, 1001 (8th Cir. 2011).

In *Miell*, the landlord defendant defrauded tenants by keeping their damage deposits after inflating the costs of necessary repairs and demanding additional money from tenants to cover repairs. *Id.* at 997. The district court did not offset the intended loss amount to account for the amounts attributable to legitimate deposit deductions and repairs. *See id.* at 1001. Because the defendant's claims against

damage deposits were "systematically tainted with fraud," the court reasoned that it would be "difficult, if not impossible" to identify what portion of the claims might have been legitimate aside from the fraud. *Id.* (quoting district court).

The district court properly applied that principle here by concluding that no offset was proper because every interaction between Hess and the next-of-kin victims was permeated by fraud, V:75-76, such that nothing of value—independent of the fraud—was conferred on the victims. That makes logical sense: Headstones marking a gravesite or urns holding cremains only had value to the victims if those gravesites or urns marked or held the remains of their loved ones as Hess had promised. They did not. And it's worth reiterating that Hess stipulated that the next-of-kin victims would have paid her nothing if they had known the truth about her fraudulent scheme. I:166.

Hess counters that *Miell* stands only for the proposition that a defendant must prove, as a matter of accounting, her entitlement to an offset, and that the defendant in *Miell* failed to do so. Opening Br. at 19. Hess continues that because *she* was able to prove the

precise legitimate goods and services provided to the victims, she is entitled to an offset. *See* Opening Br. at 19.

The district court in *Miell*, though, appeared to assume that the defendant could have backed up his claims with proof he made legitimate repairs and deducted money from the victims' damage deposits accordingly. *See Miell*, 661 F.3d at 1001. But even if the defendant had tried to prove those allegedly legitimate claims, the court still believed it would be difficult or impossible to give the defendant any credit for them because they were so steeped in fraud. *See id.*

Accordingly, and contrary to Hess's contention, the law supports the district court's conclusion that no offset is proper if the goods and services provided by the defendant confer no value on the victims. That was the case here because the goods and services were inseparable from the fraud. Hess does not appear to challenge the finding underlying that conclusion—that all of Hess's interactions with the next-of-kin victims were tainted by fraud. Regardless, that conclusion is supported by the record. In the course of the scheme, Hess lied about the services the funeral home would provide to the

next-of-kin victims (I:156); she lied about the scope of body part "donations" and how those donations would be used (I:157); and she lied about the origin of the cremains she returned to next-of-kin victims (I:162, 164, 166).

Hess also claims that the authority on which the court relied in denying an offset, *United States v. Jarvis*, No. CR 13-2379 JB, 2015 WL 7873740 (D.N.M. Nov. 16, 2015) (unpublished), actually supported her contention that she provided some value to the victims. Opening Br. at 20; V:72-73, 76. In *Jarvis*, the court declined to subtract from the loss amount a figure including the profit an honest business would have made on the services the defendants purported to provide to the victims. 2015 WL 7873740, at *9. The court concluded that the profit margin conferred nothing of value on the victims, so it could not be used to offset the loss, and doing so would only "legitimize[]" the profits the defendants there fraudulently made. *Id.*

That general principle is applicable here. The goods and services Hess provided conferred nothing of value on the next-of-kin victims, so permitting Hess to use those goods and services to offset

the loss would be akin to legitimizing the goods and services she provided that were wholly tainted by fraud.

Hess is correct that in *Jarvis*, the district court offset the loss amount to account for the value of the subpar goods (therapeutic elastic tape) that the defendants provided to the victim company. *Id.* at *3, 8-9. But all that shows is that the subpar goods at issue in *Jarvis* had some value to the victims. Here, Hess did not merely provide the next-of-kin victims with subpar products in the course of a business transaction; as the court here explained, the loss was "not measurable. It's priceless." V:72.[7]

[7] The district court stated that in every step of the process, the victims were "defrauded by defendants Koch and Hess *in furtherance of this scheme*." V:76 (emphasis added). To the extent the court was viewing the proposed goods and services as Hess's business costs, not value conferred on the victims, Hess was still not entitled to an offset.

"Perpetrators of fraudulent schemes are not entitled to credits against loss for payments made to perpetuate the schemes." *United States v. Lacerda*, 958 F.3d 196, 215 (3d Cir. 2020); *see also United States v. Stochel*, 901 F.3d 883, 890 (7th Cir. 2018). "The reason why is easy to grasp: '[T]he fraudster's costs shouldn't be deducted any more than the costs of a burglar's tools should be deducted in determining the loss suffered by the victim of the burglary.'" *Stochel*, 901 F.3d at 890 (citation omitted). The money Hess spent on goods and services for the next-of-kin victims only perpetuated the fraud that she was running a legitimate funeral home.

Even if Hess is correct that the court should have offset the loss attributable to the next-of-kin victims, any error was still harmless. Again, Hess contended that she was entitled to offset the next-of-kin victims' loss amount by about 29%, which would have resulted in a loss of about $516,000 attributable to the next-of-kin victims. Assuming the district court properly calculated the loss attributable to the Donor Services buyers (it did), that would mean that—even if Hess is correct on her offset argument—the resulting loss would exceed $1 million ($516,000 + $527,000). And that amount is more than enough to support the 14-level enhancement the court applied here. § 2B1.1(b)(1)(H); *Hamilton*, 37 F.4th at 266.

### C. Even if the court erred in calculating loss, any error is harmless.

The district court properly calculated the loss amount under the Guidelines. And because the loss was more than $1.2 million, the court properly increased Hess's base offense level by 14. § 2B1.1(b)(1)(H).

But even if Hess is correct that the loss amount was less than $550,000, and that the district court should have increased Hess's base offense level only by 12, "the record viewed as a whole clearly

indicates the district court would have imposed the same sentence had it not relied on" the improperly calculated Guidelines range. *United States v. Kieffer*, 681 F.3d 1143, 1165 (10th Cir. 2012). Thus, any Guidelines calculation error is harmless.

*United States v. Gieswein* is instructive. 887 F.3d 1054 (10th Cir. 2018). There, despite a Guidelines calculation error, this Court identified "two important factors that tip[ped] the scales toward harmlessness." *Id.* at 1063. Both factors are present here.

First, as in *Gieswein*, the record shows that the district court relied upon factors other than the Guidelines range in imposing the sentence. *See id.* The district court here stated that it usually concludes the Guidelines ranges are inadequate in white-collar fraud cases to address the seriousness of those offenses, provide adequate deterrence, or sufficiently protect the public from future crimes. V:193-94. In this case specifically, the court explained that the Guidelines were inadequate to "address moral and ethical violations"; to account for the "negative financial, emotional, and health consequences" that had occurred; and to accomplish the goals

of sentencing set out in § 3553(a). V:194, 213. Accordingly, the court imposed a statutory-maximum sentence. V:213.

Thus, the record shows that the statutory factors in § 3553(a) and the statutory maximum, *not* the Guidelines range, were the "driving force[s] behind the selected sentence." *Gieswein*, 887 F.3d at 1063 (reaching this conclusion where the court stated it imposed the selected sentence because it was the statutory maximum and the court would have imposed a higher sentence, if possible); *see also, generally*, *United States v. Brooks*, 67 F.4th 1244, 1250-51 (10th Cir. 2023) (explaining that a Guidelines error is harmless if it "did not affect the district court's selection of the sentence imposed" (citation omitted)).

Second, and again as in *Gieswein*, the district court's "thorough explanation for its sentencing determination provide[d] a reasoned basis for its decision to hew to the statutory maximum." 887 F.3d at 1063. The district court here stressed the "horrendous" and "egregious" nature of the offense conduct; the financial, emotional, and health-related consequences Hess's offenses inflicted on the living victims; and Hess's lack of "regard for" those victims'

"emotional turmoil relating to their grief." V:188-90, 193-94. It pointed to Hess's refusal "to assume any responsibility for her egregious conduct in this case." V:193. And the court discerned no features of Hess's characteristics or history to outweigh the harm she caused. V:192-93.

This thorough explanation backed up the court's decision to impose a statutory-maximum sentence. *See Gieswein*, 887 F.3d at 1063 (making this point where the court stated a statutory-maximum sentence was necessary to protect society from the defendant, and the Guidelines range did not accurately represent the defendant's criminal history).

To be sure, *Gieswein* also considered the fact that, by the time of that appeal, the district court had imposed the same statutory-maximum sentence twice: at the original sentencing hearing and again at resentencing after a Supreme Court decision cut the defendant's sentencing range by more than half. *See id.* at 1056-58, 1062-63. That fact was not dispositive, this Court reasoned, because it was speculative whether the court would reimpose the same

sentence a third time based only on those two prior sentencing hearings. *Id.* at 1062.

Accordingly, *Gieswein* does not require such facts to conclude a Guidelines error is harmless. Instead, the key is whether the court would have imposed the same sentence without the Guidelines error. That's met here. A remand for the court to recalculate the Guidelines range and reimpose sentence would only "needlessly burden the district court and counsel with another sentencing proceeding, which . . . would produce the same result." *Id.* at 1063 (citation omitted).

## II. The district court properly ordered Hess to pay full restitution to the next-of-kin victims.

**Issue raised and ruled upon:** Hess contended in the district court that the restitution amount owing to the next-of-kin victims should be offset by the goods and services she provided to them—the same argument she raised with respect to loss under the Guidelines. VI:5 (cross-referencing I:193-208); IX:13 (district court's summary of objection). The government responded that the court's prior reasoning with respect to loss applied here: "[N]one of the victims in this case would have sought funeral services from the defendants

had they known what would happen to their loved ones' bodies." VI:13-14 (footnote omitted). The court rejected Hess's contention. IX:25.

**Standard of review:** This Court reviews the legality of a restitution order de novo, the court's factual findings underlying the order for clear error, and the total amount of restitution for an abuse of discretion. *United States v. Parker*, 553 F.3d 1309, 1323 (10th Cir. 2009).

Hess's appellate claim challenges the court's factual finding that no offset to restitution was proper with respect to the next-of-kin victims' actual loss. *See generally id.* at 1324-25 (applying clear error review to finding that goods provided to victims were worthless, so the defendant was not entitled to an offset in restitution). A district court's factual finding is clearly erroneous only if it lacks evidentiary support or if this Court is convinced, after a review of the evidence, that a mistake has been made. *Mullins*, 613 F.3d at 1292.

If Hess's argument is reviewed de novo, it still fails.

**Argument:** Because Hess's offense of conviction (wire fraud) is an offense "against property," restitution was mandatory to

compensate the victims for their "actual" pecuniary loss. 18 U.S.C. § 3663A(a)(1), (c)(1)(A)(ii); *United States v. Howard*, 887 F.3d 1072, 1076 (10th Cir. 2018). The restitution amount must exclude the value of property "returned" to the victim. § 3663A(b)(1)(B); *see also Howard*, 887 F.3d at 1078-79. The overall purpose of restitution is to make the victims whole, to the greatest extent possible. *Howard*, 887 F.3d at 1076.

At the restitution hearing, the district court declined to offset the restitution amount owed to the next-of-kin victims to account for the goods and services Hess provided to them because the court had "already ruled on that issue" when it decided loss. IX:25. The court continued, "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." IX:25; *see also* VI:13-14 (same assertion in the government's briefing).

At sentencing, however, that rationale supported the conclusion that the next-of-kin victims' pecuniary harm was reasonably foreseeable, V:74-75, not that an offset was improper. The court declined to offset the next-of-kin victims' loss because Hess's

interactions with those victims were "systematically tainted with fraud" and applying an offset would "legitimize[]" the profits Hess fraudulently made. V:72, 75-76.

But notwithstanding the district court's stated basis for rejecting offsets to the restitution amount, IX:25, this Court may affirm for any basis supported in the record, *United States v. Nichols*, 169 F.3d 1255, 1280 (10th Cir. 1999) (making this observation in restitution analysis). The court's refusal to offset the next-of-kin victims' loss amount under the Guidelines was proper here because the record supports the district court's conclusion that the goods and services Hess provided had no value to the next-of-kin victims. *See* Part I.B. This Court reached a similar result, albeit based on distinct facts, in *Parker*, 553 F.3d at 1324-26, where the record supported the district court's finding that the defective goods the

defendant provided to the victims were worthless, so the defendant was not entitled to offset the restitution amount. *See id.*[8]

The Guidelines' loss determination may not always be equivalent to restitution. *See, e.g.*, *id.* at 1323-24. But here, for the same reason that the court properly declined to offset the Guidelines loss amount, Hess was not entitled to an offset in restitution. *See generally United States v. Turner*, 615 F. App'x 264, 270 (6th Cir. 2015) (unpublished) (concluding that because the actual loss amount under the Guidelines was correct, the actual loss amount for purposes of restitution was also correct).

Hess makes no other argument as to why the restitution amount owed to the next-of-kin victims was wrong. At bottom, the purpose of restitution is to return victims to their positions before the crimes—here, before the next-of-kin victims entrusted their loved

[8] The defendant in *Parker* fraudulently sold defective airplane engines. 553 F.3d at 1313. On appeal, he argued that the restitution amount should have been reduced to reflect the "core value" of those defective engines. *Id.* 1323-24. But the record supported the district court's finding that those defective airplane engines had no value to the victims. *Id.* at 1324-26.

ones' bodies to Sunset Mesa. The court's restitution order did exactly that. No reduction in the restitution amount was proper.

## III. Even if this Court discerns an error occurred, neither bias nor extreme circumstances warrant reassignment to a different judge on remand.

**Standard of review:** Where a remand is required, this Court will "remand with instructions for assignment of a different judge *only* when there is proof of personal bias or under extreme circumstances." *United States v. Slinkard*, 61 F.4th 1290, 1296 (10th Cir. 2023) (emphasis added).

**Argument:** Assuming this Court discerns a sentencing error—which it should not—Hess contends that this case must be remanded to a different judge for resentencing. Opening Br. at 24-30. Hess does not allege that the district court was personally biased against her. In the absence of that allegation, whether reassignment on remand is warranted depends on three factors:

> (1) whether the sentencing 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 . . . ,
>
> (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.

*Mitchell v. Maynard*, 80 F.3d 1433, 1450 (10th Cir. 1996) (citation omitted).

Each factor shows that reassignment is not warranted. Hess's contrary arguments are refuted by the record.

### A. The record provides no reason to suspect the district court would have substantial difficulty applying a hypothetical remand order.

Hess claims it would be substantially difficult for the district court here to apply a remand order, citing as proof this court's prior "adamant" rulings on loss. Opening Br. at 24-25. In other words, Hess claims the district court would have difficulty applying a different analysis to loss because the court reached the wrong conclusion the first time around. But if that assertion was enough to meet the first reassignment factor, it's difficult to discern when that factor would *not* be met, given that a remand occurs after an error in the district court. Yet in the absence of personal bias, reassignment is proper only in "extreme circumstances." *Slinkard*, 61 F.4th at 1296.

Hess also cites a wholly different case in which this Court found that Judge Arguello would have "substantial difficulty" in applying a remand order. Opening Br. at 25 (citing *United States v. Evans*, 677 F. App'x 469 (10th Cir. 2017) (unpublished) (*Evans II*)). But what occurred in a completely different case does not answer whether "*the record* suggests that the judge would be unwilling to set aside" its previously expressed determination. *United States v. Aragon*, 922 F.3d 1102, 1113 (10th Cir. 2019) (emphasis added).

Nor does the analysis in *Evans II* suggest the court would have "substantial difficulty" in applying a remand order here. There, this Court remanded after the first sentencing hearing with instructions to determine the value of the investments at issue when the fraud began. *See United States v. Evans*, 744 F.3d 1192, 1196-98 (10th Cir. 2014) (*Evans I*). At resentencing, Judge Arguello concluded that that amount was impossible to discern, the government agreed, and the court then applied a loss theory endorsed by neither party nor the remand order. *See Evans II*, 677 F. App'x at 472.

On appeal again after resentencing, this Court concluded that, because the government had not proven the loss amount per the

method mandated in *Evans I*, no loss enhancement applied at all. *Evans II*, 677 F. App'x at 472-73. And this Court surmised the district court would have substantial difficulty applying that holding because it had stated the defendant deserved a loss enhancement, it was regrettable the loss was not higher, and Americans "do not take white collar crime seriously enough." *Id.* at 475.

These circumstances are not present here. At sentencing, the court carefully explained its loss analysis, hewing closely to the text of the Guidelines and caselaw. V:71-74. It never indicated that it could not apply a different loss amount or that the loss should be higher. While the court opined that the Guidelines ranges for white-collar offenses were often inadequate, V:193, its observation about the tension between § 3553(a) and the Guidelines in white-collar cases does not show the court would struggle to adhere to this Court's remand order.

To the contrary, the record here shows (albeit on a different topic) that the court *could* apply law with which it disagreed. At the restitution hearing, the court opined that insurance companies should not receive any restitution because the next-of-kin victims

had paid premiums for insurance benefits. IX:19-21. It explained, "[t]hat just does not seem right because you're giving the insurance company a windfall." IX:21. Nevertheless, the court recognized that it was bound by the applicable restitution statute, and it awarded restitution to the insurance companies, subordinated to the victims. IX:20-22.

### B. No appearance of partiality exists.

Hess next argues that the district court's statements showed its alignment with the victims in this case, raising an appearance of partiality. Opening Br. at 26-30. She primarily[9] relies on two passages from the day-long sentencing hearing: (1) Judge Arguello's observation that when her husband passed away, her cognitive abilities diminished; and (2) the court-imposed moment of silence to

[9] It's not clear whether Hess also contends that permitting the victims to provide emotional testimony gave rise to an appearance of partiality. *See* Opening Br. at 26-27. Regardless, the court was duty-bound to allow the victims to address the court. 18 U.S.C. § 3771(a)(4). To the extent Hess claims that the court was overly solicitous to the next-of-kin victims' outbursts, the court frequently admonished those victims for speaking out of turn. V:63, 81, 86, 101, 117, 118, 124, 197; *Burke v. Regalado*, 935 F.3d 960, 1059 (10th Cir. 2019) (rejecting appearance of partiality where the court's admonitions were "not one-sided").

honor the deceased victims. Neither passage demonstrates an appearance of partiality.

Judge Arguello referred to her husband's death while discussing the vulnerable-victim Guidelines provision under U.S.S.G. § 3A1.1(b). V:88-93. Ordinarily, that enhancement requires particularized findings of vulnerability. *E.g.*, *United States v. Lee*, 973 F.2d 832, 834 (10th Cir. 1992). But a victim's vulnerability may be clear, obviating the need for particularized findings, if "the inference to be drawn from the class characteristics [is] so powerful that there can be little doubt about unusual vulnerability of class members[.]" *United States v. Tissnolthtos*, 115 F.3d 759, 762 (10th Cir. 1997) (quoting *United States v. Gill*, 99 F.3d 484, 487 (1st Cir. 1996)).

At sentencing, the district court noted that several victim impact statements described the victims' vulnerability at the time they interacted with Hess and Koch at the funeral home. V:90-91. The court continued, "[a]nyone who has experienced the death of a loved one knows that that loss is devastating and impacts one's mental and emotional state of mind." V:91. It was in that context

that the court provided the personal anecdote Hess now complains about:

> 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.

V:91-92.

The court's anecdote illustrated the obvious inference arising from the victims' membership in the class of grieving persons: Their mental acuity was diminished by grief at the time they interacted with Hess. That obvious inference made particularized findings of vulnerability unnecessary.

That the court made this connection by relying, in part, on its own experience does not raise the inference the court was improperly

aligned with the victims and against Hess. Judges "do not check their background or experience at the door to the courtroom." *United States v. Jordan*, 678 F. App'x 759, 768, 772 (10th Cir. 2017) (unpublished); *see also, generally United States v. Boykoff*, 67 F. App'x 15, 17-18 (2d Cir. 2003) (unpublished) (explaining that court's reliance on personal experiences did not show appearance of bias because it did not indicate partiality toward "any group of which [the defendant] is a member"); *cf. McKay v. City of Chicago*, No. 22-1251, 2023 WL 1519525, at *1 (7th Cir. Feb. 10, 2023) (unpublished) (concluding that court's statement it was "sure [it had] done many of these things myself" did not reflect judicial bias).

Nor did the court-ordered moment of silence raise an appearance of partiality. At sentencing, dozens of next-of-kin victims addressed the court to explain the harm Hess's conduct had inflicted on them. V:113-85. After preliminary remarks on its approach to sentencing, V:185-90, the court paused:

> 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.

V:190.

Relatedly, expressing sympathy for (or recognizing the humanity of) victims based on the events occurring in the judicial proceeding does not show actual bias absent "deep-seated antagonism." *United States v. Minard*, 856 F.3d 555, 557 (8th Cir. 2017). And Hess cites nothing about the moment of silence that raised the appearance of antagonism toward her or otherwise injected improper considerations into the proceedings. *Cf. United States v. Rangel*, 697 F.3d 795, 804-05 (9th Cir. 2012) (disagreeing that court's expressed sympathy for victims and personal immigrant history implied partiality; the court did not imply it could not impartially impose a sentence); *United States v. Cronin*, 429 F. App'x 241, 243 (4th Cir. 2011) (unpublished) (discerning no error in court's "apology for the victims' having had to endure seeing [the defendant] in the community"; it reflected "a reasoned opinion based on the circumstances" of the defendant's crimes that had "devastating consequences for the victims").

In addition to these two passages, Hess perfunctorily raises a few more reasons why she claims an appearance of partiality exists:

The court (1) ruled against Hess's PSR objections, (2) applied an upward departure to her sentence without the requisite notice, (3) gave "short shrift" to her sentencing statement, and (4) imposed the statutory-maximum sentence. Opening Br. at 29.

Each of these contentions merely challenges adverse rulings from the district court. Adverse rulings alone do not "indicate bias or the inability to decide fairly in subsequent rulings." *Niemi v. Lasshofer*, 770 F.3d 1331, 1356 n.13 (10th Cir. 2014). Even assuming some of the court's adverse rulings were wrong, *see* Opening Br. at 29 n.7, incorrect rulings do not automatically establish an appearance of partiality, either. *See United States v. Lake*, 472 F.3d 1247, 1267 (10th Cir. 2007) (rejecting defendants' recusal claims based on rulings against the defendants, even though some were incorrect).

Not only that, but Hess's "short shrift" argument is also refuted by the record. The district court specifically referenced the arguments Hess made in her sentencing statement in favor of a shorter sentence: She was devoted to her daughter, her intentions were altruistic, she had a brain injury, she did not have a criminal history, and she was statistically unlikely to recidivate because of

her age. *Compare* V:191-93, 213, *with* I:418-26. That the court did not deem those arguments persuasive does not mean that it insufficiently considered them.

### C. Reassigning this case would waste resources out of proportion with any benefit to the appearance of fairness.

Given that no basis for reassignment exists, doing so would waste significant resources out of proportion to any gain in the appearance of fairness. That's especially true given the significant resources the district court already expended in these proceedings. The sentencing hearing lasted an entire day. *Compare* V:6, *with* V:238. The court "spent many, many, many hours" preparing for that proceeding. V:8. Reassigning this case would require "another judge to become familiar with the rest of the case." *Burke*, 935 F.3d at 1059.

No error occurred at sentencing. Even if it did, assignment to a different district court judge is unnecessary and would waste resources with no added appearance of fairness.

## CONCLUSION

This Court should affirm Hess's sentence.

DATED this 22nd day of December, 2023.

Respectfully submitted,

COLE FINEGAN
United States Attorney

*/s/ Elizabeth S. Ford Milani*
ELIZABETH S. FORD MILANI
Assistant United States Attorney
1801 California Street, Suite 1600
Denver, CO 80202
(303) 454-0100
Elizabeth.Ford.Milani@usdoj.gov

Attorneys for Plaintiff-Appellee

## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. 32(a)(7)(B)(i), I certify that the **ANSWER BRIEF OF THE UNITED STATES** is proportionally spaced and contains 10,169 words, according to the Microsoft Word software used in preparing the brief.

/s/ *Kayla Keiter*
KAYLA KEITER
U.S. Attorney's Office

**CERTIFICATE OF SERVICE**

I hereby certify that on December 22, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

*/s/ Kayla Keiter*
KAYLA KEITER
U.S. Attorney's Office