IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DANIEL E. DANFORD,

Defendant.

OPINION AND ORDER

04-CR-0028-C

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A hearing was held in this case on January 12, 2005, before United States District Judge Barbara B. Crabb on the issue of the amount of restitution defendant is to pay following his conviction of five counts of mail fraud and interstate transportation of a security taken by fraud. Stephen Sinnott appeared for the government; Steven Eisenberg appeared for defendant, who was present in person. Although the hearing was set for the purpose of considering restitution, defendant filed a motion for a new sentencing in time for it to be considered at the hearing.

RESTITUTION

In a recent opinion, the Court of Appeals for the Seventh Circuit answered the

primary question on which the parties had submitted briefs: whether the jury's determination of the amount of loss attributable to defendant restricts the court's determination of the amount of restitution it may require a defendant to pay. The court held that the two determinations are separate and independent. "[F]orfeiture and restitution orders do 'not come within Apprendi's rule, because there is no "prescribed statutory maximum" and no risk that the defendant has been convicted *de facto* of a more serious offense.'" United States v. Swanson, No. 03-1863, slip op. at 10 (7th Cir. Jan. 7, 2005) (quoting United States v. Vera, 278 F.3d 672, 673 (7th Cir. 2002)). Courts are to resolve restitution disputes "using a preponderance of the evidence standard." Id. (citing 18 U.S.C. § 3664(e)).

When I sentenced defendant on December 7, 2004, I was persuaded by the preponderance of the evidence that he had staged the robbery that occurred at his jewelry store in June 1998, despite the jury's failure to reach the same finding beyond a reasonable doubt. I remain persuaded that defendant staged the robbery. Therefore, I find that defendant is responsible for the total loss for which he received reimbursement from the insurance company. Defendant asked an employee of his store to update him on the store's alarm system shortly before the robbery occurred; the robber supposedly accosted him in his office early in the morning, although it was unusual for defendant to be in the office before the other employees arrived; and the robber forced defendant to open the safe and took him

to the basement afterward to tie him up although the outside of the building gives no indication that it has a basement. According to defendant, the robber wore no mask. The evidence showed that defendant submitted the proof of loss to the insurance company. Eventually the company reimbursed defendant for the loss, but not until he had filed suit against the insurance company. After some time had passed, items of jewelry that defendant had reported lost started to show up in the store's inventory. When employees asked defendant about the coincidence, he explained that the items came from an independent company that he and his father-in-law had formed. No invoices accompanied the jewelry, which was an anomaly in the business. Defendant instructed his employees to credit the pieces of jewelry against debts he owed to the business.

At trial, defendant explained the return of pieces he had reported stolen by saying that he had forgotten that he had taken those items out of the store before the robbery to take to a horse show, where he hoped to sell them to friends and acquaintances. Ordinarily, when he or other persons at the store took jewelry home with them, they made a record of the jewelry they were removing. No such record existed to support defendant's testimony that he had removed pieces of jewelry from the store just before the robbery. Defendant never advised the insurance company that he had found some of the "stolen" jewelry. In July 2000, defendant told his wife and two employees that Susan McClain, another employee, had taken home certain pieces of jewelry just before the robbery for personal gain and had

later reintroduced them into the store's inventory because she was afraid she would be caught.

In March 2000, one of defendant's suppliers needed money and called defendant to ask him whether he would make a payment on the $60,000 debt he owed the supplier. Defendant made no payments but did return some pieces he had bought from the supplier before the robbery. (Immediately after the robbery, he had told the same supplier that all of the pieces the supplier had sold him had been stolen in the robbery.) During the execution of search warrants at defendant's store and home in June 2000, federal agents found many pieces of jewelry that matched items described as stolen in the proof of loss defendant submitted to the insurance company. Defendant testified that he did not prepare the proof of loss or do any of the inventory checking to determine what items had been stolen. However, he did sign the proof of loss, for which his business was reimbursed $1,235,464.

Because I find by the preponderance of the evidence that defendant planned the robbery of his store, I find by the same standard that he owes restitution to the insurance company in the amount of $1,235,464. I will amend the judgment and commitment to add the following provision:

> Defendant is ordered to pay restitution in the amount of $1,235,464, which is due and payable immediately to the Clerk of Court for the Western District of Wisconsin, for disbursement to Ohio Casualty Insurance Company, f/k/a Great

> American Insurance Company. Any items of jewelry that are returned to the insurance company are to be credited against defendant's restitution obligation. No interest is to accrue on the unpaid portions of the obligation.

Although defendant alleges that he lacks the financial resources and future earning capacity to make any more than nominal payments toward his restitution, I am not persuaded that he has made a sufficient showing to warrant an order directing him to make nominal periodic payments under 18 U.S.C. § 3664(F)(3)(A).

MOTION FOR NEW SENTENCING

Defendant's motion for a new sentencing hearing was based on the Supreme Court's January 12, 2005 decision in United States v. Booker. The motion was denied on the ground that this court has lost its authority to change defendant's sentence. Fed. R. Crim. P. 35 does not allow sentencing courts to revise sentences once they have been imposed except to correct technical errors or in response to motions filed by the government. Furthermore, now that defendant has filed a notice of appeal, jurisdiction over the case rests in the court of appeals.

ORDER

IT IS ORDERED that the judgment and commitment order entered in this case on

December 9, 2004, is AMENDED to provide as follows:

> Defendant is ordered to pay restitution in the amount of $1,235,464, which is due and payable immediately to the Clerk of Court for the Western District of Wisconsin, for disbursement to Ohio Casualty Insurance Company, f/k/a Great American Insurance Company. Any items of jewelry that are returned to the insurance company are to be credited against defendant's restitution obligation. No interest is to accrue on the unpaid portions of the obligation.

In all other respects, the order remains as entered on December 9, 2004.

FURTHER, IT IS ORDERED that defendant Daniel E. Danford's motion for a new sentencing is DENIED for lack of jurisdiction.

Entered this 13th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge