

University of South Dakota School of Law

From the Selected Works of Jonathan Van Patten

2019

At the Sturgis Rally: A Story

Jonathan K Van Patten



Available at: https://works.bepress.com/jonathan_vanpatten/33/

AT THE STURGIS RALLY: A STORY

JONATHAN K. VAN PATTEN[†]

No need to hurry, he thought. There would be plenty of time today. Jeffries knew that the festive crowd would help. He surveyed the sprawling Harley-Davidson parking area, a chaotic mixture of sights and sounds. More bikes per square foot than anywhere else in the world, even downtown Sturgis itself. To the uninitiated, it was a sea of motorcycles. This sea had many colors, many textures. Machines and men. And women, whose contributions to the diversity of the spectacle were undeniable. One could detect the unmistakable aroma of cannabis over the accumulating mix of exhaust, grease, and sweat. The smoky haze enhanced the sense of unreality, as if the concentration of mind-altering clouds affected vision as well. Bikes came and went, each with a noisy proclamation trailing behind. Rounding out the exhibition were the disembodied sounds of country and rock artists wafting over the crowd. Life was good. It was Rally week in Sturgis.

Because of the crowd, it would have taken longer than usual to reach the store, but that was not Jeffries' destination. Walking around the parking lot and observing was his specialty. This was his fifth Rally and Jeffries felt at home here. He liked bikers, with all their contradictions. They wore their independence proudly, yet had a uniform, of sorts. The uniform was a costume and bore no resemblance to the profession or trade one followed outside of the Rally. Doctors, lawyers, and accountants, as well as plumbers, firefighters, and teachers, all became vocationally undetectable with the cover provided by leather, denim, muscle shirts, and tattoos. Although positions varied widely along the political spectrum from left to right, most harbored a natural skepticism of authority and all shared a love of freedom. Bikers seemed like idealists, flaunting convention as if prophets from another era, but they were ultimately pragmatists, a necessity to survive the dangers of the road, as well as the challenges of group travel, motorcycle maintenance, and the weather. Outwardly adopting the persona of outlaws, they respected property rights, valued competency, and cherished individual autonomy. They also liked to have a good time. And the Sturgis Rally was like Spring Break for adults.

Copyright © 2019. All rights reserved by Jonathan K. Van Patten and *The South Dakota Law Review*.

[†]Professor of Law, University of South Dakota School of Law. For much needed technical and editorial assistance with this project, I am indebted to Professor Christine Hutton, Eric Preheim (USD Class of 2009), Thad Titze (USD Class of 2020), Kay Luther (USD Class of 2018), Joseph Mattson (USD Class of 2020), Austin Printz (USD Class of 2019), and Larry Mageau of Rhode Island for their important contributions and, as always, to Derek Nelsen (USD Class of 2009) for his careful reading and editing. This is a work of fiction. Although inspired by an actual incident and subsequent court proceedings, any resemblance to any actual person or persons is purely coincidental. It should be emphasized that all of the conversations and thoughts of the individuals described herein are solely from the author's imagination of the situation.

Although he liked bikers, Jeffries' business model left no room for conscience. He stole high-end motorcycles. It was a stone-cold operation. No room for emotion. Operating out of a large, nondescript residence and shop in a mid-sized town in Rhode Island, members of the extended Jeffries family had distinct roles in the business, which had a nationwide presence. Wade Jeffries' focus was on the acquisition end. Bikes parked overnight at apartments, condos, and garages were the mainstay. Easy pickings, so long as the usual precautions for selection were taken. Bike rallies provided special opportunities because they were a gathering place of inventory for which customers could pre-order their preferred make, model, and even color. Specific accessories might pose a problem but were not out of the question. Bike owners were not defenseless against theft. Attention to sensible anti-theft measures was essential. At rallies, there was strength in numbers, but also vulnerability as a result of those numbers. The motorcycle industry and law enforcement had devoted considerable resources to the matter, and the evolving cat and mouse game involved high tech ingenuity, cunning, and luck.

Wade Jeffries had waited for the day to develop. Unlike Black Friday, where the zealous attempted to beat the crowds, he welcomed the opposite. He needed the crowd to bring enough inventory for selection and to provide cover through commotion and chaos that would aid his appropriation. As he meandered through the rows of bikes, the sea of motorcycles broke down quickly under his practiced eye. With this group, the majority were Harleys, but other makes were also represented. Jeffries thought about yesterday's efforts in Deadwood, where the team was able to drive the van right into the lot across from the hotel. The red Harley Road Glide was an especially nice find, right down to the preferred color. Low hanging fruit. But you can only go back to that well every so often. At the Black Hills Harley-Davidson store, the inventory was parked in a "Bikes Only" section. No vans to help here. Higher risk, but higher reward.

And then he saw it. A new Harley Electra Glide CVO, blue and silver. It was on the list. Wade Jeffries stood by for a few minutes, seemingly paying no attention to it, as if the surrounding spectacle was enough. He bumped it to see if there was an alarm. If there had been, there would have been plausible deniability, given the general chaos. But nothing sounded. To further test his luck, he leaned over and turned on the ignition switch. The bike came to life. Most helpfully, the owner had left a fob key in a storage compartment. Rich kid, he thought. Nearly ready to go, a diversion provided an added touch. Jeffries' partners, Jill and Sonya, had been trailing behind and when he mounted the bike, they went into action. Jill yelled at Sonya about flirting with her boyfriend and soon there was the beginning of a catfight, no doubt of interest to the gathering crowd of male onlookers. Jeffries calmly pulled out from the row, when he heard a shout, "Hey, whadayathink you're doin'?" Jeffries shouted back, "It's okay. My buddy asked me to move it." "No he didn't," was the quick response. "That's my bike." The nearby catfight aficionados quickly gathered around Jeffries, impeding any further movement. Attempts at explanation were to no avail as the owner vociferously

pressed his case. Jeffries was rudely lifted off the bike by several bystanders who pushed and punched him roughly. They didn't stop there. There was grabbing of both arms, with pulling and twisting. Whereas only moments before, the crowd had been cheerful and affable, the almost sacrilegious affront posed by the attempted theft swiftly changed their mood. It was now bordering on ugly. Fortunately for Jeffries, security personnel quickly arrived. Had they not been close by, it could have been the end of business, literally, for Jeffries. Bikers take property rights very seriously.

Jeffries was quickly escorted to an area at the back of one of the sales tents. There wasn't much to talk about as they waited for the Rapid City police to arrive. While his actual experience with what was about to occur was limited, he knew enough to keep quiet. After a few minutes, Rapid City Deputy Sheriff Grace Luther entered the back area, briefly assessed the situation with security personnel, and placed Jeffries under arrest. He was handcuffed with his hands behind his back. The handcuffs were checked for proper fit and then double locked to ensure they would not tighten up during transport. Luther moved Jeffries outside and conducted a search in front of her patrol car to ensure that the dash mounted camera recorded the procedure. As Jeffries was being patted down, his keys, wallet, and cellphone were taken. The wallet would be useful in the later booking process and the confiscation of the cellphone would thwart communications with the outside, a safety issue. Also discovered embedded in Jeffries' right sock was a lock-picking device, known as a "peanut."

Although Jill and Sonya had quickly disappeared into the crowd, Wade's wife, Lynn, came to the tent area to see about her husband. She had ridden with Wade to the Harley-Davidson lot and had planned to ride the bike back to their campground. She had watched from a distance as he was rescued by security personnel but had no clue what would happen next. Perhaps she could back up whatever story Wade had come up with. Because he was not talking, Deputy Luther turned her attention to Lynn. After asking what she wanted, Luther asked for and received a driver's license from Lynn. Seeing that she was from out-of-state, Luther asked where she was staying.

"At the Deerview Campground in Piedmont," Lynn replied.

"That's about ten miles from here. How did you get here?"

"We rode."

"Where's your bike?"

Lynn motioned toward the far north end of the lot.

"What was your husband doing on another man's bike?" asked Luther.

"Don't know. He must have been moving it as a favor."

"I don't think so. Not according to the owner. Is that your husband's jacket you are holding?"

"Yes, it is. I was holding it for him while he was walking around."

“May I look at it for a moment?”

“There’s a gun in the left pocket.”

That got Luther’s attention. There was indeed a 9 mm Ruger handgun in the jacket. Luther quickly turned back to Lynn. “How come he was carrying?”

“Oh . . . he always does that at the Rally,” Lynn responded hesitantly. She was winging it with her answers. “Safety, I guess,” she offered.

Deputy Luther was not satisfied. She was an eight-year veteran of the sheriff’s department and each Rally brought new challenges. This situation didn’t feel right, especially the gun and the lock pick. Her intuition told her to check out Jeffries’ bike. She asked Lynn to point out where it was, but the response remained vague. She told Lynn to wait in the backseat of the patrol car. With Jeffries’ keys in hand and a general description as to the bike’s whereabouts, she set off in the direction of the north end. Luther was joined by Special Agent Michael Kinney, who had just arrived at the scene. Kinney, a special law enforcement agent from Connecticut, was a member of an anti-theft task force working the Rally. His experience had been acquired through fifteen plus years of dealing with vehicle theft across the country. Luther and Kinney found the bike after about twenty minutes of searching. Kinney looked at the bike carefully for several minutes and then ran the information through a database on his iPhone. He told Luther he believed the bike had been stolen. Now, they were *very* interested in the Jeffries family.

Returning to where Wade and Lynn were waiting, Agent Kinney began the interrogation in earnest. First, with Wade, after giving the *Miranda* warning.

“I’ve looked at your bike. How is it that you are riding a stolen bike?” Kinney asked.

“It’s not stolen. I have the registration with me,” Wade replied. The registration he produced showed the bike’s owner to be WJ Cycles, Inc., a Rhode Island corporation.

“WJ Cycles. Is that your business?”

“Yes, it is.”

“I work with a special anti-theft task force and I know when a bike has been stolen. So don’t bullshit me. What are you doing with a stolen bike?”

Wade did not respond.

“Where are you staying?” Kinney asked.

Same non-response. Wade’s mind was quickly trying to process this information. How did this guy figure out the bike was stolen? Was he bluffing? The VIN numbers were from a salvage bike Wade’s shop had purchased and integrated into the refurbished bike. Wade had liked the newly minted “clean” bike so much he had brought it to Sturgis, without fear of detection. Or so he

thought. Too many unanswerable questions at this point. Wade decided that he would continue to exercise his right to remain silent.

Deputy Luther engaged Lynn in conversation. “Although I am not going to arrest you, you should stick around for a few days. There’s not enough evidence, yet, that you are connected with what your husband did. We will be holding your motorcycle because we think it has been stolen.” Luther then waited for a response. Silence. “Do you want to tell me anything about the bike?” Silence. “Will you be staying at the Deerview Campground?” Silence. “Do you need a ride anywhere?” Lynn finally replied, “No, I’ll figure it out.” The last thing Lynn wanted was law enforcement at the campground. Luther made a mental note of Lynn’s refusal of the simple offer of help. And, as if sensing Luther’s interest, Lynn changed her mind and asked for a ride to the station, to be near her husband.

The ride to the Rapid City police station was silent. At the station, Kinney’s car was driven into the sally port—a secure, controlled entryway. Wade was retrieved from the car and brought into the booking room. Deputy Luther began filling out the booking form, listing the relevant identifying information, as well as the charges. A mug shot was taken. Jeffries did not look happy. After changing into jailhouse garb in a private room, he was brought back to the intake area where he signed an inventory list of property. He was then escorted to a cell.

Jeffries was still working through the events in his mind when Deputy Luther came to his cell and told him he could use the phone in the corridor to make a local phone call. Jeffries thought that any local call would be useless. The only people he knew in the area were the rest of the theft ring, including his son, Lionel. He didn’t want to finger any of them, in case the phone call was monitored (which, of course, it was). Jeffries recalled, however, seeing various bench ads for a group known as “Law Tigers,” representing bikers. He thought he could safely start there. As it turned out, Law Tigers only did motorcycle accident claims, but the receptionist was helpful enough to recommend a Rapid City lawyer by the name of Ian O’Grady. Normally, Wade would have been skeptical of any such recommendation, but he knew he had to get started finding a lawyer. He knew that he and his family were in deep trouble. Jeffries’ phone call came at a good time, as O’Grady had just finished a five-day trial in Deadwood, near the center of Rally activity. They agreed to meet the next morning.

After processing Jeffries at the station, Luther and Kinney conferred briefly and decided to follow the trail together to the Deerview Campground in Meade County. Along the way, Kinney apprised Luther of the work he was doing with the anti-theft task force during the Rally. They had agents walking among the bikes parked in Sturgis, looking for signs of stolen bikes. They carried cell phones with an app that could “read” a bike like a grocery store scanner. Luther began to understand the ease with which Kinney had made a determination on Jeffries’ bike. Arriving at the campground, they walked into the office to check on registrations. In contrast to some of the larger Rally campgrounds, the officers encountered no resistance, but instead cooperation, from the manager. He

produced a campground map, marked the space, and drew a winding line from the office to the space. The officers followed the directions and arrived at a large space occupied by a number of vehicles—a motorhome, a horse trailer, and a closed panel utility van. No one else was in sight. This was promising, however. Luther and Kinney could wait. And in the meantime, an affidavit and request for a search warrant were being prepared at the direction of Agent Kinney for review by a judge at the Meade County courthouse.

As the officers waited, a young man rode a motorcycle into the campground. He identified himself as Lionel Jeffries, age nineteen, a resident of West Warwick, Rhode Island. Coming into the campground about fifteen minutes later was an officer who delivered a signed search warrant. Kinney looked over the search warrant and told Lionel that he wanted to execute a search of the vehicles. Lionel was unsure of what to do, but offered no resistance. Kinney asked for the keys and he and the other officer proceeded first to the motor home. Deputy Luther stayed with Lionel.

“Have you been to the Rally before?” asked Luther.

“My parents have been coming out here for five years. This is my second year,” said Lionel.

“When did you arrive?”

“Last Friday.”

“What do you make of all this? Are you enjoying it?”

“Yeah. Sure. A lot of crazy things going on. I really liked the concert at the Buffalo Chip on Monday. Lynyrd Skynyrd. The crowd was great.”

Kinney came back and reported that a motorcycle inside the motorhome, in a space cleared for storage, had been identified as stolen during last year’s Rally. Enough talk for now. Luther told Lionel he could retrieve some personal items, while accompanied, but no further access would be allowed until the search had been completed. Kinney, Luther, and the officer who brought the signed warrant combed through the vehicles, one at a time. In the horse trailer, they found four motorcycles, three of which were registered to other owners and recently reported stolen. The fourth was likewise registered to an out-of-state owner but not yet reported stolen. In the van, they found a channel lock and pliers to break ignition locks. In the motor home, they found an owner’s manual with a VIN number, along with the owner’s name, address, and phone number. Kinney called the number and reached a Thomas Smith, from Charleston, South Carolina, who quickly confirmed that his new Harley Road Glide had been stolen last year during the Daytona Rally. There was now no question in Kinney’s mind that he had stumbled upon a motorcycle theft ring.

Kinney turned again to Lionel, advised him of his *Miranda* rights, and asked him about the stolen bikes in the trailer. Lionel said he didn’t know anything about

the bikes in the trailer. He claimed not to know much about anything else. "I am just a kid who came along with his parents for some vacation." Then, on a more serious note, he asked, "Have my parents been arrested?"

"Your father, yes. Your mother, not yet" Kinney replied. "You better stick around for a while. You're more than old enough to be riding these bikes and yet you don't know anything about why there are so many of them stored in the trailer? Doesn't make sense." Lionel had no response. The officers spent the next two hours compiling an inventory from the search. This included taking many photographs to document the details. Agent Kinney commented extensively as they went through each bike, sharing his knowledge of what to look for. Deputy Luther was receiving a crash course in motorcycle theft interdiction.

The next morning, Jeffries and O'Grady met and began cautiously sizing each other up. O'Grady, it turned out, was an ideal choice. He was a native South Dakotan, with a fighter's attitude developed around dinner table discussions, led by his father, also a lawyer, as well as with his many brothers and sisters. One had to be tough and competitive to stay in that game. It served him well as he followed his father's career path through the military and later at the University of South Dakota School of Law. Joining a leading Rapid City law firm upon graduation, he learned his craft under the mentoring of legendary trial lawyer, Joe West. After West's death, O'Grady left the firm and earned his reputation as a superb courtroom lawyer. Although he had many high-profile matters, his passion for defending the little guy and his inherent distrust of authority led him to take on less glamorous, but nonetheless challenging, cases.

Jeffries' prior experience with attorneys in Rhode Island had not been positive, although the circumstances there had not been ideal for any long-term relationship. Jeffries thought that the lawyers there seemed to be anxious to get on to the next case, that his matters were simply a means for the lawyers to extract money, and that his issues were never understood at anything more than a superficial level. O'Grady was different. He listened more than he talked. When he spoke, he did not talk down to his client. His thoughts were neither stock, nor clichéd. His questions were probing and sought to understand where his client was coming from. He seemed to care about Jeffries' concerns. Refreshing. Wade began to feel a sense of relief as they worked through some awkward matters.

"I'm not going to beat around the bush," Wade said. "I've been caught red-handed riding away on another man's bike. And somehow they figured out my own bike was a stolen bike. It only gets worse, if they can track down our campground, there are more bikes."

"Normally, I don't want to hear at this stage whether you did it," Ian responded. "It limits our options at trial. But there it is, out on the table. Okay, tell me everything you can about what happened. Don't hold anything back. I don't want you to be in charge of deciding what you think I should know."

Wade related the events of the day and then described the activities of the week, moving on finally to a fairly complete description of the entire business

operation. It could be assumed that the theft task force would find its way to the campground and then eventually to the shop in Rhode Island. None of this would be good. Ian listened impassively, occasionally prodding Wade with a question for clarity. Not much to work with, if one was thinking in terms of a Perry Mason acquittal.

When Wade had finished, Ian said, "Let's talk about what you would like to see happen. I take it you are not expecting this to simply go away."

"I don't see how it can. Is there a magic bullet somewhere?"

"I'd like to tell you there is, and I will look for one. You never know. We won't go to court unarmed. There might be something that can bring them around. We'll have to dig for it. But, let me ask again. What would be an acceptable outcome? I understand that I'm asking you to discuss potential outcomes, all of which are bad. What would be least bad? Or, what is most important to you?"

Wade sighed and his voice shook, "My wife and my son. They shouldn't be part of this. I mean they are a part of this. But . . . can you help me? If there is any way to keep them out of prison, I'll do whatever needs to be done."

"Was she with you?"

"Yeah . . . I mean Lynn knows everything about the operation. She's a part of it. I just don't want her to be pulled into this mess, if it can be helped. She hasn't been well lately, and I'm worried about her."

"Okay, it's good to at least have some direction on what is important. Let's go back to the identification of your bike as stolen. You seem surprised by that. Tell me about it."

Wade had felt comfortable with bringing one of last year's acquisitions to the Rally because it had been "refurbished" at the home shop. He would typically purchase a salvage bike from an insurance company. It would be the same make and model, many times the same year, and as close to the look of the stolen bike as possible. The salvage bike would be registered in Rhode Island, brought to the shop, and reassembled to form a new vehicle with the VIN numbers of the newly titled vehicle replacing the numbers on the stolen bike. This was enough to pass a regular inspection, so the relatively quick determination that the bike was stolen indicated to Wade that there was some undetectable method of numbering that had not been removed. Ian made a mental note to check into this.

The conversation moved on to a discussion of money. "How much is this going to cost me?" Wade asked. "We have some money, but most of it has gone back into the business. We are not wealthy."

Ian responded, "It's a little early to give you a definite number because we just met this morning, and I'm still sorting through the issues. What, if anything, was said to police before *Miranda* warnings were given or whether any evidence was seized without a warrant will shape what we do to move the case in a favorable direction. This doesn't feel like a case that will go to trial. If the police are competent, and there is no reason at this point to believe that they are not, going to trial means you will lose. And not just you, but everyone connected with the

operation. The magic bullet, if there is one, will not let you walk, but may set things up for a not-so-bad resolution.”

“Getting back to money,” Ian continued, “you should seriously consider separate counsel for your wife and for your son. I know that will increase the expense, but it probably will be money well spent in order to peel them off from the prosecution’s main focus. The more we make them work, the better.”

“So, what does that mean, in terms of money?”

“How many are involved? Is it just the three of you?”

“There are five of us out here. Myself, my wife, Lynn, my son, Lionel, and two non-family employees, Jill and Sonya. I’m not sure what happened to the two gals. They were there at the Harley-Davidson store to create a diversion, and they did. What happened after that, I don’t know. I was kinda busy at that point. I assume Lionel is still at the campground, and he will likely be found there, if he does not first come looking for us. Then there is the shop in West Warwick, Rhode Island. I’ve got two cousins who do the bike work there.”

“Okay, my immediate concern is not with those in Rhode Island. That’s another jurisdiction, although local law enforcement and the feds will likely show up there. It looks like Jill and Sonya are on their own, unless they come into the net. Perhaps not. We’ll worry about that if and when it happens. So, for now, I would recommend three lawyers.”

“Wow, why not two? You, plus one more for my wife and son?”

“Well, if Lionel was not at the scene in Rapid, it is best to keep as much distance from you and your wife, who were. Also, we can prohibit the use of a statement made by one defendant against another.¹ One lawyer representing all three has a built-in conflict. It is best to have the lawyers cooperate yet maintain separate adversarial positions for each client. Right now, we don’t yet know the pressure points that might break the case in your direction. Again, the object is to make the prosecution work. The harder it becomes for their case, the more likely they will come around with a favorable offer.”

“They? Do you mean there will be more than one prosecutor?”

“Yes. In fact, potentially several. There is the theft in Rapid. That’s Pennington County. You described at least one theft in Deadwood. That’s Lawrence County. You are staying at a campground in Meade County and, as I understand it, you have bikes there. Plus, there is your home operation in Rhode Island. And then, throw in the feds. It won’t be hard for them to make charges for interstate trafficking in stolen goods and conspiracy. Yes, potentially lots of prosecutors, and prosecutions.”

“Oh shit. It’s worse than I thought,” Wade replied. “Well, good to know what we are up against, I guess. You’re not just rattling my cage, are you?” There

1. See *Bruton v. United States*, 391 U.S. 123, 126 (1968) (“We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner’s guilt, admission of Evans’ confession in this joint trial violated petitioner’s right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.”).

was a long pause. Then Wade continued, “Okay, I get it. I’m in real trouble. My family is in trouble. Yeah. So, give me an estimate of what this might cost.”

“I think you need to raise a minimum of \$50,000 for us to get started. I know two lawyers who would be excellent for what is needed in this case. There would have to be separate letters of engagement, but the funds can come from a single source. And that raises another problem.”

“What’s that?”

“Law enforcement, particularly the feds, have a nasty habit of making a preemptive strike on litigation funds, claiming they are the fruits of the illegal operation, especially if they throw RICO² into the mix, seeking forfeiture of those funds. Don’t be surprised if they try that here. In any event, that’s potentially ahead. You need to be aware of that. But we have enough trouble for now and we’ll burn that bridge when we get there.”

“What does that mean?”

“Sorry, that’s just one of my goofy expressions. Forget about it for now. Let’s deal with the problem of raising funds to pay for a credible defense. \$50,000 will just get it started and, although I don’t think this will go to trial, by the time we come to the settlement end-game, it may run as high as a \$100,000 between the three of us. I know this is a lot, but you need to be prepared, in case it goes that far. Can you come up with \$50,000 now? Are there resources besides the business, like other family?”

“Well . . . yes. But it will severely impact our business.”

“Frankly, I don’t think you will have a business by the time the feds are done. You need to think about yourself and your family. I think you’re probably out of the motorcycle business. I know your world has been turned upside down in the last 24 hours. But you’ve got time now to think about it.”

“Does that mean I won’t be getting out soon?”

“Yes. For many reasons. We could ask a judge to set bail, but I’m pretty sure it would be denied or be way too costly. You are a Rhode Island resident charged with serious crimes. No local ties to the community. That means you will be viewed as a flight risk. No doubt. Even if we can get a judge to consider bail, it will be expensive. By the time you come before a judge, they may have

2. RICO is the handy acronym for Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. § 1961 (2018). RICO provides a civil remedy for victims of criminal-like activity inflicted by an “enterprise” that utilizes the means of interstate commerce: “Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee[.]” 18 U.S.C. § 1964(c) (2018). The civil forfeiture provision allows the government to go after the proceeds of the criminal activity. *See* 18 U.S.C. § 981 (2018) (outlining civil forfeiture); 18 U.S.C. § 1963 (2018) (outlining criminal penalties). *See, e.g.,* *Alexander v. United States*, 509 U.S. 544, 551 (1993) (“The RICO forfeiture statute calls for the forfeiture of assets because of the financial role they play in the operation of the racketeering enterprise.”). *Cf. United States v. McCorkle*, 321 F.3d 1292, 1295 n.4 (11th Cir. 2003) (“[A] criminal defendant cannot pay an attorney for the rendition of future legal services with the expectation that the entire payment will be immune from forfeiture.”).

identified more stolen bikes, meaning a greater number of charges. I think the minimum is likely to be \$500,000, cash only bond.”

“Cash only bond?”

“No bail bond, where you pay ten percent (non-refundable) to a bail bondsman and he puts up the \$500,000. Instead, you put up the whole amount, in cash or property. Based on our discussion of fees, it is unlikely you have another \$500,000 free and clear to turn over. Right?”

“Right.”

“Sorry, but it was good to go over that. And, while you are in jail, this will keep you out of the investigation, for the moment. And, of course, you have to follow the number one rule—do not talk to anyone, except me. This means you do not talk to any of the jailers, or anyone they might put in a cell with you, or anyone who tries to contact you by phone, email, or scratched out notes. Do not talk to your wife or son, unless I am present. I cannot emphasize this too strongly. Don’t even talk to yourself. Do you understand?”

“Yeah, I got it.”

“Anything else we need to talk about now?”

“No. This is happening very fast. Not like I thought it would turn out. But you’re right, I’ve got some time to think about it.”

O’Grady excused himself and went back out to the entrance desk. He saw an anxious middle-aged woman waiting in the lobby. He asked if she was Lynn Jeffries. She nodded and Ian introduced himself. He told her that Wade had hired him to be his lawyer. “Could you join me for a quick, private conversation in my car?” he asked. She nodded again. When they were in Ian’s car, he gave a brief description of Wade’s situation, as well as how she might be affected. He did not sugar-coat it. Although he would not be able to represent her, he said that there were other very good lawyers who could help her and her son. With her permission, he would contact the other lawyers and one of them would contact her. Lynn agreed. After getting a brief rundown of Lynn’s conversation with Deputy Luther and the matter of the gun, Ian gave her a ride to a nearby hotel that had a rare Rally vacancy.

Six weeks later, three lawyers met at O’Grady’s Rapid City office. Arriving early, as was his habit, was Peter Robinson, whose confidence showed through his likeable personality. Robinson had graduated from the USD Law School, near the top of his class. Robinson, now thirty-three (and about twenty-five years younger than O’Grady), had clerked for the Nebraska Supreme Court before taking a position with O’Grady’s former firm, where he had just made partner. He had become known for his extensive preparation and intuitive sense about finding the moral center of a case. Although most of his experience was on the civil side, his research skills would serve well for what was needed on behalf of Lionel, and the others.

Arriving slightly later, but still on time, was Eric Hoffman, a Rapid City lawyer who had graduated from Harvard Law School. He was originally from the

East Coast but had made his way to South Dakota through an internship as a lawyer at the Pine Ridge Indian Reservation. Hoffman, now a solo practitioner specializing in criminal defense, was closer to O'Grady in age and experience. Although portly and occasionally disheveled, he was more polished than he appeared. He possessed a brilliant analytical mind. Many, if not most, lawyers work from what is known to figure out the unknown. Hoffman's uncanny ability to find an answer was unhampered by conventional approaches. He was truly an original thinker. His gift was complemented by an almost supernatural ability to focus on a problem until the answer revealed itself. That ability allowed him to ask questions and to offer solutions that others did not see because of self-limiting habits of mind. He also had a deprecating sense of humor that clothed his modesty well. He would represent Lynn Jeffries.

Ian gave his assessment of the case. "Wade Jeffries has been pretty upfront about his responsibility. He is not expecting a miracle. He wants us to do damage control, and there is a lot of potential damage out there. He has described to me the operation in Rhode Island. The locals and the feds have been through the shop already and there will be no good news coming from back

East. It is a full-blown motorcycle theft ring and law enforcement has shut it down. Wade's main concern is protecting his wife and son, as much as can be done. A new development that adds to this is Lynn's recent diagnosis of breast cancer. He would really like to see her avoid prison. That's going to be tough, but it is doable, Eric, if we can negotiate this the right way. Wade feels very bad about his cousins, who have worked at the shop for a long time, but the business will have to see to their defense back there. Our focus is here, and I think our opportunity is with the required showing that the bikes are stolen."

"Right now," Ian continued, "we are looking at two prosecutions, one in Pennington County and one in Meade County. Pennington will go first. Our motion to dismiss one of the charges is scheduled in front of Judge Sorensen on the tenth of next month. We'll see if we can flush out their proof. Wade's biggest problem, however, is the bike he was caught on. That clearly was someone else's bike. Not much can be done with that. Eric, you need to keep Lynn as far away from that bike as possible. Her statements to the police will be crucial. Lionel's okay right now. So far, he hasn't been charged in Pennington. The bike that Wade and Lynn rode in on is where our opportunity lies. Wade thought he was safe with that one. Somehow, the task force guy figured it out right away. But, I think that's their weakness. They apparently don't want to give up how he figured it out. We'll have another go at it in Meade, but let's see what we get first from Judge Sorensen."

"I not worried about Lynn's statements to the police," Eric responded. "My concern is her involvement with the business. I've talked with her several times over the last few weeks. She comes across as well-spoken, knowledgeable about the motorcycle business, and very aware of her present circumstances. I won't be

able to sell an innocent spouse defense. We'll have to leverage the prosecution's reluctance to reveal what they know to push for a favorable resolution."

Peter agreed with this plan. He would not be directly involved in the Pennington prosecution and would use the time to polish their respective briefs. They would need every bit of authority on this one. That, and exposure of the prosecution's "trust me, I know when a bike is stolen" arrogance. "This is where the lawyering will make a difference," he added. "No magic bullet to slay the beast, but there is more than enough to wound him."

The defendants' motion to dismiss came on for hearing in front of the Honorable Timothy Sorensen. A former prosecutor, Sorensen had been a trial judge for over a dozen years, handling mostly criminal matters. He had a reputation as a good listener, with a quick inquisitive mind. While some judges have been known to wear the prosecutor's hat after they ascend to the bench, Sorensen would be fair. All in all, a good sign for the defense in this case. Not so good for the defense was the presence of the prosecutor, Vanessa Blake. She had become her office's top trial lawyer and was known for her ambition. Ambition was not in and of itself a problem, so long as it did not lead to abuse of power.³ A healthy dose of determination, hustle, and confidence, coupled with passion and yet coolness under pressure, had served her well. She would be a formidable adversary.

Blake took the first witnesses through Jeffries' arrest. In light of what she knew would be a difficulty later on, she delved into the details that put Wade on someone else's bike, without a credible explanation of why. The diversionary role played by Jill and Sonya was even mentioned, although they themselves had managed to elude the law's net. Next, she called Agent Michael Kinney to the stand. After establishing his training and experience, Blake directed him to a discussion about Lynn Jeffries:

Q: When you began speaking with Ms. Jeffries, did you advise Deputy Luther or anybody else, that it was time to arrest the Jeffries?

A: At some point I did.

Q: Do you recall when that was?

A: I don't recall when the point was. It was Deputy Luther's investigation to start with. And although I have run our task force here and I'm sworn in Pennington County and Meade County, I'm still an East Coast person. So we delicately handle things so we don't bruise egos or offend anyone.

Q: After you spoke to Lynn Jeffries, you conducted an investigation at the scene?

3. See Jonathan K. Van Patten, *Suing the Prosecutor*, 55 S.D. L. REV. 214 (2010) ("Power brings the possibility of its abuse.").

- A: Deputy Luther and I searched through Black Hills Harley Davidson, attempting to locate their motorcycle.
- Q: After the bike was identified, a search of that vehicle occurred?
- A: Yes.
- Q: And then after you found evidence on that bike, you then suggested or assisted in the call that it was time to arrest both Mr. and Ms. Jeffries?
- A: At some point within that whole realm of everything. I know everybody had still been there, and the motorcycle was being seized and standing on its own. My recommendation was that they both be arrested and charged.
- Q: Because that was the additional evidence necessary to confirm your suspicions?
- A: In my—the way I describe things is a series of indicators. My indicator threshold had been well surpassed.

Although Kinney's threshold had been met, he deferred the decision on the arrest of Ms. Jeffries to Deputy Luther. Arrest of Lynn for theft was a stretch because, on paper, everything was in order. The bike was registered to WJ Cycles, the Jeffries' business.

On cross-examination, O'Grady went over Kinney's direct testimony, usually a mistake for cross, but, here, Ian had a purpose:

- Q: When you came upon the Jeffries' motorcycle, what led you to conclude that the bike had been stolen?
- A: When I looked at the motorcycle, we are talking about his black and red full dresser, and I looked at it. I found that the wiring harness on the frame was attached differently and more secure than normal. When moving the wire harness to view the public VIN, I noticed the paint was different surrounding the VIN number. I then checked the Federal Safety Standard Label, which is a federal label showing that each vehicle conforms with federal emission standards, and it includes the year of the vehicle and the complete VIN. And when I examined that, I found that it had a razor-blade cut, it was two different labels and it was not the original label that was on that frame.
- Q: Can you describe that for me? When you say it had a razor-blade cut, what do you mean by that?
- A: If I took a label, any type of label and you applied it to a round piece of stock, and it would circle the metal, and if

you wanted to cut it and if you took a razor and a ruler and ran that razor down, you could peel off half of it.

Q: Why would you do that? Why would someone do that?

A: To put a sticker with a VIN number that did not belong on that frame.

Q: Anything else?

A: There were the components. And I also examined and immediately recognized that the transmission was a parts and accessory transmission case, bought over-the-counter. When I examined the motorcycle, I ran the VIN on the motorcycle, through the National Insurance Crime Bureau, and was immediately made aware that it was a salvage vehicle; salvage meaning that it was destroyed and bought as salvage and reconstructed.

Q: Did you ever do follow-up to confirm your suspicions about the label?

A: Oh, yeah.

Q: And what did those suspicions show?

A: It showed that the frame had the altered label that had come off of an original frame and was put on that frame. The complete motorcycle was supposed to be a 2001 Harley Davidson Ultra. The frame was actually a 2000 vintage and not a 2001. And I was able to determine that from some other marking on the frame. And someone had actually cut the entire area where the VIN number is attached into the frame, cut the entire frame out and taken the piece of metal with the original from that salvage vehicle and welded it, very neatly welded it, bonded it and painted it and baked the pin onto it to give it an original appearance.

And then came the crucial point that Ian had set up:

Q: Did you ultimately confirm that any of these serial numbers or stickers, however and whatever permeation they might lie, originated with the vehicle that had been stolen?

A: I identified the fact that they were altered, that there was an alteration on the motorcycle, and it was done in a very professional manner.

Q: My question was, did you ever determine that any of the numbers on the vehicle in any form came from a vehicle with a motorcycle which had been stolen?

- A: No. We had not identified a particular victim motorcycle. But from experience we know the only reason to change the numbers is to conceal –
- Q: I understand, but that isn't what I'm asking.
- A: I'm trying to answer.
- Q: Did you ever determine that any parts on the Jeffries' motorcycle were stolen?
- A: Physically get an identification number of whom it was stolen from? No.
- MR. O'GRADY: Thank you. That's all I have got.

Vanessa Blake sought to support her case with evidence of prior bad acts,⁴ principally with what had been discovered at the Jeffries' residence and shop on Coal Hollow Road in West Warwick, Rhode Island. There was plenty of evidence there. Law enforcement had identified over fifty bikes that fit the pattern of refurbished bikes with legitimate salvage bike VIN numbers. The question was whether the prosecution could prove any particular bike had been stolen.

William Rostenkowski, another anti-theft task force agent who supervised the execution of the search at the Jeffries' Rhode Island shop, testified as to what was found. To the inexperienced ear, this testimony was devastating. But it was not what Rostenkowski found at the shop that was challenged, it was his conclusion that the bikes were part of a theft operation that was laid bare by Ian's cross-examination:

- Q: When you went to the Coal Hollow address, you say you found many Harley-Davidson motorcycles that you determined to be stolen. Do I understand that correctly?
- A: Correct.
- Q: And tell me, let's call them 1, 2, and 3, tell me how you determined that they were stolen?
- A: Under Rhode Island law, we have case law that supports our position that our method is confidential. We don't have to reveal how we identify them as being stolen.
- Q: Well, you are in South Dakota now, so I'd like to know how you were able to determine that first motorcycle was stolen?
- A: Through confidential means.

4. S.D.C.L. § 19-19-404(b) (2016):

(b) Crimes, wrongs, or other acts.

(1) *Prohibited uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted uses; notice in a criminal case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Q: And you are telling me it was stolen, but you won't explain how you know it's stolen?

A: Correct.

Q: How about the second motorcycle found at Coal Hollow Road. Same thing: It's a secret?

A: Correct.

Q: And the third motorcycle at Coal Hollow Road? It's a secret?

A: Correct.

Q: Is there anything in this entire investigation that you will tell me?

A: That's a loaded question.

Q: Well, it's not loaded with very much if you won't tell me anything. Is there anything at all about this investigation that you will tell me? Will you tell me how you determined any single part, or engine, or transmission, or car, or motorcycle that you discovered at Coal Hollow Road? Will you tell me how you determined any of those things were stolen?

A: Through confidential means.

Q: But you won't tell me how?

A: No.

Q: And will you tell me the names of the owners of these things which you allege are stolen?

A: Not at this point, no.

Q: At what point will you be able to do that, do you think?

A: When we interview and do an investigation on every person.

Q: You haven't done that yet, have you?

A: No.

Q: You don't know really how these motorcycles were reported as stolen?

A: No, sir.

Q: Okay, other than through a method you say is confidential, is there any other evidence to support your conclusion that these bikes are stolen?

A: Because the numbers have been altered, the vehicle identification numbers have been altered.

Q: Did you trace the vehicle identification numbers of the other Harley-Davidsons in order to determine that they were stolen?

A: There was a number, that's the 17-character vehicle identification number on the Harley, it came back registered

to the salvage place that your client, Mr. Jeffries, had purchased. Everything underneath it was stolen.

Q: Everything underneath what?

A: Everything that that number was attached to, the frame, the neck of the frame was the only thing we can identify positively as being legitimate, everything else underneath that was stolen.

Q: How do you know that? Tell me. I hear you say the neck, you know the neck wasn't stolen but you say everything else underneath that was stolen. How do you know that?

A: By identifying it and getting pictures from our victims. Victims giving us what the vehicle looked like, and through confidential means of identifying the rest of the motorcycle.

Q: And you are just simply not at liberty to tell us any of that today?

A: That's right.

MR. O'GRADY: That's all I have.

THE COURT: Mr. Hoffman.

Q: (By Mr. Hoffman): You say these various motorcycles that were reported stolen at some point, that they were listed on the NCIC as being stolen?

A: Yes.

Q: Things that are reported stolen, aren't always stolen, are they?

A: Not always.

Q: People commit fraud?

A: Sure.

Q: But, because you won't tell us the names or the circumstances of your investigation, we are not at a juncture where we can determine the history of the bike, the parts, the engines or whatnot, to figure out whose hands it might have gone through, and what the circumstances of the initial theft reports were, are we?

A: That's right.

Q: You are not going to testify about how you determined that either bikes in Rhode Island or bikes in Sturgis, the complete methodology you used to determine or conclude that those bikes are stolen, are you?

A: In an open Court, I will not expose confidential methods.

MR. HOFFMAN: That's all I have.

At this point, the Judge stepped in and sought to clarify what had been bothering him about this whole line of testimony.

THE COURT: Let me ask you this. In Rhode Island, or wherever you are at in Court, you come in and you say, this is a stolen motorcycle, and they say, prove it, how do you prove it?

THE WITNESS: In closed Court, without explanation in front of defendants and defense attorneys, or even with the defense attorneys, I would explain and show in detail how that is done.

THE COURT: But not in front of the jury?

THE WITNESS: If we had to do—there are some things we would explain, and there are some things we won't. We will use some of these confidential sources, but we will not display everything, because we are not in the business of trying to train someone that's been accused of theft to better their ability. We are not going to put all our cards on the table.

THE COURT: Are you able to prove it's stolen without going into where this number is or what that number should be, or how it should look?

THE WITNESS: Some things, yes.

THE COURT: Enough of them to show it's stolen?

THE WITNESS: Oh, yes.

And so, the prosecution's weakness had been exposed. Even when pressed by Judge Sorensen's simple question—how do you prove it is stolen? —the witness would only suggest that such proof might come later, and then only with significant limitations.⁵ But would the Judge toss out this count on that basis? The Defendants would have to wait on the Court's ruling, as it had taken the matter under advisement.

Ian met with Wade after the hearing to discuss what had just gone on. "I feel pretty good about the hearing. I think we made our point with the Judge," Ian reported. "If he agrees, then we really have something to bargain with. Negotiation only works if you have cards of value. Blake is too good to be moved by pure bluff." Wade greeted this news with some hopefulness, but it was not enough to overcome his generally pessimistic mood. He was still very concerned about how all this was affecting Lynn, particularly in light of her pressing health concerns. And, understandably, his jailhouse stay had not improved his outlook

5. Consider, for example, the potential impact of the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" on these stated terms and conditions. U.S. CONST. amend. VI.

thus far. In a way, the Jeffries family remained an enigma to Ian. Wade and Lynn seemed like a very ordinary working-class couple, with attitudes not unlike Ian was used to seeing in the Midwest. It was jarring to think that these ordinary folks knowingly operated a nationwide theft ring. Yet, that was what they did for a living. Certainly, they had the skills and experience to prosper without putting the whole family in jeopardy. Crazy. When and where they had made the fateful choice to go in that direction would remain a mystery. Ian didn't have to know that to be effective in this case.

And to Wade, Ian was somewhat of a puzzle. He was unlike the other lawyers he had met in Rhode Island. So, Wade asked, "You've been very focused on my case. Why?"

"What do you mean?" responded Ian.

"Well, you're not like the other lawyers I've dealt with."

"I am just doing my job."

"But you seem to really care about my case. And I've already told you that I did it. It's not like you're working hard to save an innocent person. How come you're working this hard for someone who is guilty?"

"Ah, now I get what you are asking. It's because I believe in our system of justice. I believe that the State should not be able to put someone in prison unless it follows its own rules. The rules say the State must prove beyond a reasonable doubt that you have committed the crimes it has charged you with. Right now, it isn't even close. They have to show that the bikes are stolen, and they refuse to do that. I'm the one who makes sure they follow the rules. That is for everybody's protection and I can get behind that."

"Alright, I see that. Wow! That's reassuring. You're like a Boy Scout!" Wade then paused and looked at Ian. "Sorry, I didn't mean any disrespect."

"No, that's okay. Sometimes, I get a little passionate about what I do. I usually tell my clients that they hire me for my time, but I throw in my heart for free. That's how I was raised," Ian concluded.

Ian had a meeting later at his office with Eric and Peter. They did a post-mortem on the hearing, with everyone giving their sense of where they thought Judge Sorensen would come out. Peter, being the youngest, was the most optimistic: "The Judge has to be troubled by the arrogance of a prosecution witness who refuses to answer his direct question of how they will prove the bikes were stolen. How can the prosecution go on without at least some evidence in the record? Right now, there may be inferences, but no direct evidence on a required element of the offense." Even the more experienced lawyers thought they had a shot. Eric responded, "He didn't exactly refuse. He just said not now, maybe later. But I don't think the Judge liked that answer." Ian thought that the longer the Judge took to decide, the better their chances became. That is, it would not take too much for any judge to pass on what was a preliminary, early motion. The more time Judge Sorensen took, the more he would be thinking about it, and the prosecution's case didn't get better on that record. "On the other hand," Ian

remarked, “our seeming advantage right now might turn to dust and we’re back to square one if Judge Sorensen denies our motion. Let’s see how the next hearing goes. If it goes well, that might be the time to pitch an offer to both prosecutors. I’m not saying we are going to lose either motion, but the settlement value might evaporate quickly if either judge rules against us. There is a lot that needs to go right.” High risk; high reward.

The discussion moved to the upcoming hearing in Meade County. Meade County had absorbed the Deadwood bike into its case under a statute that allowed it to prosecute on the basis of where the stolen bike was found in possession, rather than where it had been stolen.⁶ The prosecutor had brought in Lionel as a defendant because he was at the campground where four bikes were found. Peter’s job was to keep Lionel away from the operation that had brought the bikes to the campground. Eric’s job was more delicate because Lynn had undeniably had an active role in the business. Fortunately, that was located in Rhode Island. Her influence was less obvious from the distant vantage point of Sturgis, South Dakota. When it came to trial, if it did, Wade would have to fall on his sword for her. For purposes of the hearing in Meade County, she could remain safely in the background, as the prosecution continued to stumble over proving the elements of its case.

For the Meade County hearing, they would face another experienced prosecutor named Wilson Samuels. Samuels had been the state’s attorney for over a decade and was known as a competent, no nonsense, straight-dealing prosecutor, with no apparent ambition for any other job. Having dealt with Rally-related issues all throughout his tenure, there wasn’t much that he had not seen. O’Grady felt that he would be reasonable when it came time to settle the case.

Last, but certainly not least, they would be in front of Judge Harriet Payne. She had come to Rapid City by way of Creighton Law School. She had brought her personal qualities to the practice of law, with great effect. She was extraordinarily smart, yet grounded firmly in common sense, persuasive without being pushy, and no one had ever outworked her. While some women lawyers imposed limitations on themselves to avoid a reputation of being too aggressive or ventured too far in the other direction on the assertiveness scale, Harriet was able to litigate free of the stereotypes, aggressively and uncompromisingly as a professional should, and without causing even the losing side to dislike her. This was a gift. You see it sometimes with a professional entertainer who has “it.” Harriet had “it” but was always modest about it. That is why judges and lawyers never failed to like her. When she herself became a judge, those personal qualities further enhanced her effectiveness in resolving disputes intelligently and fairly. Defendants’ counsel welcomed her participation in the case.

6. See S.D.C.L. § 23A-16-8 (2016) (providing that “[w]hen a public offense is committed partly in one county and partly in another county, or the acts or effects thereof constituting or requisite to the offense occur in two or more counties, the venue is in either county.” See also *State v. Greene*, 192 N.W.2d 712 (1971) (affirming defendant’s forgery convictions in connection with a body shop scheme).

On the day of the hearing at the courthouse in Sturgis, the prosecution showed up in the form of a young Deputy State's Attorney by the name of Justin Hart. He explained that he would handle the prosecution's case in the absence of Samuels, who was still recuperating from a recent hip replacement operation. He expected that Samuels would be back as early as the following week. In the meantime, Hart said he was familiar with the issues and ready to go. That sounded acceptable to defense counsel. Because the bulk of the testimony that day would deal with the prosecution's offer of other acts evidence under Evidence Rule 404(b), Mr. Hart proceeded first.

Hart called William Rostenkowski, the agent who had supervised the search and seizure at the Jeffries' shop in Rhode Island and who had testified at the Pennington County hearing. He began by describing his connection to the case.

Q: How are you acquainted with the criminal cases against members of the Jeffries family?

A: I'm with the Rhode Island State Police Auto Theft Task Force, and we were advised of the incident with the Jeffries family as of August 5 of last year at the Sturgis Rally. As a result of that, we started an investigation in Rhode Island.

Q: What's the connection between the Jeffries and Rhode Island?

A: The Jeffries live in Rhode Island.

Q: Okay. Specifically, do you know where they live?

A: Yes. Their residence is on 1271 North Coal Hollow Road, in West Warwick, Rhode Island.

Q: And do they have any businesses there?

A: Yes. They have a—

MR. ROBINSON: Your Honor, I'm going to object to the general nature of the question do "they" have any businesses there. There are three different Jeffries that we are talking about, and the State is just continually lumping them together.

THE COURT: I think it's preliminary at this point.

Overruled.

Not expecting to win that minor skirmish, Peter was content to make his overarching point early and often.

Rostenkowski continued with his description of what he found at the Jeffries' shop:

Q: And what steps has the Rhode Island State Police taken to further the investigation?

A: We are still in the process of identifying motorcycles and vehicles that the Jeffries have sold as a result of their business—or we refer to it as a chop shop. We really don't refer to it as a business. We haven't found anything legitimate in our findings that the Jeffries have done, so we refer to it as a chop shop. Regarding the selling of vehicles, we are tracking them down and identifying them as stolen.

Q: When you say “chop shop,” would you describe for the Court what you mean by that?

A: A chop shop is a place that—or it could be—it doesn't have to be any particular building or property, just the process of tearing down—taking apart motorcycles that are stolen to either profit from the parts or to what we refer to as retagging where they switch the vehicle identification number of a salvaged bike that they may have purchased and put that onto a stolen bike. They switch the vehicle identification numbers.

MR. HOFFMAN: Your Honor, I'm going to object. This is all speculation. This is this person's speculation as to what Mr. Jeffries would be doing.

THE COURT: Overruled. I think it is preliminary. You will have an opportunity.

Please continue, sir.

A: Oh sure. It's a matter of switching the identification numbers, the parts, from the stolen motorcycle to the salvage, and now he's representing the stolen motorcycle as the salvage bike and then he sells them. He, either by word of mouth or through some sort of paper or magazine, sells the motorcycle to somebody who's looking for it. They come and they—They call him, and they come to Coal Hollow Road, they look at it, they purchase it. It's all been cash transactions. Everyone that we've spoken to, he's wanted cash only. And they buy it, they take it to their house, and they drive it for a year, two years, three years, however long they have had it, and then we find out through the records—because once Jeffries buys the salvage, it has to be titled in Rhode Island, so we're able to track the salvage that he has. If it comes back registered to him through Rhode Island—and it's just a matter of running that vehicle identification number and finding out who it's currently registered to—and if it's still on the road or registered to somebody other than WJ Cycles, then we go and look at the bike. We receive consent to search the bike and identify it.

Q: I sensed some hesitancy about your answer to my last question about how the bikes were titled and traded. Did you want to explain that further?

A: Yeah. When you asked the question, it was starting to get into how we actually identified the motorcycles, and that was one of the things that I was kind of cautious on how I was going to word that because I don't want to give out how we identify the stolen vehicles. Through case law in Rhode Island and Federal Law, we're not obligated to give that information out as exactly how we identify the motorcycle. Mr. Jeffries is a very knowledgeable guy, and from what we've been able to understand, he's been very curious on how we identify them. And it's for protecting the integrity of what we do, I was very cautious in answering the question.

THE COURT: I sensed this problem coming up because I read the testimony from Officer Kinney who testified in Rapid City. If you charge somebody with grand theft, you have to prove that it's stolen from a particular person with the intent to deprive the owner of the property. Now, if you can't give out the information to prove that, then maybe we need to go home.

MR. HART: Judge, this is not his decision. This is my decision, and we can prove it. There are maybe 15 different ways to identify a stolen motorcycle from different numbers, different places, different type settings, different letters that the VIN has to begin with and if—and I will guarantee the Court and counsel now—that at the time of trial, we will identify them through at least one or two different ways, and we can prove that they are stolen. It is not necessary for the Court or counsel to know all of the 15 different ways to identify it as being stolen. If I can prove it through one way—Mr. Kinney and Mr. Rostenkowski have agreed to give us at least one method to identify it as being stolen in a manner that is reasonably public.

MR. HOFFMAN: Your Honor, if I may—I think the State has put forward the position that their witnesses can prove to any jury by disclosing some means that these bikes were stolen. But none of them will disclose all the ways they look at a bike to determine whether or not it's stolen. So what they are essentially doing is they are trying to give the Court half of their side of the story, and not let us look at the other half. If they have got 15 different means of trying to identify

whether a bike or a part is stolen, and 3 or 4 of them indicate that the bike or part is stolen, but a bunch of ways that they won't disclose to us show to the contrary, then that's valuable exculpatory evidence that we're being deprived of. We don't know what's out there. We don't know what their tests are. We don't know what methodology is in all these other ways so we can't see if they failed under a different methodology.

THE COURT: I don't think I need to know all the possible ways of tracing and tracking stolen property. If the State intends to prove that these items are stolen property, then they will have to prove it. Mr. O'Grady?

MR. O'GRADY: I'm only asking this question because of what took place in Rapid City. We never did find out—I mean, it was a secret in Rapid from start to finish. Are they going to be required to tell us today how they have determined that these bikes are stolen, or are they going to be allowed to keep it a secret, which is literally what they said, until trial and just spring it on us there?

THE COURT: I'm going to do it this way: I will let Mr. Hart present his direct examination his way. As far as cross-examination and any confidentiality issues, I will deal with them when the time comes. But before I allow other acts evidence, you're going to have to satisfy me that you can prove that these are stolen items.

As between the two arguments, the “don't let them spring it on us at trial” seemed more promising, but the prosecution's obvious hesitancy to reveal *any* method of identification meant there still was some bargaining power left with the other argument. At the very least, nothing would go to the jury until the prosecution came forth with credible proof that a bike was indeed stolen.

Mr. Hart continued the direct examination of Agent Rostenkowski:

Q: When was this bike stolen from Sturgis?

A: August 3, 2016.

Q: And how have you identified that as a stolen vehicle?

A: That was done through confidential means.

Q: I'm looking at two different VIN numbers on here. Is that not one of the ways you identified them?

A: The one that's identifying a P-VIN under the category of P-VIN, that's what we refer to as the public vehicle identification number. That's the one that is the 17-character

number that's on the neck of the motorcycle. By the neck, I mean under the handle bars of the motorcycle, the front end of the bike, that's where that is located. That's what is registered to the Department of Transportation and that's how you would find where the bike is currently registered at this point.

The other number, the true VIN we're referring to it, that's the actual—that's the vehicle identification number of the theft that was—when we actually identified it, it wasn't the P. P-VIN is just the number—the salvage one, the disguised one to throw you off. The true VIN was the theft, what the actual bike was.

Q: When is the P-VIN, the public VIN number, assigned to a motorcycle?

A: From the manufacturer when it's first put together.

Q: So when you represent on your spreadsheet that this bike has a public VIN different from the true VIN, what does that mean?

A: It means that the bike was disguised, the true identity was being hidden from—it would have to be law enforcement. No other reason to hide it from anybody else.

Q: So when you say that the public VIN number on this bike was 1HD1FB, et cetera, that was the number that you actually discovered on the motorcycle as you examined it?

A: That's correct.

Q: Okay. And how did you determine what the true VIN number was for that motorcycle?

A: That would have been through one of the confidential ways that we identify the bike. When we find the—what we refer to as a C-VIN, Confidential VIN, we are able to identify through that confidential VIN what the actual vehicle identification number is. There's a database that—when the bike is manufactured, there are vehicles—there are confidential vehicle identification numbers assigned to that bike as it's going through the factory, or the car or whatever it might be, and those numbers stay with that vehicle identification number. When that VIN number is registered as stolen, we're able to retrieve the information of not only the stolen public VIN, the 17-character, but also all the C-VIN numbers as well. And if we were to put in the C-VIN number into a database, it would pull out what the actual VIN should be, and then we can—and then that would tell us whether or not that number is stolen or not.

At this point, the Court began to ask questions:

THE COURT: Is the C-VIN and the true VIN the same thing?

THE WITNESS: Well, yes and no. The C-VIN—The C-VIN is usually not—is not the full 17-character digit. The C-VIN is usually a derivative of digits of the true VIN.

THE COURT: Is that on the motorcycle?

THE WITNESS: No. A derivative—the motorcycles are different than cars. Each manufacturer does them in different ways. The C-VIN on a motorcycle is—there are different locations for them, but they are—they have their own—Harley-Davidson has their own formula for the derivative, and it's not a derivative of the VIN. It's a number that's assigned to that vehicle identification number as it's coming off the factory and it stays with that bike, that VIN, for the life of that VIN. They don't duplicate that.

THE COURT: The P-VIN is on the frame. Right?

THE WITNESS: Yes.

THE COURT: In the front of the frame.

THE WITNESS: That's correct.

THE COURT: The C-VIN is a derivative of that number?

THE WITNESS: Yes. On bikes it's a number that's not going to match anywhere on the neck, the P-VIN. It's a totally separate number.

THE COURT: Is the totally separate number on the bike anywhere or is it just in a bookkeeping entry?

THE WITNESS: There's locations on the bike. There's one on the engine, there's one on the transmission, and there's one on the crank case, and there are a couple others that we have that we feel are the confidential ones.

THE COURT: Is it the same number in these different locations or different numbers in these various locations?

THE WITNESS: The ones on the engine and the crank case—the one on the engine is going to be a derivative of the VIN. The one on the crank case and the transmission are going to be totally separate numbers. Those aren't considered confidential numbers. You can visually see those as you're looking down on it. It's not 17 characters, but it's not confidential. Those are going to be different numbers.

THE COURT: But those are not the true VIN numbers are they?

THE WITNESS: That's correct.

THE COURT: So we have P-VIN, true VIN, and confidential numbers.

THE WITNESS: That's correct.

Although a bit unclear at times, Rostenkowski's testimony indicated that there is a number, different than the public VIN, that was hidden and detectable only by law enforcement. But was he willing to reveal the final point that could seal the charge of theft? For some reason, still not fully known to defense counsel, no. Rostenkowski continued on safer ground with further description of how the purchase of salvage bikes was the key to the operation. One thing he managed in his testimony was to tie in Lynn to the operation. Lynn served as the notary on the title applications for the bikes, but she was not listed as an officer for the business. Not guilt beyond a reasonable doubt, but nonetheless a piece in the prosecution's case. And there still was no concrete evidence to tie Lionel in to the business.

Justin Hart began to show his frustration, and his inexperience, when he broke off the direct examination to make an offer of proof:

MR. HART: Judge, if I can just briefly make an offer of proof. I believe Mr. Rostenkowski's testimony will explain to the Court that there was no legitimate business means for them to acquire all these motorcycles. Lionel Jeffries lived at the house with Lynn and Wade. They frequently had new-model motorcycles being brought home and being sold from their property, and they don't have any legitimate income to justify the purchases.

THE COURT: I think we're wandering off. I think we need to confine ourselves to the stolen bikes, and also the absence of other legitimate income, if you want to call it that.

MR. HART: Okay.

MR. HOFFMAN: Your Honor, if I might just respond. I'd ask, if the State is going to present this evidence, then they better be able to support it by a forensic accountant or forensic economist to testify that there wasn't adequate income to purchase these vehicles. This witness is not qualified to testify to this or to that which Mr. Hart wants to draw the inference.

MR. O'GRADY: If I could also just renew or just make—I'd like notice of this. We don't have notice of anything like this. This is going to be quite a deal. This is going to take quite a bit of examination—

MR. HART: Did you read my 404(b) notice, Mr. O'Grady?

MR. O'GRADY: Yes, I read—

THE COURT: Just a minute. He's speaking to me. You speak to me. You do not speak directly to him.

MR. HART: Sorry, Your Honor.

After that mild rebuke from the Court, Mr. Hart seemed to lose his focus. He moved on to the computers seized at the residence and adjoining shop. There were three computers in all, but no clear identification as to who owned or operated any particular computer:

Q: Was there any evidence obtained from the search or seizure of those computers?

A: Yes.

Q: Would you care to tell us what it is?⁷

A: The evidence would be pictures of the stolen bikes. We were able to blow up the pictures and—

MR. ROBINSON: Your Honor, could we clarify what computer he's talking about now?

THE COURT: Yes.

THE WITNESS: All of them.

MR. ROBINSON: All of them?

THE WITNESS: All three of them.

A: We had either stolen vehicles or parts—stolen vehicles or motorcycles on all three computers. They would take digital pictures of the bike or the vehicle, and many times if the vehicle were a passenger car, the registration plate would still be attached to it. When we blow up the bike pictures, we can clearly see the vehicle identification number to the bike and when we run it, it comes back as a theft.

Q: Do I understand you correctly that you actually have pictures of the motorcycles with their original stolen state registration plates on them on these computers?

A: On the bikes?

Q: Yes.

A: No, not the bikes. What we have on the motorcycles is him taking a picture of the bike and sometimes just the vehicle identification number, which baffles us, and when you blow it up, there's the—and we run it, it comes back as a theft. Never owned by him. The bike was never registered by him, the theft.

MR. ROBINSON: Could we clarify who "him" is?

7. Hart was beginning to get hostile with his own witness.

THE WITNESS: Mr. Jeffries—Wade or Lynn or Lionel Jeffries.

MR. ROBINSON: You're trying to say all three?

MR. HART: I'm sorry, I'm going to object at this time.

THE COURT: Would you clarify it for us?

THE WITNESS: I guess it would probably be more along the lines of Wade and Lynn.

MR. O'GRADY: These are the computers taken from Lionel's house?

THE WITNESS: There were computers taken from the Jeffries' home; one of the computers was Justin's.

THE COURT: Okay. Now, if you could try to word your questions a little more carefully so it doesn't turn into a talk show.

MR. HART: Yes, Your Honor.

THE COURT: Thank you.

Q: (By Mr. Hart, continuing): Specifically, let's talk about Lionel Jeffries. What evidence do you have—have you found in Rhode Island linking him to the supposed refurbishment and resale of the motorcycles?

A: There was nothing in Lionel's name that we have found. Everything went from WJ Cycles, Inc. to Lynn. Everything was put in Lynn's name after it was all—all the supposed reconstruction. We have not found anything at this point to be in Lionel's name.

What we do have are pictures of all of them. By all of them, meaning Wade, Lynn, and Lionel. We have pictures from Sturgis, and there's pictures from all over the country that they had went to, and Lionel and Lynn and Wade all being on—pictures of them riding on motorcycles or pictures of them at motorcycle rallies or motorcycle trips.

MR. ROBINSON: Your Honor, I hate to do this, but it's so unmanageable. We don't have dates. We don't have locations. We don't have anything. All we have is a rambling narrative that could go over years.

THE COURT: I know, Mr. Robinson, but you'll have an opportunity to narrow it down on cross-examination.

MR. ROBINSON: Thank you.

Justin Hart tried to get back to more manageable ground. The search in Rhode Island had turned up numerous articles of clothing and accessories. In some cases, law enforcement was able, either through receipts with their name on it or some sort of documentation with that individual, to contact that individual

and find out that their bike was stolen. And that it had been recovered in Rhode Island. For example, there were sunglasses in a case and inside the case was a receipt with a person's name on it. They had already determined (through confidential means) that the bike had been stolen and the individual, when contacted, was able to identify those as his sunglasses and that they had been in the bike at the time of the theft in Sturgis. So far, so good. But then Hart returned to the same problem, once again:

Q: Did you find any receipts for the stolen vehicle? I know we found receipts on the salvage stuff, but on the stolen vehicles?

A: No.

Q: So you don't have—even through your exhaustive search where you found pictures and bills of sales of the salvage vehicles, you don't have anything linking the Jeffries to the purchase and sale of any of these stolen vehicles?

A: That's correct.

The defense couldn't have put this any better. Now, Hart was beginning to see his plan falling apart in front of the Court. When he attempted to introduce an exhibit with a listing of fifty bikes from the Rhode Island seizure, the Court inquired:

THE COURT: Are you saying then that you intend to offer other acts evidence as to all fifty items?

MR. HART: Judge, in all honesty, I don't intend to introduce evidence on each of the fifty bikes. However, I believe that it all is proper other acts evidence.

THE COURT: How much do you need? I mean, realistically? Do you reach the point in order to lay the proper foundation—and I'll tell you, you haven't laid the proper foundation because we haven't talked with this witness about what he had personal knowledge of. I know—or I'm sure that some of his information is based upon reviewing reports. Is that fair?

THE WITNESS: That would be from the theft reports.

THE COURT: And maybe case reports and other documents. But what I'm saying is, we don't have a single witness who can come in and say, yes, this Road King was taken from here on this day and these numbers indicate that the true VIN number is such and such, do we?

MR. HART: Judge, people that get their bikes stolen at the Sturgis Rally come from all over the country and the world. I don't

know that I would be able to produce the actual first victim who had the vehicle stolen.

THE COURT: Okay. I'm painfully aware of that. But what I'm getting at is, we still have rules of evidence and you must lay foundation so that witnesses testify from personal knowledge or they testify from records properly admissible under the business records rule or some other public records act. But I have allowed you, in an effort to just try to grasp the scope of this whole thing, to let the witness testify without establishing the basis for his firsthand knowledge. In other words, many of the questions you've asked today could have been the subject of a valid objection for lack of foundation. But I didn't sustain any because I was trying to figure out how big this thing might get. And I expected that during cross-examination, the witness would be telling us more about the specifics of his involvement in this case so I can get an idea of who else would have to testify in this case. But I'm thinking these fifty items, you're taking on a huge undertaking here. None of which is directly charged in the Indictment. Is that fair?

Mr. HART: No, Judge. They—I believe that these people operate a chop shop and they traffic in stolen vehicles. That's their business, it's stealing and selling motorcycles.

THE COURT: I know what you believe, Mr. Hart, and I know why you believe it. But what I'm getting at is it would take over a week to introduce all of this evidence. Because one witness cannot introduce all of this evidence under our rules of evidence. The objection was whether you intended to offer evidence as to all of it.

MR. HART: No, Your Honor. I will limit our 404(b) to originally those vehicles stolen from the state of South Dakota.

THE COURT: Okay. Does that help you, Mr. O'Grady?

MR. O'GRADY: It does. I still object to the admission of this exhibit. It is a compilation of a bunch of numbers strung together, but there is no foundation. That's my threshold objection. I don't think they have met their burden.

THE COURT: Mr. Hoffman?

MR. HOFFMAN: In addition to Ian's objection, I would renew my objection to this exhibit. It's at least triple hearsay. I haven't seen the document, but as this Court has indicated, there's no foundation. He was attesting to things that were reported at least through three layers of people, and to get to the source for us to make any determination that that's a

reliable document, we have to get a heck of a lot closer than the chain of three people.

THE COURT: Mr. Robinson?

MR. ROBINSON: Could I reserve my objection until I cross-examine him? My situation is a little different.

THE COURT: Okay. I'll take the exhibit under advisement.

Thereafter, it did not get better for Justin Hart or his witness. In desperation, he tried to bring in a business associate of Wade Jeffries, but that was of little help. After an attempt at foundation on the connection between Wade and his friend, Tony Cain, Hart threw this Hail Mary question:

Q: And at some point here, this was in your investigation of Mr. Cain, did you make any findings regarding his mob ties?

MR. O'GRADY: Oh, my.

MR. HOFFMAN: Your Honor, for Lord's sake.

MR. O'GRADY: I mean, just objection.

THE COURT: Sustained.

MR. HART: [Pause] No further questions.

Thus ended the direct. But, there was more. O'Grady hadn't yet done his cross, and things then really began to go badly for the prosecution:

Q: Mr. Rostenkowski, do you have any basis at all to testify that cutting the neck off of a motorcycle is somehow criminal or indicative that criminal activity is afoot?

A: Only if you're wishing to conceal the true identity of that motorcycle?

Q: Or if you were going to cut the neck off the Harley-Davidson motorcycle because that's what Harley-Davidson requires and you send it in to get a new frame?

MR. HART: Objection. Mr. O'Grady is testifying.

MR. O'GRADY: Well, I am. It's cross.

THE COURT: Excuse me. It's cross-examination. Overruled.

And then came an amazing climax:

Q: So now let's go back to Motorcycle No. 8. When you talk about the public VIN or the P-VIN, you're talking about the vehicle identification number that's taken off the front of the frame. Right?

A: The P number, yes.

Q: And that is the P-VIN that you took off the motorcycle frame itself. Right?

A: That is the one that was on the motorcycle, the neck that you were referring to, yes.

Q: And you say that P-VIN does not match the true VIN. Right?

A: They're different numbers, that's correct.

Q: But there is no indication at all that the P-VIN listed for No. 8 is a stolen motorcycle, is there? That's not a stolen motorcycle?

A: That's correct, P-VIN, no.

Q: Right. P-VIN for No. 8 is not stolen.

A: No. That was the salvage.

Q: The VIN number for the engine for Motorcycle No. 8 did not indicate that the engine was stolen, did it?

A: No.

Q: The identification number, the VIN number for the transmission did not indicate that the transmission was stolen, did it?

A: No, it didn't.

Q: And the crank case identification number did not indicate that the crank case was stolen. Correct?

A: That's correct.

Q: So now for Vehicle No. 8, we've got a frame, not stolen, we got an engine that's not stolen, we got a crank case that's not stolen, but you say it's a stolen motorcycle. Do I understand that correctly?

A: That's correct.

Q: And you've done that through secret means, apparently.

A: That's correct.

Q: And why don't you tell me—you've got some parts that you say you can look at to determine whether or not, in this case, Motorcycle No. 8 is stolen. What part did you look at for Motorcycle No. 8 to determine whether or not it was stolen?

MR. HART: Objection, Your Honor. There's a strong public policy argument against Mr. Rostenkowski making this information public.

THE COURT: If I sustain your objection, I question how you're going to prove it's a stolen motorcycle. Can you answer that question?

THE WITNESS: Yes, I could, but to do that would be detrimental to our case in Rhode Island.

THE COURT: Okay. Then you don't have to answer. But I'm telling you that the less you tell me, the less chance you've got with your other acts evidence. Because I think it's a fair question to ask, "Why is this a stolen motorcycle?" And you say, "I can't tell you because it will jeopardize our case in Rhode Island." And I'm thinking, "I respect that, so let's not go into it and let's not use it in trial then." That's what I'm getting at.

If you want to use it in this case against the defendants, we need to know what makes that a stolen motorcycle, if the motor isn't stolen, the transmission isn't stolen.

MR. HART: That is not actually true, Your Honor. The motor is stolen. The motor case is a new case. The crank is stolen. The crank case is a new case that is not stolen.

THE COURT: So you can tell us what parts are stolen, or you can't?

THE WITNESS: In reference to the engine, Your Honor, the engine numbers that are there, the ones that he had purchased, the ones that they come back either through the parts and accessories or the ones that originally belonged to the legitimate bike, those are just the cases, that's not what's inside.

O'GRADY: Could I examine?

THE COURT: Okay, go ahead, Mr. O'Grady.

Q: We're still on Motorcycle No. 8, and I want to talk about the engine. You're saying that when you buy an engine case, the engine case has numbers on it, which Harley-Davidson can identify. Correct?

A: That's correct.

Q: But the guts that are inside the engine are not—

A: Not identifiable.

Q: —identifiable. And you'd agree with me that of course you can't identify the guts inside the engine as having been stolen or legitimately purchased, can you?

A: No.

Q: You can't trace the guts inside the engine to the public VIN number or what you say is the true VIN number. Correct?

A: That's correct.

Q: Now, I want you to pay close attention to the question I'm going to ask you. I don't want to ask you about where these special secret numbers are inside the part. Okay? But will you even tell me the part on Motorcycle No. 8 that you

determined to have been stolen which in turn led you to what you claim is the true VIN number?

A: Yeah, we believe, aside from those engine cases with those legitimate numbers and the public number as being legitimate. Outside of that, it's—the whole bike is stolen.

Q: This isn't a belief question. I'm asking you specifically what part on Motorcycle No. 8 did you determine to be stolen?

A: And that's where I get back to the whole bike as being stolen, aside from those numbers.

Q: I understand that you believe that the whole bike was stolen. And I'll take your word for it that you believe that. But you see that doesn't—I need more than that. What else—you've got a frame, an engine, a transmission, and a crank case that aren't stolen. Just tell me the name of the part, I want to put my hand on it.

A: [Witness pauses]. Fenders.

Q: The fenders?

A: Fenders. You can identify it through fenders. You can identify it through multiple ways, but those fenders come back matching the theft.

Q: Are you talking about the fenders as they left Harley-Davidson, the factory?

A: I'm talking about the theft report. If somebody reports a Road King stolen, and let's say it's a red—they don't list just red, but let's just say it was a rich red Harley-Davidson Road King with a stripe on it, that's how it would come from factory, it would be rich red with a stripe, and the theft matches to—and I'm able to identify through confidential ways, through other numbers, as a theft, and I'm looking at the bike and I get the theft report and the theft report says that it's rich red with a stripe, and I'm looking at a rich red with a stripe, I'm able to determine that I'm at least on the right track here.

So, in the end, it came back to the same answer. Near the conclusion of his testimony, Rostenkowski took off the gloves and finally admitted that he would never divulge the confidential methods, not even at trial. Judge Payne wound up taking the matter under advisement and defense counsel withdrew to a nearby bar, where they discussed the day's remarkable events.

At the post mortem, their first emotion was elation. They knew the hearing had gone well. In fact, much better than well. Beyond all expectations. They had been aided by Hart's melt-down midway and by Rostenkowski's obstinance throughout. With unrestrained glee, they replayed Judge Payne's dressing down

of Hart on the rules of evidence. Good stuff there. Hart was still trying to ascend the front side of the learning curve. His inexperience hurt him because he was in over his head and he didn't realize it. To paraphrase Rumsfeld, he didn't know what he didn't know.⁸ Hart thought he was ready for the hearing, but he hadn't thought it through or, worse, he hadn't walked it through with someone who knew how to do some of things he didn't know how to do.

Rostenkowski's and, earlier Kinney's, refusal to answer the basic question proved to be the magic bullet. Now, they had something to bargain with. But soon, reality set in. "Let's not get carried away with today's wonderful showing," warned Ian. "Our good fortune only goes so far. We still have the problem, actually Wade has the problem, with the first bike. There is no magic bullet in sight for that one. He was caught riding another man's bike. And then there are the other bikes at the campground." Ironically, the weakest for the prosecution was the one that conveniently had an owner's manual with name, address, and phone number. But, it had been stolen last year and thus had been through the Rhode Island cleansing process. Wade and company had not had the opportunity to "refurbish" the other bikes. The prosecution could identify all those owners through their "confidential methods" and then call them to testify at trial. "It's going to be hard to beat any of those," Ian concluded. "The prosecution has given us an opportunity by their overreaching. They got greedy. But if they roll back their case to what they can prove without the confidential information, there's a lot of trouble ahead. And believe me, Wilson Samuels knows the rules of evidence, how to lay foundation, and what to reach for and what to leave alone. Our good fortune, for today, was just that. We cannot expect a repeat of today's fiasco."

Eric and Peter both agreed. "Is there anything we can do now to capitalize on today? Do we call Blake and Samuels and make a pitch for a deal? They both will know they took a beating on the lack of proof that a bike is stolen," Peter added hopefully.

"No, we have to wait for the call," Ian responded. "Calling them first, under these circumstances, will be seen as weakness. We simply have to trust that Judge Sorensen and Judge Payne will do the right thing and cut down the prosecution's case. Actually, I think it is better to wait and hope we get a call from the prosecution before either Judge decides. Maximum settlement potential there."

8. See David A. Graham, *Rumsfeld's Knowns and Unknowns: The Intellectual History of a Quip*, THE ATLANTIC (Mar. 27, 2014), <https://www.theatlantic.com/politics/archive/2014/03/rumsfelds-knowns-and-unknowns-the-intellectual-history-of-a-quip/359719/> (quoting Donald Rumsfeld stating that "[a]s we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know.").

The call from both Blake and Samuels did come just a few days later. Negotiation usually goes better with experienced players. And it did here. There were few illusions, as each could see pretty well the value of everyone else's cards. The prosecution had concluded that their other bad acts evidence was not coming in. They would simplify their respective cases to one count of theft in Pennington and four counts in Meade. That's where they started.

Ian led the discussion for the defense. He (with his client's grant of authority) offered up Wade. "How much do you want?" Ian asked. "There is only so much you can get. Wade is fifty-seven and is resigned to what is practically a life sentence. It won't take a plea to very many counts to get there. And, South Dakota shouldn't have to foot the full expense of incarceration. There is the Rhode Island case, which has been filed in federal court. Let them pay for some of it. For all practical purposes, Wade is out of business for good. There won't be much to offer for restitution, but we think that would be better handled with the remaining assets in Rhode Island and the case there."

Eric followed with a review of the evidence against Lynn, which was not overwhelming. On paper, she was not a principal player in the business. She was not an officer or director of the business. She notarized title applications. She did have her name on the title for many of the bikes, but those were all back East. None of the South Dakota bikes, except one, had been processed to get to that stage. Because she had kept quiet through this whole ordeal, she could credibly pull off the "my husband ran everything" defense. The prosecution's focus on Wade and the business in Rhode Island had left them short on information about Lynn. Eric finished with the revelation of her current health problems and asked, "What's the point of incarceration in her case?"

Peter had the easiest sell because the parents had kept Lionel pretty much out of things, at least on paper. The prosecution, here, Samuels, had no stomach for trying that one, given the near concession made by Rostenkowski at the hearing.

So where did that leave them? There were additional back and forth communications for several days thereafter, but ultimately they settled on Wade pleading guilty to two counts of grand theft, with dismissals against Lynn and Lionel. Wade was later sentenced to serve two consecutive ten-year terms in the state penitentiary.

No one could be fully satisfied with the outcome in this case. Neither side hit a homerun. But what would a homerun have looked like? And would that have been justice? The adversarial system had worked in that the result made sense. And that is a pretty good answer to the question, what is justice in this case? If the law is to continue to command respect, it must make basic common sense.⁹ All things considered, the result was just. The system did not fail the parties, nor the State. Each player made a responsible and respectable contribution

9. Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D.L. REV. 250, 270 (2004).

to that process. And Mr. Hart will eventually learn that it is important to know what you don't know.