NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MATTHEW CHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

Petitioner, Matthew Channon, through his attorney, who was appointed pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(c), respectfully moves this Court to grant leave to continue to proceed *in forma pauperis*. In support of this motion, counsel states:

1. The Federal Public Defender Organization for the District of New Mexico is an entity organized pursuant to 18 U.S.C. §3006A(h)(2)(a).

2. Pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(b) & (c), on April 24, 2014, the United States Magistrate Judge for the District of New Mexico appointed the Federal Public Defender to represent Mr. Channon during criminal proceedings before the United States District Court of New Mexico.

3. Pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(c), on November

25, 2016, the United States Court of Appeals for the Tenth Circuit appointed the Federal Public Defender for the District of New Mexico to represent Mr. Channon on appeal.

4. Mr. Channon has indicated he wants his appointed Federal Public Defender attorney to present this petition to this Court.

5. Mr. Channon is currently released on conditions pending the outcome of this petition for writ of certiorari. As far as counsel is aware, Mr. Channon continues to be indigent and to qualify for appointment of counsel.

For these reasons, petitioner Matthew Channon moves this Court to grant leave for him to proceed *in forma pauperis* before this Court.

*/s/ Marc H. Robert*

Marc H. Robert
Attorney for Petitioner
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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MATTHEW CHANNON,

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UNITED STATES OF AMERICA,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

---

Respectfully submitted,

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SERVICE TO:
Solicitor General
Department of Justice
Washington, D.C. 20530

May 29, 2018

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MATTHEW CHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

## QUESTION PRESENTED FOR REVIEW

As business records have evolved from handwritten receipts and columnar pads to databases and all-electronic creation and storage, trial judges across the country look for guidance on the application of the old rules of evidence to these new forms of evidence. This case presents the important question: Is electronically created and maintained business information effectively exempt from the rules of evidence that apply to physical documents?

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MATTHEW CHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**DECLARATION OF COUNSEL**

Pursuant to Supreme Court Rule 29.2, I, Marc H. Robert, Assistant Federal Public Defender for the District of New Mexico, declare under penalty of perjury that I am a member of the bar of this court and counsel for petitioner, Matthew Channon, and that I personally caused to be mailed the petition for writ of certiorari to this court by first class mail, postage prepaid by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately 5:00 p.m. on the 29th day of May, 2018.

s/ Marc H. Robert
Marc H. Robert
Attorney for Petitioner

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Matthew Channon, Appellant below. Respondent is the United States, Appellee below. Petitioner is not a corporation.

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**This case presents an important question of federal law which has not been, but should be, settled by this Court and concerning which the Tenth Circuit decided in a way that is in conflict with decisions of other Tenth Circuit decisions and the decisions of other federal and state courts: whether summary exhibits derived from a spreadsheet created by investigators, federal law enforcement agents and federal prosecutors for the specific purpose of**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MATTHEW CHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Matthew Channon respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming his conviction.

## OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Matthew Channon*, 10th Cir. No. 16-2254, 881 F.3d 806 (10th Cir. 2018), affirming Mr. Channon's convictions was filed on January 31, 2018. That opinion is attached as Appendix A to this petition. The Tenth Circuit denied Mr. Channon's petition for rehearing and rehearing en banc by order filed on February

27, 2018. That order is attached as Appendix B to this petition. The October 20, 2016 amended district court judgment in a criminal case entered by the United States District Court for the District of New Mexico is attached as Appendix C.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction of the cause under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction of the appeal of the district court's judgment pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Tenth Circuit entered its opinion affirming Mr. Channon's conviction on January 31, 2018. The Tenth Circuit entered its order denying Mr. Channon's petition for rehearing and rehearing en banc on February 27, 2018. Consequently, pursuant to Supreme Court Rules 13.1 and 13.3 and 28 U.S.C. §2101(c), this petition is timely filed if filed on or before May 29, 2018.

## FEDERAL RULES OF EVIDENCE

The federal rules of evidence involved in this case are:

Federal Rule of Evidence 803(6), which provides as follows:

> **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
> **(A)** the record was made at or near the time by—or from information transmitted by—someone with knowledge;
> **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> **(C)** making the record was a regular practice of that activity;

**(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

**(E)** the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Federal Rule of Evidence 1001(d), which provides in part:

> An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout—or other output readable by sight—if it accurately reflects the information. . . .

and Federal Rule of Evidence 1006, which provides:

> The proponent may not use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

## STATEMENT OF THE CASE

### INTRODUCTION

At Mr. Channon's trial on wire fraud and conspiracy charges, the prosecution offered summary exhibits into evidence over objections Mr. Channon raised both before and during trial. The summary exhibits, described by the prosecution as indispensable to its case, were all derived from an Excel spreadsheet ("the Spreadsheet"). The Spreadsheet was populated with OfficeMax business data stored in databases maintained by multiple corporations. The Spreadsheet was painstakingly constructed by in-house fraud investigators, FBI agents and federal prosecutors for the purpose of prosecuting Mr. Channon. The Tenth Circuit found that the Spreadsheet was both an original document for purposes of Federal Rule of Evidence 1006 and a business record for purposes of Federal Rule of Evidence 803(6). The Tenth Circuit affirmed Mr. Channon's convictions for wire fraud and conspiracy, rejecting the issues raised concerning the Spreadsheet and the summary exhibits.

The Tenth Circuit's decision in this case is in conflict with decisions in analogous cases in other circuits. The Tenth Circuit's flawed decision rendered meaningless decades of jurisprudence addressing the meaning of "original document" and "business record". The Tenth Circuit's opinion misstated

fundamental facts and provided little or no legal support for its holdings, and provided little or no guidance to trial courts, in the Tenth Circuit or elsewhere, in dealing with the admissibility of electronically maintained business records in various forms. This Court should grant this petition for writ of certiorari in order to provide guidance to United States courts for determining issues of admissibility of the various forms of electronically maintained business records. This Court should reverse the Tenth Circuit Court of Appeals and Mr. Channon's convictions.

## PROCEEDINGS BELOW AND FACTUAL BACKGROUND

In September, 2010, Steven Gardner, an OfficeMax in-house fraud investigator, received an online adjustment report that triggered his suspicion of fraud. Transcript ("Tr.") 544-45, 593. A large number of account holders making online adjustments had e-mail addresses of teechur12345678, bargle12345678 and coach12345678 with dots in various places within the addresses. Tr. 545, 553, 1014-15. He contacted Becky Gale at SHC. SHC was the third party contractor that housed the MaxPerks website and maintained one or more databases containing information related to the rewards program. Tr. 548, 554. He asked Ms. Gale for more detailed information about the suspect accounts. That started a years-long, back-and-forth process that Mr. Gardner testified he engaged in "quite often" resulting in "a lot" of electronic spreadsheets. Tr. 554-55, 605; *see also* Tr.

229 (FBI Special Agent Moon referring to "numerous" spreadsheets).

In late September or in October, 2010, Mr. Gardner contacted the FBI to pursue a criminal prosecution against whoever was defrauding the rewards program. Tr. 594. From then on through at least December, 2014, Mr. Gardner worked with the FBI to figure out what information they wished to extract from the SHC databases. Tr. 222, 601-02. Agent Moon testified he spent more than 100 hours with OfficeMax personnel to understand the data from the third party databases and provide criteria for database queries used in creating the spreadsheets. Tr. 221, 232-38. There was no dispute that the spreadsheets resulting from this back-and-forth process were created in anticipation of the prosecution of Mr. Channon and his wife. Tr. 601, 608.

To create the spreadsheets, Mr. Gardner would contact personnel at SHC, and request information with particular parameters. Tr. 414-15, 600. For example, he would give SHC a list of MaxPerks ID numbers and ask for more details related to those numbers, providing additional fields for which he sought data. Tr. 428-29, 453. The SHC contact would then pass along that request to the SHC analytical team. That team would query the SHC databases. Tr. 429, 454. Those databases included point-of-sale information from OfficeMax and reward card numbers from yet another third party vendor, as well as the data SHC kept as part of running the

MaxPerks program. Tr. 411, 427-28, 448. All the data was in electronic form. Tr. 414, 424, 550-52. In December, 2014, to create a spreadsheet from which the government's summary exhibits were drawn, the analytical team queried data from two different database platforms, an old archived platform as well as the current one. Tr. 433, 438, 439.

Neither the in-house investigator nor the FBI had access to the SHC databases. Tr. 234, 237, 596. No analytical team member, or anyone else who did have such access, ever testified in this case. The SHC contact with whom the agents dealt testified that, until Office Depot merged with OfficeMax after the final spreadsheets were created, she could have exported SHC's original data for someone's examination. Tr. 451-52.

After the analytical team conducted its various queries, it would populate the Excel spreadsheets with the results and transfer the spreadsheets to the SHC contact who would provide them to Mr. Gardner. Tr. 429-30. Ms. Gale worked with the prosecutor as well as the investigator and the FBI to fine tune the final spreadsheets. Tr. 460-62. Mr. Gardner testified that he believed the data selected to populate the spreadsheets was recorded at or near the time of the described event, was kept in the regular course of OfficeMax's business practices and was routinely generated as part of OfficeMax's business. Tr. 590-91. He testified to

this effect even though it was SHC, not OfficeMax, that maintained the database SHC queried. He assumed the data from SHC was "good" because it had been "good" in other investigations. Tr. 615-16. Ms. Gale testified that SHC data was entered at or near the time of the event, she made regular reports to the OfficeMax investigator regarding the data and that SHC relied on the data. Tr. 417, 421, 268-71.

The final spreadsheet from which the government derived its summary exhibits, the Spreadsheet, was an amalgam of spreadsheets which purported to depict 63,857 transactions associated with 5,463 suspect rewards card accounts, including names, addresses, school affiliation, e-mail addresses of the account holders, among other things. Tr. 293, 306. In one of the spreadsheets were "hidden" worksheets which apparently were the results of SHC's analytical team's queries that Mr. Gardner had requested in other unrelated cases. Tr. 606-07. Excel spreadsheets can be edited, as evidenced by an anomaly the fraud investigator noticed in one of the source spreadsheets. Tr. 602.

Mr. Channon moved to disclose the original data underlying the spreadsheets. He contended that it was not possible to determine whether the suspect spreadsheet data was accurate without examining the original databases SHC queried. Vol. 2 at 417-24, 474-79. The government asserted, *inter alia*, that

it had no duty to disclose the underlying data because it did not possess that data. Vol. 2 at 450-51. The district court denied Mr. Channon's discovery motion for that reason. Vol. 2 at 487-88.

A forensic accounting expert testified during pretrial hearings about anomalies which she identified in the numbers included in the spreadsheets. The expert indicated that she could not determine the nature or impact of those anomalies without access to the underlying database. Tr. 155-56, 164-66, 187, 190-91, 216, 497-98, 502-03, 508, 520, 531-32.

Prior to trial, Mr. Channon moved for the exclusion of the government's summary exhibits that were derived from the Spreadsheet. Vol. 2 at 76-77, 157, 407-13, 464-73, 586-98. Mr. Channon objected to these exhibits on the basis that the Spreadsheet was not an original document as required under Rule 1006; that the database entries which *were* the original documents with which the Spreadsheet was populated were never provided to the defense; and that if the Spreadsheet was found to be an original document notwithstanding these arguments, it was not admissible under Rule 803(6). Two pretrial hearings were held to address these objections. Vol. 2 at 76-77, 157, 407-13, 464-73, 586-98. The district court overruled Mr. Channon's objections. The evening before jury selection, the district court announced a ruling that the Spreadsheet was an original document for

purposes of Rule 1006. Vol. 2 at 603-06. The following morning, before commencement of voir dire, Mr. Channon argued that the Spreadsheet was inadmissible hearsay and thus not a proper basis for the summary exhibits. The government told the district court that it could not proceed if the district court sustained Mr. Channon's objection. Tr. 607-10. 678-83, 700-01. The district court ruled that the Spreadsheet was admissible pursuant to Rule 803(6), making the summary exhibits derived therefrom likewise admissible. Tr. 720-22.

The trial proceeded. During trial, Mr. Channon objected to those exhibits and those that referred to information in the summary exhibits. Mr. Channon raised objections based on the Confrontation Clause during trial as well as his repeated hearsay objections. The district court overruled each of those objections, before and throughout the trial.

The jury convicted Mr. Channon of all five counts against him in the second superseding indictment. Mr. Channon was sentenced to one year and one day in the custody of the Bureau of Prisons, a term of supervised release, restitution and a special penalty assessment. Appendix ("App.") C. The district court also entered a judgment for forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C). Mr. Channon appealed his convictions, and specifically the district court's evidentiary rulings complained of here, as well as the forfeiture judgment, to the Tenth Circuit Court

of Appeals.[1]

### THE DECISION OF THE TENTH CIRCUIT

The Tenth Circuit rejected Mr. Channon's argument on the issue presented here and affirmed his convictions.[2] The Tenth Circuit held that the Spreadsheet fell within the "business records" exception to the hearsay rule set forth at Rule 803(6), and that the Spreadsheet was an original document for Rule 1006 purposes and otherwise qualified as the foundation for the government's numerous summary trial exhibits. The Tenth Circuit held that because the business information reflected in the Spreadsheet was "machine generated", it was not generated by a "person" and was thus beyond the reach of Federal Rule of Evidence 801. App. A at 7-8. This holding conflicts with holdings from other circuits. The Tenth Circuit also held that, even if the information was hearsay, it met all of the criteria of Rule 803(6). This holding is likewise in conflict with decisions from other circuits.

Mr. Channon petitioned for panel rehearing and rehearing en banc. The Tenth Circuit denied that petition. App. B.

## ARGUMENT FOR ALLOWANCE OF THE WRIT

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[1] Mr. Channon remains on conditions of release pending this Court's disposition of this petition.

[2] Mr. Channon also appealed the district court's forfeiture order. The Tenth Circuit remanded the forfeiture judgment for further proceedings. That issue is not presented here.

**This case presents an important question of federal law which has not been, but should be, settled by this Court and concerning which the Tenth Circuit decided in a way that is in conflict with decisions of other Tenth Circuit decisions and the decisions of other federal and state courts: whether summary exhibits derived from a spreadsheet created by investigators, federal law enforcement agents and federal prosecutors for the specific purpose of prosecuting a criminal defendant in federal court is admissible pursuant to Federal Rule of Evidence 803(6).**

## INTRODUCTION

Business information maintained electronically must comply with the Federal Rules of Evidence, just like analogous paper documents maintained by a business. The Tenth Circuit held that a spreadsheet populated with computer-maintained business information through substantial human agency is "machine-generated" and therefore cannot be hearsay. This holding is in conflict with decisions from other circuits. The Tenth Circuit alternatively held that even if computer-maintained business information can be hearsay, the evidence presented in this case met all the criteria of Rule 803(6) and was admissible at Mr. Channon's trial. This holding also conflicts with decisions from other circuits.

The ubiquity of electronically maintained business information ensures that this question will recur repeatedly in both civil and criminal cases. The guidance of this Court is desperately needed to assist trial courts in making appropriate decisions as to the admissibility of information offered for admission as a business record.

## THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

The Tenth Circuit's opinion was flawed in several respects. First, that court seemingly misapprehended a critical fact which is central to the issue presented here. The Tenth Circuit asserted that the Spreadsheet was "maintained by a third party formerly known as SHC Direct (SHC). . . . SHC would place the data into a user-friendly Excel spreadsheet for OfficeMax to use". App. A at 3. In fact, as the record below unambiguously made clear, SHC maintained relevant data in a database, for OfficeMax's use. The Spreadsheet was not created until Mr. Gardner, the fraud investigator, made requests over the course of several years, with the assistance of the FBI and federal prosecutors, for information which resulted in the disclosure by SHC's technical staff of information that had been maintained in SHC's database. The Tenth Circuit opinion ignored the unequivocal facts in a way that made the Spreadsheet appear to have been maintained in the ordinary course of SHC's business, when in fact it was created in a painstaking and protracted process by the fraud investigator, the FBI and the prosecutors for the sole and specific purpose of prosecuting Mr. Channon.

The Tenth Circuit concluded that the Spreadsheet was an "original" for purposes of Rule 1006, citing a single case in support of its conclusion. That case, *United States v. Whitaker*, 127 F.3d 505, 601 n.3 (7th Cir. 1997), did not actually

address the issue which Mr. Channon presented, and for which the Tenth Circuit offered it. The court's conclusion concerning this issue was thus essentially unsupported.

The Tenth Circuit concluded that the Spreadsheet, created by actors with and for a prosecutorial purpose, was a business record for purposes of Rule 803(6). Critically, the court found that the "records were produced by machines. They therefore fall outside the purview of Rule 801, as the declarant is not a person. *United States v. Hamilton*, 413 F.3d 1138, 1142 (10th Cir. 2005)." App. A at 7-8. As discussed below, *Hamilton* is inapposite to the situation presented in the instant case.

The Tenth Circuit's holding is central to the issue presented here. OfficeMax transactions were conducted involving persons: a buyer, a seller, a cashier, various other employees of OfficeMax and the people who managed the information. The SHC database collected information reflecting those transactions and maintained the information. Humans, including the fraud investigator, various FBI agents and various federal prosecutors, asked questions and presented requests for information to the humans responsible for maintaining the database. Those persons identified, harvested and produced the information responsive to those requests. The prosecution team then "fine-tuned" the collected information into

what became the Spreadsheet. Summary exhibits were drawn from the spreadsheet.

The elision of this sequence of events leads to the blithe conclusion by the Tenth Circuit that the information was "machine-generated," not created with human agency, and thus fell outside the reach of Rule 803(6). Hearsay is admissible under Federal Rule of Evidence 803(6) when: the record of an act or event "was made at or near the time by—or from information transmitted by—someone with knowledge"; "the record was kept in the course of a regularly conducted activity of a business"; "making the record was a regular practice of that activity"; and all these conditions are shown by the testimony of the custodian or another qualified witness." Hearsay is not admissible under Rule 803(6) when the record of an act or event is created for litigation purposes. *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943); *United States v. Cestnik*, 36 F.3d 904, 909-10 (10th Cir. 1994); *Arias-Izquierdo*, 449 F.3d at 1183-84.

The government has never denied, and Mr. Gardner admitted, the spreadsheets were created for litigation purposes, to prosecute the Channons. Tr. 601, 608. It is obvious this is true. Mr. Gardner worked with FBI agents from the beginning of his investigation for more than four years to develop spreadsheets, culminating in the ones used as the bases for the summary exhibits. Tr. 222, 601-

02. The final spreadsheets were created with the guidance of the prosecution. Tr. 460-62.

The government's position has been that the spreadsheets' litigation purpose does not matter. They are merely containers of original data and that data was created in compliance with the Rule 803(6) requirements, the government has asserted. Vol. 2 at 133, 136-37, 459-62, 609-10; Tr. 260-63, 278-79, 285-89, 353-57, 373-74, 378-79, 384-85, 658-59, 684-91, 696-700, 701, 714-17. But that position incorrectly ignores the years-long data manipulation that led to the spreadsheets.

For computer records to qualify under the business records hearsay exception they must have "automatically retrieved the information unaltered." *United States v. Kim*, 595 F.2d 755, 762 n. 36 (D.C. Cir. 1979). That is not what happened in this case. The prosecution, the FBI, Mr. Gardner, the SHC's contact person and the SHC analytical team molded the data to create as strong a case as possible against the Channons.

The spreadsheets in this case are like the Potamkin History in *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627 (2d Cir. 1994). The Second Circuit found that document was not produced in the regular course of business in large part because the facts suggested it "required significant selection and

interpretation of data, not simply a downloading of information previously computerized in the regular course of business." *Id.* at 633. The spreadsheets in this case suffer from the same infirmity. They were the result of significant selection and interpretation of data. Similar circumstances led the Eleventh Circuit in *United States v. Thomas*, 315 F. App'x 828 (11th Cir. 2009), to hold spreadsheets created for the investigation of the defendant were not business records where the prosecution witness developed the spreadsheets after analyzing and reorganizing information he retrieved from the database. *Id.* at 836; *see also Lebron v. Wilkins*, 990 F. Supp. 2d 1280, 1297 (M.D. Fla. 2013) (end product of data matching served a litigation, not a business, purpose).

The Tenth Circuit cited a single case—*United States v. Hernandez,* 913 F.2d 1506, 1512-13 (10th Cir. 1990)—in connection with its conclusion that the Spreadsheet was a business record - that it was simply a business record in one form and presented in another. App. A at 8. Again, that case was inapposite to the relevant point. *Hernandez* involved a simple printout of computer-maintained data, not the product of a process of cherry-picking information from a sea of data for inclusion in a document (the Spreadsheet) intended for use in a criminal prosecution.

In *Thomas*, the Eleventh Circuit held that spreadsheets prepared for the

prosecution of a defendant by a lay witness were not "simple printouts" from the database, but were personally created by the witness after he analyzed and reorganized information he retrieved from the database. 315 F. App'x at 836. That is precisely what happened in this case. The fraud investigator, the FBI and the federal prosecutors, over the course of a period of years and through several iterations of the spreadsheet, created the final spreadsheet for the purpose of prosecuting the Channons. As in *Thomas*, the spreadsheet here was no "simple printout." The Tenth Circuit's decision in this case is in direct conflict with the conclusion of the Eleventh Circuit.

The Tenth Circuit's simplistic conclusions have superficial appeal. In *United States v. Fujii*, 301 F.3d 535 (7th Cir. 2002), printouts of business records, KAL reservation and check-in records, were found to retain their character as business records where they are printed into hard copy for purposes of introduction into evidence. The mere transformation of electronically stored information into paper by printing did not change their character. *Fujii*, 301 F.3d at 539. Unlike the case at bar, however, the records in *Fujii* were simple printouts, unmediated by human agency.

Other cases from various circuits are to the same effect: that printouts of electronically maintained business information, unmediated by human agency or

selection, do not lose their character as business records simply because the electronic information is rendered on paper by directly printing the information from its original source. *United States v. Ary*, 518 F.3d 775 (10th Cir. 2008) (direct printouts of museum records); *United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990) (direct printouts of telephone company records); *United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988) (direct printouts of financial data); *Hernandez* (direct printouts of business data).

More closely analogous to the case underlying Mr. Channon's petition, and in conflict with the Tenth Circuit's dismissive conclusions, is *Thomas*. In *Thomas*, the court held that a spreadsheet populated with information provided one business and maintained by a third party contractor was not a record of regularly conducted activity as contemplated in Rule 803(6). 315 F. App'x at 836. It explained: "'Rule 803(6) requires that both the underlying records and the report summarizing those records be prepared and maintained for business purposes in the ordinary course of business and not for purposes of litigation.' *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1183-84 (11th Cir.2006)." 315 F. App'x at 836.

Similarly, in *Potamkin Cadillac Corp.*, the Second Circuit held that a "history" prepared by the computer department by extracting data was not produced in the regular course of business if it required significant selection and

interpretation of data and was not simply a downloading of information previously computerized in the regular course of business. The court held that a business record may include data stored electronically on computers and later printed out for presentation in court, so long as the "original computer data compilation was prepared pursuant to a business duty in accordance with regular business practice." 38 F.3d at 632.

The contrast between simple, direct printouts and a selective compilation of actual business records was demonstrated in *United States v. Sanders*, 749 F.2d 195 (5th Cir. 1984). In *Sanders*, the court affirmed the admission of a printout that "was not a selective compilation of random pieces of data stored in TDHR computers but was instead a complete list of all information TDHR possessed relating to Sanders' claims." *Id.* at 199. The spreadsheet in this case was a carefully crafted document solely and specifically intended for use in the prosecution of Mr. Channon, the sort of thing that the *Sanders* court distinguished from what it found admissible in the case before it.

Perhaps most troubling about the Tenth Circuit's facile treatment of this issue is its blithe assertion that the information at issue in Mr. Channon's trial is not hearsay because it is "machine-generated". App. A at 7. The Tenth Circuit opinion includes no authority for this remarkable proposition.

When is information "machine-generated"? An electronic thermometer generates a number by its internal operations, without mediation by a human intervenor. That number can be said to have been machine-generated. Contrariwise, a calculator also generates a number on its LCD screen. When the device is activated, the "zero" which appears can fairly be said to have been machine generated. Any further calculation, however, cannot occur without an outside agency inputting information onto the device's keyboard. Such further calculation cannot be said to have been machine-generated. It was the result of the actions of a human, a person.

Characterization of the data at issue here is infinitely more complex. Business data is generated by OfficeMax at its points of sale and at other places in the information stream. Humans are involved in the transactions which produce those data. The data are transferred to a third party contractor, which maintains a database for the purpose of holding the information. Humans are involved in the creation and maintenance of the database. A fraud is suspected by a human, the fraud investigator. The investigator seeks information from the information technology staff at the third party contractor, who selectively pulls data from the database. The IT staff, with input from the fraud investigator, creates a spreadsheet with the organization, tabs, formulae and so forth as requested by the fraud

investigator. The IT staff populates the spreadsheet with information requested by the fraud investigator and delivers the spreadsheet to that investigator. Then the investigator gets the FBI involved, and the special agents ask for more information, perhaps, or a different configuration of the spreadsheet so that the information can be formatted in a way that facilitates investigation and prosecution. Eventually, a federal prosecutor is involved, and makes her own requests about the nature of the data needed and the organization of the spreadsheet.

That was the process described in the testimony in the district court in this case. The testimony was adduced at pretrial hearings as well as at trial. To describe the end result, the spreadsheet from which the summary exhibits were culled, as "machine-generated" ignores the hundreds of hours of human involvement in the creation of the spreadsheet that was crafted for the purpose of prosecuting Mr. Channon.

The Ninth Circuit recently addressed the dichotomy between information that can be considered to be machine-generated and that which cannot. In *United States v. Lizarraga-Tirado*, 789 F3d 1107 (9th Cir. 2015), the defendant objected to the admission of Google earth images during his trial. The images included GPS coordinates and "tacks" which identified specific locations relevant to the case. The Ninth Circuit rejected the defendant's argument, holding that the images and

the coordinates and tacks placed on the images by the Google Earth program are machine-generated and not hearsay. *Id.* at 1109. Critically, however, the court went on hold that if a person had applied a label or some other content, that would be classic hearsay. *Id*. In other words, such content could not be considered to be not machine-generated.

Similarly, in *Patterson v. City of Akron, Ohio*, 619 F. App'x 462 (6th Cir. 2015), the court held that the raw data generated by a Taser device, where the information regarding an incident was generated without the intervention of a human actor, is not hearsay. *Id.* at 480. *See also United States v. Lamons*, 532 F.3d 1251, 1264 (11th Cir. 2008) (raw data produced without human intervention); *Hamilton*, 413 F.3d at 1142 (headers on pornographic images generated by computer software not hearsay, since no human agency caused the headers to appear); *United States v. Khorozian*, 333 F.3d 498, 507 (3rd Cir. 2003 (header on a fax transmission, generated by the fax machine, found to have been machine-generated and not hearsay). All of these cases dealt with information which was generated by operation of a machine or a computer program without the intervention of a human agent.

The Tenth Circuit's decision in the instant case is thus in conflict with the *Lizarraga-Tirado* decision in the Ninth Circuit and the decisions of other sister

circuits noted above. This Court should grant a writ of certiorari in order to resolve the split among the circuits.

### THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE

The issue of the admissibility of electronically maintained business information is an important question of federal law worthy of the grant of a writ of certiorari. Given the ubiquity of electronic business information systems and the almost universal maintenance of business information in electronic form, this question will arise in countless cases, both criminal and civil.

The importance of the question this case squarely presents—whether, when a party to litigation constructs a spreadsheet for the sole and express purpose of litigation, using data collected and maintained in one or more databases, that spreadsheet, and summary exhibits derived therefrom, are admissible, requires this Court's attention. Lacking guidance on this issue, the nation's state and federal courts are left to fend for themselves and resolve the question in a scattershot, patchquilt manner. Accordingly, this Court should grant certiorari in this case.

## CONCLUSION

For the reasons stated above, petitioner Matthew Channon requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
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(505) 346-2489
marc_robert@fd.org

s/ Marc H. Robert
Marc H, Robert
Attorney for Petitioner

# ATTACHMENT A

FILED
United States Court of Appeals
Tenth Circuit

January 31, 2018

Elisabeth A. Shumaker
Clerk of Court

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MATTHEW CHANNON,

Defendant - Appellant.

No. 16-2254

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRANDI CHANNON,

Defendant - Appellant.

No. 16-2285

---

**Appeal from the United States District Court**
**for the District of New Mexico**
**(D.C. Nos. 1:13-CR-00966-JCH-KK-1 and 1:13-CR-00966-JCH-KK-2)**

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Marc H. Robert, Assistant Federal Public Defender, Albuquerque, New Mexico, for Defendant - Appellant Matthew Channon.

Todd B. Hotchkiss, Albuquerque, New Mexico, for Defendant - Appellant Brandi Channon.

C. Paige Messec, Assistant United States Attorney (James D. Tierney, Acting United States Attorney, with her on the brief), Albuquerque, New Mexico, for Plaintiff - Appellee.

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Before **PHILLIPS**, **KELLY**, and **MURPHY**, Circuit Judges.

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**KELLY**, Circuit Judge.

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Defendants-Appellants, Matthew and Brandi Channon, were convicted by a jury of wire fraud and conspiracy to commit wire fraud relating to a scheme to defraud retailer OfficeMax. 18 U.S.C. §§ 1343, 1349.[1] They now appeal, challenging the district court's decision to (1) admit exhibits derived from computer records and (2) enter a money judgment forfeiture. Exercising jurisdiction under 28 U.S.C. § 1291, we uphold the district court's admission of the exhibits but remand so the district court may conduct further proceedings on the money judgment of forfeiture.

## Background

Defendants used fictitious names and addresses to open rewards accounts at OfficeMax — known as MaxPerks accounts. They used these accounts to fraudulently obtain more than $100,000 in OfficeMax products. The scheme came to light when Steven Gardner, an OfficeMax fraud investigator, noticed an unusually high number of online-adjustments across several different accounts. Mr. Gardner observed that most of

[1] Mr. Channon was sentenced to imprisonment of one year and a day, and two years' supervised release to run concurrently (Counts 1, 3, 5, 6, and 7), as well as restitution of $96,278. Mrs. Channon was sentenced to probation of three years to run concurrently (Counts 1, 2, and 4), as well as restitution of $96,278. In addition, the district court entered a money judgment of forfeiture jointly and severally against them in the amount of $105,191.

these accounts were registered to one of three email addresses, although a fourth address was discovered later.[2] Defendants used the same email addresses and simply interspersed periods between the characters of each address (e.g., teechur123.45678@gmail.com). OfficeMax recognized the variations as unique email addresses, but gmail did not. Defendants then used these fraudulent email addresses to claim purchases by other customers, thus generating rewards to which they were not entitled. They also used various accounts to sell more than 27,000 used ink cartridges, receiving $3 in rewards from OfficeMax for each after paying an average of $.32 per cartridge on eBay.[3] In total, over the 21 months of their scheme, Defendants redeemed $105,191 in OfficeMax rewards.

Prior to trial, Defendants objected to the use of summary exhibits regarding their accounts. These exhibits summarized thousands of transactions and were drawn from three Excel spreadsheets containing OfficeMax records — which had been maintained by a third party formerly known as SHC Direct (SHC). OfficeMax would send SHC the data it collected each day, and if OfficeMax later needed to view information, SHC would place the data into a user-friendly Excel spreadsheet for OfficeMax to use. SHC would not alter the raw data, but would consolidate the necessary information from the larger database.

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[2] Those email addresses were teechur12345678@gmail.com, coach12345678 @gmail.com, bargle12345678@gmail.com, and garble12345678@gmail.com. These accounts make up the bulk of what is called the Group 2 accounts, while another 118 accounts were designated as Group 1.

[3] Defendants used many fraudulent accounts for the ink cartridge sales because OfficeMax restricted customers to a monthly maximum of 20 cartridges per month, and only up to the amount the customer had already spent at OfficeMax that month.

The three Excel spreadsheets (also called workbooks) at issue in this case consisted of (1) enrollment and transaction activity for the majority of fraudulent accounts (File 1); (2) information for the Group 1 accounts during the specific time period of the scheme (File 2); and (3) an enhanced spreadsheet, essentially a user-friendly version of File 1 and 2 combined (File 3). Each Excel workbook contained several worksheets. These included a worksheet listing the 5,463 suspect accounts, a worksheet listing the 63,581 transactions associated with the suspect accounts, and a worksheet listing the 2,144 transactions in which a reward card was used by one of the suspect accounts.

Defendants argued that the exhibits derived from Excel were inadmissible because they were not originals, and Defendants never received the full database maintained by SHC. They also argued that the spreadsheets were hearsay because they were prepared for purposes of litigation. The district court rejected Defendants' arguments, finding that the spreadsheets were originals under Federal Rule of Evidence 1001(d). Moreover, the district court found that File 1 and File 2 were business records,[4] and also that the records were likely machine generated. The files were therefore found to be admissible.

After Defendants were convicted, the government moved for entry of an order of forfeiture in its favor. The district court entered a money judgment of $105,191, or the value of the merchandise Defendants fraudulently obtained from OfficeMax.

[4] The district court did not rule on File 3. Only the first two files were necessary for the summary exhibits, since File 3 was simply an enhanced version of Files 1 and 2.

## Discussion

### A. Summary Exhibits

Defendants first contend that the district court erred in admitting several of the government's trial exhibits. We review the district court's admission of evidence for an abuse of discretion. United States v. Jenkins, 313 F.3d 549, 559 (10th Cir. 2002). Under this standard, "we will not disturb an evidentiary ruling absent a distinct showing that it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error in judgment." Id.

Federal Rule of Evidence 1006 permits summary exhibits "to prove the content of voluminous writings . . . that cannot be conveniently examined in court." Although the information upon which a Rule 1006 summary is created need not itself be admitted into evidence, it must still be admissible. United States v. Irvin, 682 F.3d 1254, 1261 (10th Cir. 2012). Moreover, the party who offers the summary exhibit must make the originals or duplicates available to the other party. Fed. R. Evid. 1006. Defendants contend both that the spreadsheets (on which the summary exhibits were based) were not originals and that they were not granted access to the original database.

Federal Rule of Evidence 1001(d) defines an "original" of electronically stored information as "any printout — or other output readable by sight — if it accurately reflects the information." In other words, the question is whether the spreadsheets accurately reflect the information found in the underlying database. The government is required to lay a foundation to this effect. See United States v. Whitaker, 127 F.3d 595, 601 n.3 (7th Cir. 1997).

The government's witnesses, Mr. Gardner, FBI Agent Jeffrey Moon, and Victoria Mills, a former manager at SHC, testified that the spreadsheets reflected the same information as in the database. Defendants' expert, Janet McHard, a forensic accountant, testified that it was not possible to determine whether the spreadsheet was accurate without examining the main databases, given the potential for alteration. The district court found that the government's experts had provided a proper foundation and determined that Files 1 and 2 were originals under Rule 1001(d). Memorandum Opinion and Order, United States v. Channon, 13-966-JCH-KK (D.N.M. Jan. 12, 2016), ECF No. 287; 5 R. 1004–09, 1050–51.[5]

Defendants contend, as they did in the district court, that the process by which the data was selected and then transferred (to the Excel spreadsheets) renders them other than original. According to Defendants, because the spreadsheets resulted from many data queries, they are not originals. They maintain that the government should have provided them with access to complete databases. However, the district court's finding that the spreadsheets (Files 1 and 2) accurately reflect database information and are thus originals under Rule 1001(d) is supported by the record and therefore not clearly erroneous. Therefore, because the spreadsheets are originals and were provided to Defendants, Defendants' additional argument that they were not provided access to the database also fails.

[5] The district court noted that File 3 was based on File 1 and File 2, thus implicitly finding that File 3 was also an original.

**B. Hearsay**

Defendants next contend that the summary exhibits were inadmissible hearsay because the underlying spreadsheets were created for purposes of litigation and are therefore not admissible under the business records exception. Although we review district court determinations on the admissibility of evidence for an abuse of discretion, because "hearsay determinations are particularly fact and case specific," we provide a more deferential review. United States v. Hamilton, 413 F.3d 1138, 1142 (10th Cir. 2005). The district court found that the spreadsheets fell under the business records exception and, alternatively, appeared to be machine-generated non-hearsay. 5 R. 720–21, 1072. We agree.

Under Federal Rule of Evidence 801, hearsay is defined as an oral or written assertion by a declarant offered to prove the truth of the matter asserted. "'Declarant' means the person who made the statement." Fed. R. Evid. 801(b) (emphasis added). Here, the Excel spreadsheets contained machine-generated transaction records. The data was created at the point of sale,[6] transferred to OfficeMax servers, and then passed to the third-party database maintained by SHC. In other words, these records were produced by

[6] To the extent that a cashier would have manually entered any information, that would still fall under the business records exception discussed below. Similarly, the customer-enrollment worksheet detailing the suspect accounts created by the Channons falls under both the business records exception or as non-hearsay statements by a party-opponent. See Fed R. Evid. 801(d)(2).

machines. They therefore fall outside the purview of Rule 801, as the declarant is not a person. United States v. Hamilton, 413 F.3d 1138, 1142 (10th Cir. 2005).[7]

Even if the records were considered hearsay, they would fall under the business records exception. See Fed. R. Evid. 803(6). To satisfy the exception, the business record must have been prepared in the normal course of business, made near the time of the events at issue, based on the knowledge of someone with a business duty to transmit such information, and there must be an indication that the methods, sources, and circumstances of preparation were trustworthy. See United States v. Ary, 518 F.3d 775, 786 (10th Cir. 2008).

As discussed above, the records at issue in this case were prepared by OfficeMax and then transferred daily to SHC. Although this would appear to be enough to meet the Rule 803(6) standard, Defendants contend that transferring these records into spreadsheets for purposes of litigation eliminates the business records exception. We disagree. As we have previously held, business records in one form may be presented in another for trial. United States v. Hernandez, 913 F.2d 1506, 1512–13 (10th Cir. 1990). Here, we have just that — business records in one form, a database, simply presented in another form, a spreadsheet.

In sum, the district court did not abuse its discretion in admitting the spreadsheets; it committed no legal error and its decisions are supported by the record.

[7] Many of Defendants' arguments are better placed as questions concerning authentication. However, as this was not raised in the briefs, any argument to this effect was waived. Bronson v. Swensen, 500 F.3d 1099, 1104 (10th Cir. 2007).

### C. Forfeiture

Defendants last argue that the government failed to meet its burden to prove the amount forfeited ($105,191) was traceable to the offense of wire fraud. We have held that wire fraud proceeds are subject to forfeiture under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461. See United States v. Courtney, 816 F.3d 681, 685 (10th Cir. 2016). The property subject to forfeiture includes "[a]ny property, real, or personal, which constitutes or is derived from proceeds traceable to [the] violation." 18 U.S.C. § 981(a)(1)(C). The substitute-asset provision, 21 U.S.C. § 853(p), provides the only method for the forfeiture of untainted property. Honeycutt v. United States, 137 S. Ct. 1626, 1633 (2017).

The government concedes a remand to conform the money judgment to the requirements of § 853(p) may be necessary. The government explains that going forward it will seek only to enforce a forfeiture money judgment through the substitute-asset provisions of § 853(p) and will seek to amend the forfeiture order under Fed. R. Crim. P. 32.2(e). Accordingly, we remand so the district court may conduct further proceedings on this issue.

AFFIRMED in part, REMANDED in part.

# ATTACHMENT B

**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**February 27, 2018**

**Elisabeth A. Shumaker**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MATTHEW CHANNON,

Defendant - Appellant.

No. 16-2254

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRANDI CHANNON,

Defendant - Appellant.

No. 16-2285

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**ORDER**

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Before **PHILLIPS**, **KELLY**, and **MURPHY**, Circuit Judges.

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Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court

who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

# ATTACHMENT C

# UNITED STATES DISTRICT COURT

**District of New Mexico**

UNITED STATES OF AMERICA
V.

**MATTHEW CHANNON**

**Amended Judgment in a Criminal Case - Reason:**
Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

(For Offenses Committed On or After November 1, 1987)

Case Number: **1:13CR00966-001JCH**
USM Number: **72031-051**
Defense Attorney: **Marc H. Robert and John Robbenhaar**

THE DEFENDANT:

☐ pleaded guilty to count(s)
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ after a plea of not guilty was found guilty on count(s) **1, 3, 5, 6, and 7 of Indictment**

The defendant is adjudicated guilty of these offenses:

| *Title and Section* | *Nature of Offense* | *Offense Ended* | *Count* |
|---|---|---|---|
| 18 U.S.C. Sec. 1343 | Wire Fraud | 03/09/2010 | 1 |

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The Court has considered the United States Sentencing Guidelines and, in arriving at the sentence for this Defendant, has taken account of the Guidelines and their sentencing goals. Specifically, the Court has considered the sentencing range determined by application of the Guidelines and believes that the sentence imposed fully reflects both the Guidelines and each of the factors embodied in 18 U.S.C. 3553(a). The Court also believes the sentence is reasonable and provides just punishment for the offense.

☐ The defendant has been found not guilty on count .
☐ Count dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

**October 20, 2016**
Date of Imposition of Judgment

**/s/ Judith C. Herrera**
Signature of Judge

**Honorable Judith C. Herrera**
**United States District Judge**
Name and Title of Judge

**November 7, 2016**
Date Signed

Defendant: **MATTHEW CHANNON**
Case Number: **1:13CR00966-001JCH**

## ADDITIONAL COUNTS OF CONVICTION

| *Title and Section* | *Nature of Offense* | *Offense Ended* | *Count* |
|---|---|---|---|
| 10 U.S.C. Sec. 1343 | Wire Fraud | 05/29/2010 | 3 |
| 18 U.S.C. Sec 1343 | Wire Fraud | 06/04/2010 | 5 |
| 18 U.S.C. Sec. 1343 | Wire Fraud | 08/02/2010 | 6 |
| 18 U.S.C. Sec. 1343 | Wire Fraud | 11/04/2009 | 7 |

Defendant: **MATTHEW CHANNON**
Case Number: **1:13CR00966-001JCH**

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **12 months + 1 day** .

**A term of 12 months and 1 day is imposed as to each of Counts 1, 3, 5, 6, and 7 of Indictment; said terms will run concurrently.**

☒ The court makes the following recommendations to the Bureau of Prisons:

**The Court recommends that the Defendant be incarcerated at the camp at FCI, Florence, Colorado to be close to family.**

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:
  ☐ at on
  ☐ as notified by the United States Marshal.
☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  ☐ before 2 p.m. on
  ☒ as notified by the United States Marshal.
  ☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

_____ at _____ with a Certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Defendant: **MATTHEW CHANNON**
Case Number: **1:13CR00966-001JCH**

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years .**

**A term of 2 years is imposed as to each count of Indictment; said terms shall run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
The defendant shall not commit another federal, state, or local crime.
The defendant shall not unlawfully possess a controlled substance.
The defendant shall refrain from any unlawful use of a controlled substance.
The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by statute. (Check, if applicable).

☐ The defendant shall register with the state, local, tribal and/or other appropriate sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Criminal Monetary Penalties sheet of this judgment.
The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

Defendant: **MATTHEW CHANNON**
Case Number: **1:13CR00966-001JCH**

## SPECIAL CONDITIONS OF SUPERVISION

**The defendant is prohibited from incurring new credit charges, opening additional lines of credit, or negotiating or consummating any financial contracts without prior approval of the probation officer.**

**The defendant must provide the probation officer access to any requested financial information, personal income tax returns, authorization for release of credit information, and other business financial information in which the defendant has a control or interest.**

**The defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon.**

**The defendant must submit to a search of the defendant's person, property, or automobile under the defendant's control to be conducted in a reasonable manner and at a reasonable time, for the purpose of detecting illegal contraband and to monitor his computer at the direction of the probation officer. The defendant must inform any residents that the premises may be subject to a search.**

**The defendant must consent, at the direction of the United States Probation Officer, to having installed on the defendant's computer(s), any hardware or software systems to monitor the defendant's computer use. Monitoring will occur on a random and/or regular basis. The defendant must warn others of the existence of the monitoring software placed on the defendant's computer.**

**The defendant shall consent to the United States Probation Office conducting periodic unannounced examinations of the defendant's computer(s), hardware, and software which may include retrieval and copying of all data from the defendant's computer(s). This also includes the removal of such equipment, if necessary, for the purpose of conducting a more thorough inspection.**

**The defendant shall not make any changes to the defendant's computer services, user identifications, or passwords without prior approval of the Probation Officer.**

Defendant: **MATTHEW CHANNON**
Case Number: **1:13CR00966-001JCH**

## CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties in accordance with the schedule of payments.

☐ The Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

| Totals: | Assessment | Fine | Restitution |
|---|---|---|---|
| | **$500.00** | **$0.00** | **$96,278.00** |

## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.
Payment of the total fine and other criminal monetary penalties shall be due as follows:
The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

A ☒ In full immediately; or

B ☐ $ immediately, balance due (see special instructions regarding payment of criminal monetary penalties).

**Special instructions regarding the payment of criminal monetary penalties: Criminal monetary penalties are to be made payable by cashier's check, bank or postal money order to the U.S. District Court Clerk, 333 Lomas Blvd. NW, Albuquerque, New Mexico 87102 unless otherwise noted by the court. Payments must include defendant's name, current address, case number and type of payment.**

**Pursuant to the Mandatory Victim Restitution Act, it is further ordered that the defendant will make restitution to Office Depot in the amount of $96,278.00. Restitution shall be submitted to the Clerk of the Court, Attention Intake, 333 Lomas Boulevard N.W. Suite 270, Albuquerque, New Mexico 87102, to then be forwarded to the victim(s). The restitution will be paid in full jointly and severally with codefendant Brandi Channon; however, if the defendants are unable to make immediate full restitution, he shall pay no less than $200 per month or no less than 10% of his gross monthly household income, whichever is greater. All interest is waived.**

**The defendant shall pay a Special Assessment of $100.00 as to each count of conviction, for a total of $500.00, which is due immediately.**

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made as directed by the court, the probation officer, or the United States attorney.

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

MATTHEW CHANNON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**CERTIFICATE OF SERVICE**

I, Marc H. Robert, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Matthew Channon, I caused to be mailed copies of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid to the Solicitor General, Department of Justice, 950 Pennsylvania Ave. NW, Room 5616, Washington, DC 20530, and to be sent electronic copies of the foregoing by e-mail at supremectbriefs@usdoj.gov, on this 29th day of May, 2018.

s/ Marc H. Robert
Attorney for Petitioner
FEDERAL PUBLIC DEFENDER
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