

No. _____

In the
Supreme Court of the United States

AMALYA CHERNIAVSKY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances must a district court sua sponte instruct the jury on a theory of defense presented and relied upon at trial where the theory of defense addresses only one of several theories of guilt?

PARTIES TO THE PROCEEDINGS

The parties are Petitioner, Amalya Cherniavsky, and respondent, United States of America. All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Amalya Cherniavsky, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, entered in the instant proceeding on July 24, 2018, Ninth Circuit Court of Appeal № 16-50060.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued an unpublished memorandum in this matter. App. 2a. See also United States v. Cherniavsky, 732 Fed. Appx. 601 (9th Cir. 2018)(unpublished). The district court order from which Mrs. Cherniavsky appealed is also unpublished. App. 7a.

STATEMENT OF JURISDICTION

The date on which the Ninth Circuit Court of Appeals filed its memorandum in the instant matter was July 24, 2018. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE AND FACTS

A. Mrs. Cherniavsky's Background

Mrs. Cherniavsky was born in Baku, Azerbaijan to a Christian family of mixed Russian and Armenian origin. PSR 19. Her childhood was marked by multiple unexpected deaths in her family, the first of which occurred when Mrs. Cherniavsky's cousin was killed in a car accident when she was eight years old. About a month later, her grandmother died of a heart attack. PSR 19.

When Mrs. Cherniavsky was twelve, her father suddenly died of a heart attack. A year after her father died, Mrs. Cherniavsky's mother went to work in a local bakery and Mrs. Cherniavsky worked with her so that she could earn some money for the family and continue attending school. In 1987, when Mrs. Cherniavsky was thirteen, her grandfather died of a heart attack. PSR 19.

In February 1988, shortly after Mrs. Cherniavsky turned fourteen, the Nagorno-Karabakh War broke out in Azerbaijan . Knowing that a lot of people of Armenian origin had been killed, Mrs. Cherniavsky's family realized they had to leave Baku. They were hidden by their closest

neighbors in their houses until the military came to their rescue in December 1988 and put them on a train to Soviet Armenia. They were on the train for a couple of days, arriving in Yerevan the same day that a devastating earthquake struck the area. Understanding that they would not be able to receive help as refugees there due to the immediate needs after the earthquake, the family boarded a train to Moscow in Soviet Russia where they were put in a refugee camp with thousands of other refugees from Baku. PSR19. While at the refugee camp, Mrs. Cherniavsky's family learned that Mrs. Cherniavsky's uncle and five-year-old cousin had been killed in the ethnic violence in Azerbaijan. PSR 19.

Mrs. Cherniavsky's family put in applications with the United States Embassy requesting refugee status and the ability to relocate to the United States. After a year, their applications were approved, and the following year, shortly before Mrs. Cherniavsky's 17th birthday, the family arrived in Detroit, Michigan. PSR 19.

Mrs. Cherniavsky did not enroll in high school, as she needed to find work to help support the family, but she eventually was able to go to

cosmetology school and ultimately get her cosmetology license. PSR 19-20.

After moving to Los Angeles, Mrs. Cherniavsky met and married her husband, Vladislav Tcherniavsky. PSR 20. They had two children, a girl and a boy. After giving birth to her son, in 2003, Mrs. Cherniavsky cared for the children full-time until 2004. PSR 20, 25.

B. The Facts Giving Rise to Mrs. Cherniavsky's Conviction, the Charging Documents, and the Tcherniavskys' Arrests and Pleas

In 2003, Mrs. Cherniavsky's husband approached her with the idea of opening a medical supply business. Mr. Tcherniavsky wanted to put the business under Mrs. Cherniavsky's name and call it "JC" after their daughter. PSR 24-25.

When Mr. Tcherniavsky approached Mrs. Cherniavsky with the idea, she felt "privileged" and thought it would be a great next step in their lives as a family. Mr. Tcherniavsky told his wife that she could continue caring for their children at home and he would get the business started and take care of all the applications for licensing and permits and would

bring her the papers to sign at home. ER 2463-2471; PSR24-25. See also, ER 3350. JC Medical Supply was not incorporated and was operated as a sole proprietorship in Mrs. Cherniavsky's name. ER 886, 890, 896, 900, 904, 906, 908, 910, 2458-2459; PSR 24-25. The bank account for JC Medical was opened in the name of both Mr. and Mrs. Tcherniavsky. ER 3329.

In 2006, Medicare issued JC Medical a Medicare provider number. ER 2463; PSR 24-25. Around the time the business was licensed and permitted, Mr. Tcherniavsky had a problem with the only employee at JC Medical always coming in late. To help with this situation, Mrs. Cherniavsky started working at the supply store in 2007. Her job tasks were simple and included opening the store, working as a receptionist, cleaning the store, and writing down the messages from the answering machine. At 1 or 2 p.m. each day, her husband would arrive and she would go to pick up their children from daycare and school. Her husband then ran the business until closing time each day. PSR 24-25.

On September 19, 2013, the grand jury returned an indictment against Vladislav Tcherniavsky and his wife, Amalya Cherniavsky,

alleging violations of Conspiracy to Commit Health Care Fraud (18 U.S.C. § 1349); Health Care Fraud (18 U.S.C. § 1347); and, Causing an Act to be Done (18 U.S.C. § 2(b)). ER 2584.

The Indictment alleged that Mr. and Mrs. Tcherniavsky co-operated JC Medical Supply, a durable medical equipment (DME) supply company. ER 2584-2593. The Indictment further alleged that Mr. Tcherniavsky owned and operated a medical clinic with certain co-conspirators, one of whom was a physician. ER 2585.

The government asserted the Tcherniavskys paid kickbacks in return for DME prescriptions that they used to submit claims to Medicare on behalf of JC Medical. ER 2588. It also asserted that Mr. Tcherniavsky and others at his medical clinic generated false and fraudulent prescriptions and documents, including medically unnecessary power wheelchair prescriptions. ER 2589. These asserted fraudulent prescriptions were then submitted to Medicare, causing Medicare to make payments to JC Medical. ER 2589.

The government claimed that during an approximately eight-year time period, JC Medical submitted to Medicare false and fraudulent

claims totaling approximately \$1,507,390, and Medicare paid JC Medical approximately \$770,330 on those claims. ER 2052, 2590.

Government agents arrested Mr. and Mrs. Tcherniavsky on October 9, 2013 who were then released on bond. ER 2573-2574, 2576-2577-2583. At the arraignment hearing, the Tcherniavskys pled not guilty. ER 2572, 2575.

C. The Trial

Mrs. Cherniavsky and her husband were tried together. The six-day trial began on October 7, 2015. ER 295, 1330,1550,1795, 2027, 2253.

1. Evidence presented regarding the nature of Medicare
 - a. Medicare and the provision of durable medical equipment

Medicare Part B pays for durable medical equipment needed by Medicare beneficiaries. ER 2431. Durable Medical Equipment (DME) is medical equipment that can be used over and over again such as power wheelchairs. Private companies supply the DME to beneficiaries and Medicare reimburses the companies for a portion of the DME's cost. ER

2432. A company must be approved to supply DME, and following such approval, the company receives a unique supplier ID number. ER 2433.

The process for receiving reimbursement for the provision of a DME starts with the beneficiary seeing his or her attending physician. The physician determines whether the patient needs some type of a DME and if so, the physician will write a prescription for it. ER 2433-2434. The patient then receives the prescription and takes it to a DME supplier. ER 2433. A prescription is always necessary to obtain a DME from a supplier. ER 2434-2435, 2439. Only a healthcare provider, not a medical supplier, may write a prescription. ER 2491.

A beneficiary who has received a prescription for a DME need not personally take it to the medical supplier for fulfillment. Someone else can take it to the medical supplier or the physician can fax it. ER 2046.

A DME, such as a power wheelchair, is only considered medically necessary when a beneficiary is limited in his or her mobility-related activities of daily living and meets a checklist of criteria as determined by the attending healthcare provider. ER 496-500,507-510. Thus, before writing a prescription, the attending healthcare provider must evaluate

the patient face-to-face. ER 507-508, 515, 2435.

Medicare requires that when a medical supplier deliver a DME, such as a power wheelchair, the supplier must get a signature that the equipment has been delivered and do an environmental assessment to make sure the power wheelchair functions in the home. ER 2442-2443.

Medicare will not reimburse a supplier for DME provided to a beneficiary where (1) the DME was not medically necessary; (2) the supplier did not actually provide the beneficiary with the DME; (3) the prescription for the DME is obtained as a result of paying a kickback; (4) the healthcare provider obtains the beneficiary as a patient through a patient recruiter (i.e. someone who is paid to bring in patients to a clinic or medical supply company); or (5) the supplier had not conducted an environmental assessment of the beneficiary's home. ER 2045-2046, 2443-2444, 2482, 2486-2487.

- b. Medicare's lack of a requirement that a DME supplier investigate or verify the accuracy of DME prescriptions

Medicare does not require a medical supplier to investigate a DME prescription nor does it require a DME supplier verify anything that is written on the forms provided to it by the physician who wrote the prescription unless there is something on one of the forms that needs completion or clarification. ER 2494-2495, 2501. Similarly, the medical supplier need not investigate whether the physician was paid a kickback for prescribing the DME. ER 2047. Medicare merely requires that the medical supplier gather the required documents to support the claim. ER 2494-2495.

Medicare does not require medical suppliers to have any medical training. They are not required to know how to fill out a medical prescription. ER 2495. As explained by a Medicare fraud expert testifying on behalf of the government, it is not always easy to detect Medicare fraud. ER 2497, 2499.

2. Evidence presented regarding “red flags” and modus operandi of DME Medicare fraud

At trial, the government elicited testimony regarding “red flags” that Medicare looks for in determining whether a DME supplier is engaging in fraud.¹ ER 2483. These red flags included (1) the majority of a supplier’s sales are comprised of one particular, high-priced item, such as power wheelchairs; (2) a limited number of healthcare providers are writing the prescriptions; and (3) certain beneficiary demographics such as the patients being located in a particular area or at a great distance from the attending physician’s office. ER 2483-2484. Missing documentation, does not in and of itself mean that fraud is being committed, but it can be a red flag. ER 2062-2063.

Over counsel’s objections, the government presented testimony regarding the modus operandi of Medicare fraud schemes. ER 2066. In this regard, a medical supplier works with a patient recruiter who finds Medicare eligible beneficiaries who will accept an expensive DME, such as a power wheelchair. ER 2066-2069. The recruiter takes the

¹The district court overruled Mr. Tcherniavsky’s objection to this line of questioning. ER 2483.

beneficiaries to a clinic that has been agreed upon by the medical supplier. Someone at the clinic writes a prescription for the beneficiary. The clinic or recruiter then sends the prescription to the medical supplier. ER 2067. The recruiter and attending physician are paid from the Medicare reimbursement. ER 2068.

3. Evidence presented regarding kickbacks and allegedly fraudulent DME prescriptions
 - a. Testimony of co-conspirators

TESTIMONY OF GEORGE LIANG

Co-conspirator, George Liang, testified at the trial on behalf of the government. Mr. Liang had pled guilty to Medicare fraud in a criminal matter unrelated to either Mr. or Mrs. Tcherniavsky. As part of his plea agreement, Mr. Liang agreed to testify in the Tcherniavsky matter. ER 1834-1835. He hoped that as a result of his testimony he would get a reduced sentence. ER 1835, 1842-1843.

Mr. Liang testified that in approximately 1999, he and Mr. Tcherniavsky opened Pacific Medical Clinic. Mr. Liang was the office manager. ER 1985. Mr. Liang, along with Mr. Tcherniavsky engaged paid

marketers to bring clients to the clinic. ER 1856-1857, 1872-1873, 1990-1991.

In 2006, Mr. Liang and Mr. Tcherniavsky decided to open a DME company. ER 1996. They realized that because they ran a medical clinic, they could not open a DME company in their own names. ER 1996-1997. So, they decided to open it in Mrs. Cherniavsky's name. ER 1997-1998. Ultimately, Mr. Liang did not become an actual partner in the business. ER 1998-1999. Rather, Mr. Liang and Mr. Tcherniavsky entered into an arrangement whereby Mr. Tcherniavsky would pay him, and others, for prescriptions generated by Pacific Medical Clinic. ER 1817-1818, 1999, 2002-2003, 2015-2016. Mr. Tcherniavsky paid Mr. Liang in cash and by check. ER 1819-1822, 2017. The checks were made out to Mr. Liang's cousin, Harriet Liang, in an attempt to prevent others from discovering that Mr. Tcherniavsky was paying Mr. Liang for DME referrals. ER 1819-1822, 1827. Mr. Liang received checks directly from Mr. Tcherniavsky. ER 3270, 1817-1818, 1824.

Dr. August Ohemeng was the medical director of the medical clinic. ER 2009. Dr. Ohemeng, however, never saw patients . ER 2010. See also

ER 2197, 2199. It was Dr. George Tarryk, Harry Murray (a physician's assistant), and Tina Salinas (a nurse practitioner) who examined patients. That was allowable under Medicare regulations. ER 1846, 1850, 1853-1854.

For efficiency purposes, Dr. Ohemeng would sign a number blank prescriptions and related forms. ER 1811, 1832, 1858, 1999-2000, 2019. Dr. Ohemeng would then discuss with Mr. Liang what to fill the blanks with. ER 1849, 2019-2020. Mr. Liang also filled out prescriptions that were signed by Dr. Tarryk. ER 1806-1807, 1809-1810, 1812-1815. On several occasions, Mr. Tcherniavsky watched Mr. Liang fill out the forms, and on occasion Mr. Tcherniavsky filled out part of the prescriptions . ER 1808, 1808, 1811, 1813-1814, 2019-2020. Mr. Liang testified that he gave a prescription he procured from Dr. Ohemeng to Mr. Tcherniavsky. ER 1806.

TESTIMONY OF DR. GEORGE TARRYK

Dr. George Tarryk, who worked with Mr. Liang and Mr. Tcherniavsky at the Pacific Medical Clinic in Long Beach, testified at trial. ER 1719, 1722. Dr. Tarryk had been indicted for Medicare fraud in

a case wholly unrelated to the instant matter. As a result of that indictment, he pled guilty and agreed to testify against Mr. Tcherniavsky in the hope that he would receive a more lenient sentence. ER 1753-1754.

Dr. Tarryk testified that while he worked with Mr. Tcherniavsky, the two agreed that Mr. Tcherniavsky would pay him for writing prescriptions for power wheelchairs. ER 1719, 1724-1727. In coming to this agreement, Mr. Tcherniavsky informed the doctor that marketers would be used to bring in patients for the power wheelchair prescriptions. ER 1725, 1730-1731. George Liang, Pacific Medical Clinic's manager, also participated in the agreement. ER 1729-1731. Dr . Tarryk testified that the power chair prescriptions he wrote and that were fill by JC Medical were not medically necessary. ER 1719-1720, 1731, 1733, 1739, 1742-1743, 1748, 1751. Once he wrote these prescriptions, he would give them to Mr. Tcherniavsky directly or through Mr. Liang or one of the marketers. ER 1735.

Dr. Tarryk testified that in completing documents such as prescriptions, exam notes, etc., it was his intention to cause anyone reading those documents to believe that there was a medical necessity to

prescribe the power wheelchairs. ER 1769.

b. Testimony of investigating agents and Medicare employees

TESTIMONY OF FBI SPECIAL AGENT MARK COLE

FBI Special Agent Mark Cole testified that he participated in the investigation of JC Medical's alleged Medicare Fraud. ER 2069. Agent Coleman testified that a total of 26 health care providers had sent JC Medical power wheelchair prescriptions. Four healthcare providers accounted for more than 50 percent of the wheelchairs billed. These four healthcare providers were Dr. Augustus Ohemeng, Dr. George Tarryk, Dr. Robert Karns and nurse practitioner Tina Salinas. ER 2103. The top three healthcare providers, Dr. Ohemeng, Dr. Tarry, and Ms. Salina were all located at the Pacific Avenue Medical Clinic. ER 2097, 2103.

Agent Coleman seized documentation from JC Medical which included hundreds patient files. ER 2114-2116, 2119. See also ER 2614-3264. Such patient files normally contain a completed face-to-face evaluation form, the prescription from the doctor, the environmental assessment completed by the medical supplier, the medical supplier's

delivery ticket and any doctor's progress notes. ER 2162-2163. Additionally, the patient file would normally contain a detailed description of the DME product prescribed, a photocopy of the beneficiary's driver's license and his or her Medicare card. ER 2162.

Upon reviewing the patient files, Agent Coleman found some were missing required documents. ER 2110, 2169, 2180-2181, 2184, 2186-2188. In some of the files, the documents did not contain the required information. ER 2160, 2169-2171, 2188-2189, 2192-2194, 2198-2201. Despite the missing documents and information, JC Medical billed Medicare for some of these beneficiaries. ER 1673, 2128-2129, 2160, 2170, 2183, 2187, 2202, 2208-2209, 2219-2220, 2224.

Agent Coleman found instances of what he believed were medical records having been altered and instances of medical documentation having been filled out by personnel at JC Medical Supply.² He claimed to have found instances of records being completely fabricated. ER 1364, 2128-2129, 2160, 2170, 2208-2211, 2219.

During the trial, Agent Coleman discussed the patient files of

²Testimony revealed, however, that anyone can fill out a face-to-face evaluation. ER 2169.

individuals listed in the Indictment and in so doing discussed what he believed were their deficits. ER 2164, 2172-2174. In this regard, all the files he reviewed were missing documentation. Also, documentation indicated the beneficiary could walk well or with a cane. ER 300-301, 701 2169-2172, 2174-2185.

Agent Coleman personally interviewed five beneficiaries who were listed as having received a power wheelchair and that other agents interviewed approximately fourteen additional witnesses. ER 1933. The beneficiaries he interviewed indicated that the power wheelchairs JC Medical provided were not medically necessary. ER 2109-2110.

Agent Coleman, along with another agent, interviewed Mr. and Mrs. Cherniavsky and the top four healthcare providers who had prescribed the power wheelchairs that JC Medical had supplied. ER 2987. When interviewed, Mrs. Cherniavsky explained that she owned JC Medical Supply and that her husband managed it. ER 2106. Mr. Tcherniavsky stated that he was the individual who delivered the power wheelchairs to the beneficiaries. ER 2109, 2132. During the delivery, he would conduct the environmental assessment. ER 2108-2109. From the interviews and

other materials, Agent Coleman believed the Tcherniavskys were knowledgeable about Medicare rules and requirements regarding power wheelchairs. ER 2108. See also ER 2134-2137, 2147-2150.

During his investigation, Agent Coleman obtained records from JC Medical's checking account showing that it had made payments to Harriet Liang. JC Medical did not employ Ms. Liang. Rather, she is a relative of George Liang who managed one of the referring physician's clinics. ER 3322-3328, 3449, 2089-2090. The checks had been signed using the name Amalya Cherniavsky. ER 3322-3328, 2088.

TESTIMONY OF ARMAN SAHAKYAN

Arman Sahakyan was a special agent criminal investigator. In that position he investigated fraud in the Medicare system. ER 1641-1642. He investigated JC Medical and as part of that investigation interviewed eleven beneficiaries to whom JC Medical Supply provided power wheelchairs. ER 1541-1543, 1545-1546. None of the beneficiaries qualified for chairs because all were able to walk. ER 1645-1645. Two of the individuals interviewed had not received their chairs at all. ER 1645-1646,

1673, 1675.

c. Testimony of Medicare beneficiaries, family members, and their treating physicians

Several of the beneficiaries named in the Indictment testified. They were Maria Espinosa, Sonvonna Phillips, and Edward lee.

Ms. Espinosa stated that in 2011, after she and her companion ,Jose Chavez were approached by a woman who offered them power wheelchairs, they received the chairs. ER 1882, 1885, 1896. The chairs were delivered by a man, but he did not assess the home. ER 1888-1889. Neither Ms. Espinosa nor Mr. Chavez needed any assistance in getting around. ER 1880-1881, 1895. See also ER 296-297, 1678, 1890-1892, 1895-1897.

Ms. Phillips and Mr. Lee testified that they had never requested a power wheelchair nor had they ever received one. ER 1691, 1782-1783. See also ER 1383-1384, 1483, 1493,1711, 1714, Both testified that they did not need the assistance of a power wheelchair. ER 1691, 1782.

Phoeun Sok was a beneficiary listed in the Indictment. Ms. Sok's regular physician testified that she never prescribed Ms. Sok a power

wheelchair because Ms. Sok could get around with a cane and then a walker. ER 298-299, 1563-1564. Ms. Sok's daughter in law testified that Ms. Sok couldn't walk well but she had never used the power wheelchair provided to her in the house. ER 1779.

Dr. Robert Karns testified on behalf of the government. In a wholly unrelated matter, Dr. Karns had had his medical license revoked. ER 1519.

Dr. Karns testified that when he was practicing medicine, he had never heard of JC Medical Supply, or Mr. and Mrs. Tcherniavsky. ER 1539-1540. Dr. Karns also testified that he trusted his staff to provide him with documents for signing that he did not read. ER 1500-1502. His signature was on the Lee, Phillips, Espinosa, and Chavez power wheelchair documents. ER 1502-1506. Although he signed them, he didn't fill them out. ER 1508-1509, 1513-1515. He did not believe that he every made a medical determination that Ms. Phillips, Ms. Espinosa, or Mr. Chavez needed a power chair. ER 1512-1514.

4. Evidence presented regarding Mrs. Cherniavsky's knowledge of and connection with the alleged fraudulent DME prescriptions

As George Liang testified, he and Mr. Tcherniavsky decided to open their own DME company in Mrs. Cherniavsky's name because Medicare regulations did not allow them to do so. ER 1995-1996. Similarly. Dr. Tarryk testified that JC Medical was ". . . owned by Vladislav Tcherniavsky, but it was under the name of his wife, Amalya." ER 1726.

Mr. Liang testified that Mrs. Cherniavsky never participated in any discussions he had with Mr. Tcherniavsky. ER 1867. Mrs. Cherniavsky was not present during any conversations between Mr. Liang and Mr. Tcherniavsky regarding payments to Harriet Liang. ER 1872. Similarly, the 1099 form that Ms. Liang received for the checks written in her name was signed by Mr. Tcherniavsky and given to Mr. Liang by Mr. Tcherniavsky. ER 307, 1827-1828.

Mr. Liang further testified that Mrs. Cherniavsky was never present when Mr. Liang filled out any of the prescription forms or other DME documents. ER 1868. Although Mrs. Cherniavsky made some visits

to the Pacific Medical Clinic, they were short, social in nature, and only for the purpose of visiting her husband. ER 1867. Dr. Tarryk, the physician who testified that he wrote fraudulent prescriptions for JC Medical, also testified about Mrs. Cherniavsky's non-involvement. ER 1726.

When interviewed by a government agent, Mr. Tcherniavsky stated that he was the individual who delivered the power wheelchairs to the beneficiaries. ER 2109, 2132-2133. During the delivery he would conduct the environmental assessment. ER 2108-2109. Ms. Espinosa, a beneficiary who received a power chair from JC Medical, confirmed that when two chairs were delivered for her and her companion, they were delivered by a man. ER 1888. Similarly, one of the investigating agents testified that none of the beneficiaries interviewed stated that they had any dealings with Mrs. Cherniavsky. ER 1441-1442, 2167.

Others attested to Mr. Tcherniavsky's management of JC Medical Supply. A vendor for JC Medical said that his contact person was Mr. Tcherniavsky. ER 1461, 1479-1480. At trial, Mrs. Cherniavsky called JC Medical Supply's biller, Alica Jarolimek, to testify. Ms. Jarolimek testified

that she was the medical biller for JC Medical for seven years. ER 1533-1534. During those seven years. Ms. Jarolimek was primarily in contact with Mr. Tcherniavsky. ER 1534-1535.

Ms. Jarolimek testified that most of her dealings were with Mr. Tcherniavsky. ER 1536-1537. Whenever she had a question regarding a bill she was engaged to submit, she would ask Mr. Tcherniavsky. ER 1535-1538. She really didn't have any dealing with Mrs. Cherniavsky regarding billing. ER 1536. Ms. Jarolimek stated that her impression of Ms. Cherniavsky's job description was merely to answer the phone. ER 1535.

When government agents interviewed Mrs. Cherniavsky, she explained that she owned JC Medical Supply and that her husband managed it. ER 1536. From this interview and other materials gathered, one investigating agent believed that Mr. Tcherniavsky was knowledgeable about Medicare rules and requirements regarding power wheelchairs. ER 2108. See also ER 2133-2136, 2147-2150, 2152-2158.

The inspectors who had interviewed Mrs. Cherniavsky for Medicare compliance also believed she had a sufficiently high level of knowledge

about the business because she was able to answer the questions they posed and she could provide the documents requested. ER 1577, 1588, 1593, 1610-1611.

An investigating agent asserted his belief that Mrs. Cherniavsky “ran the day-to-day operations at JC Medical Supply.” ER 2134. He testified that most of the cash withdrawals from the JC Medical bank account were made by Mrs. Cherniavsky. ER 1440. This agent testified he had never seen Mrs. Cherniavsky enter or exit the bank to withdraw cash. Rather, he concluded that Mrs. Cherniavsky had withdrawn the money because her signature was on the bank withdrawal slips. ER 1440-1441. When asked about the investigating officers’ ability to identify Mrs. Cherniavsky’s signature, however, one agent admitted no one involved with the investigation had identified Mrs. Cherniavsky’s handwriting. ER 1942.

Through Exhibit 25, the government presented checks written from JC Medical Supply’s bank account. Some of these checks allegedly represented kickbacks and appeared to have Mrs. Cherniavsky’s signature. ER 3312, 3316, 1825-1826. During cross-examination, Mr.

Liang testified that one of these checks, check 1183 made out to Harriet Liang was signed “Amalya Cherniavsky.” Although Mrs. Cherniavsky signed the check, Mr. Liang testified that it was Mr. Tcherniavsky who filled the check out. ER 1868-1869.

Mr. Liang testified that Mrs. Cherniavsky never delivered any of the checks in Exhibit 25 to him. ER 1870. Similarly, Mr. Tcherniavsky signed and delivered Ms. Liang’s 1099 to Mr. Liang. ER 1870. As to Exhibit 55, which was a document initialed “AC” (presumably for Amalya Cherniavsky), Mr. Liang testified that the “AC” looked as if it had been written by Mr. Tcherniavsky. ER 1870-1871.

5. Evidence presented regarding the alleged amount of loss suffered by Medicare

JC Medical Supply operated from March 2006 to June 2013. During that time, the company billed Medicare a total of \$1,520,727. ER 306, 2536, 3361. As is its custom, Medicare paid JC Medical 80% of the amount billed, which totaled \$783, 756. ER 306, 1655-1656.

Seventy-five percent of claims JC Medical presented to Medicare were for power wheelchairs and their accessories. ER 305, 1656, 2480. The

total amount billed and paid by Medicare to JC Medical on the power wheelchairs and their accessories was \$615,418. ER 304, 1656-1657.

A total of 26 health care providers gave JC Medical power wheelchair prescriptions. ER 2097-2098. Dr. Tarryk, Dr. Ohemeng, Dr. Karns and Ms. Salinas wrote prescriptions for 52% of the power wheelchair prescriptions filled by JC Medical Supply. The remaining 48% of prescriptions were filled by 22 other unspecified healthcare providers. ER 302-303, 1561, 1658-1700.

6. Jury deliberation and verdict

During its deliberation, the jury sent a note to the court stating the following:

Does an owner of a DME business billing Medicare have a responsibility to detect specific cases of fraud? i.e., [count] 2 to 6 . . . If the owner was not aware of an activity but should have been, are they responsible?"

ER 231, 1250.

In response to the note the court instructed the jury to reread jury instructions 39, 52, and 55. ER 1234-1238. See also ER 232. Ultimately, the jury found Mr. and Mrs. Tcherniavsky guilty of all six counts of the

indictment. ER 227-230, 295, 1261-1262.

7. Motions for acquittal and new trial

At the close of the government's case, Mrs. Cherniavsky moved under Fed.R.Crim.P. 29 for a verdict of not guilty. ER 1487. The district court denied the motion. ER 295, 1330, 1492.

After Mrs. Cherniavsky rested, she renewed her Rule 29 motion. The district court again denied the motion. ER 1273.

On November 16, 2015, Mrs. Cherniavsky filed a motion for acquittal under FRCP Rule 29(c) and a motion for new trial under FRCP Rule 33(a). ER109. The district court denied both motions. ER 87, 90.

D. The Presentence Report (PSR) and the Parties' Sentencing Positions.

1. PSR

In its Presentence Investigation Report (PSR), the Office of Probation calculated Mrs. Cherniavsky's custodial Guideline Sentence to be 41 to 51 Months. PSR 1, 10. Under 18 U.S.C. § 3553(a), however, Probation recommended that the district court impose a 21-month

custodial sentenced on each count, to be served concurrently, and followed by three years supervised release, also to be served concurrently. PSR 1-5.

With respect to the actual loss Medicare sustained as a part of Mr. and Mrs. Tcherniavsky's actions, Probation asserted that, of the fraudulent claims submitted for power wheelchairs and their accessories, Medicare paid \$615,418 in reimbursement payments. PSR 14-15. Thus, Probation recommended that the district court order Mrs. Cherniavsky to pay Medicare \$615,418 in restitution. PSR 1.

2. The government's sentencing position

The government objected to Probation's custodial sentence recommendation and instead asked that the district court impose a 78-month custodial sentence. ER 141, 155, 217, 221.

The government also objected to Probation's calculation of Medicare's actual loss and asserted that Mrs. Cherniavsky should be required to make restitution in the amount of \$783,756, which represented all of the money paid to JC Medical by Medicare, even though only \$615,418 of that amount could be attributed to power wheelchairs and their accessories. ER 141, 155, 218, 225-226.

3. Mrs. Cherniavsky's sentencing position

In her sentencing memorandum, Ms. Cherniavsky requested a term of probation. ER 173, 177. She stated that restitution should not exceed the \$615,418 which represented Medicare's actual loss from the Medicare reimbursements for the power wheelchairs and their accessories. ER 166, 179-173, 177.

E. Sentencing and the Appeal

Mrs. Cherniavsky's sentencing hearing took place on January 29, 2016. ER 1, 9. The district court sentenced Mrs. Cherniavsky to three years probation for each of the six counts on which she was convicted. The district court ordered that Mrs. Cherniavsky serve her terms concurrently and that she reside in a residential reentry center for a period of six months to be followed by six months of home detention. ER 1, 6, 59-62. The district court also ordered a three-year term of supervised release on each count to be served concurrently. ER 63.

The district court ordered Mrs. Cherniavsky make restitution in the amount of \$615,418, which was the actual loss Medicare had sustained.

ER 35-36, 40, 132, 138. Mrs. Cherniavsky, like her husband, was ordered to make an immediate, partial payment of \$50,000. ER 40, 61.

On February 9, 2016, Mrs. Cherniavsky filed a notice appeal. ER 119. On July 24, 2018, the Ninth Circuit Court of Appeals affirmed the district court's judgment against Mrs. Cherniavsky. App. 2a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IN THIS MATTER IS CONTRARY TO DUE PROCESS AND CONFLICTS WITH THE DECISIONS OF THIS COURT AND SISTER CIRCUITS ON AN IMPORTANT ISSUE OF LAW; THUS, THERE ARE COMPELLING REASONS TO GRANT CERTIORARI.

The Court of Appeals' decision in the instant matter is in conflict with the decisions of this Court and other United States Courts of Appeals in that the decision improperly limits the circumstances under which a district court is required to provide, *sua sponte*, a jury instruction. Additionally, the decision is in conflict with the Due Process Clause. For these reasons, this Court should grant the petition for a writ of certiorari.

At trial, the government espoused at least two theories under which Mrs. Cherniavsky could be convicted of Medicare fraud. First, the government contended that Mrs. Cherniavsky sold power wheelchairs to clients even though she was aware that the equipment was not medically

necessary.³ Secondly, the government argued that Mrs. Cherniavsky committed fraud because she falsified Medicare documents. ER 1347-1349, 1359, 1365-1367, 1407, 1410-1411. In defense of the initial argument, Mrs. Cherniavsky presented evidence and argued that not only was she not aware that the equipment was not medically necessary, but also that she was under no legal requirement to know whether the equipment was medically necessary. ER 1378-1379, 1393-1394, 2494-2495, 2497-2498, 2501-2502. As testimony elicited at trial showed, the law requires the attending healthcare provider to determine medical necessity, not DME suppliers. So long as the DME supplier has what she believes to be a legitimate prescription, there is no obligation to independently ascertain medical necessity. ER 2494-2495, 2497-2498, 2501-2502.

On appeal, Mrs. Cherniavsky explained that a reversal of her conviction was necessary because the district court plainly erred when it

³See ER 1367 where, in its closing argument, the government stated that it had charged Mrs. Cherniavsky with “. . . defrauding the Medicare program by submitting false and fraudulent claims for power wheelchairs that were not medically necessarily to the beneficiaries named in each count or they weren’t delivered.” See also, ER 1347-1349, 1359, 1365-1367, 1407, 1410-1411. The government’s closing arguments were in keeping with the allegations made in the indictment. ER 2589.

failed to instruct the jury that, by law, she had no legal duty to know whether the power wheelchairs she sold to clients were medically necessary. See *United States v. Weitzenhoff*, 35 F.3d 1275, 1287, 1286 (9th Cir. 1994). See also *Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1047 (9th Cir. 2013). As such, the judge was required to instruct the jury on the law, *sua sponte*, because, while the jury is the arbiter of the facts, the judge is the arbiter of the law. *United States v. Amparo*, 68 F.3d 1222, 1224 (9th Cir. 1995). See also *United States v. Della Porta*, 653 F.3d 1043, 1052 (9th Cir. 2011); *United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006).

In its Memorandum, the Ninth Circuit essentially holds that because Mrs. Cherniavsky's asserted defense could not prevent a conviction on the issue of false documentation, then the defense was not viable as a whole. In this regard, the Court of Appeals Memorandum states that:

The district court did not commit plain error by failing to instruct the jury that Medicare regulations do not require durable medical equipment (DME) providers to evaluate whether the medical equipment was necessary. Medicare's lack of a requirement that DME providers must investigate the medical necessity of a piece of equipment has no bearing on whether Cherniavsky

violated or conspired to violate 18 U.S.C. § 1347.⁴ Cherniavsky was not charged with ordering medically unnecessary equipment, but, rather, knowingly and willfully participating in a scheme to procure and fabricate the documents necessary to defraud Medicare. As such, any defense by Cherniavsky on this basis would not have been “viable.” Cf. United States v. Bear, 439 F.3d 565, 569-71 (9th Cir. 2006) (finding plain error where defense was “viable”).

App. 4a.

To understand the conflict the Ninth Circuit’s Memorandum creates, it is important to note that the jury in this case was not given the ability to make separate findings on whether Mrs. Cherniavsky was guilty of Medicare fraud based on selling medical equipment without there being a medical necessity versus fraudulent documentation. ER 232-292. Thus, it is not possible to know under which theory the jury convicted her. The Memorandum in this matter thus essentially holds that even if the defense presented is viable with respect to one theory of guilt, a district court is not required to instruct the jury on that defense if it cannot serve to extinguish guilt on all the theories raised by the government. The Court

⁴The Court of Appeals’ decision fails to acknowledge that Mrs. Cherniavsky was convicted under 18 U.S.C. § 1349 as well as 18 U.S.C. § 1347.

of Appeals' decision is disturbingly at odds with the decisions of this Court, sister circuits, and due process.

As this Court has noted, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Mathews v. U.S.*, 485 U.S. 58, 63 (1988). Similarly, this Court and federal appellate cases permit the raising of inconsistent defenses. *Id.* citing *Johnson v. United States*, 138, 426 F.2d 651, 656 (D.C. 1970)

By limiting the circumstances under which a district court is required to instruct a jury, the Memorandum's holding flies in the face of the broad ranging language of this Court and others to the effect that an instruction must be given as to "any recognized defense." See *United States v. Diaz-Maldonado*, 727 F.3d 130, 136 (1st Cir. 2013); *United States v. Goldson*, 954 F.2d 51, 55 (2nd Cir. 1992); *Government of Virgin Islands v. Isaac*, 50 F.3d 1175, 1180 (3rd Cir. 1995); *United States v. Hackley*, 662 F.3d 671, 681 (4th Cir. 2011); *Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002); *Mitzel v. Tate*, 267 F.3d 524, 537 (6th Cir. 2001); *Sloan v. Gramley*, 215 F.3d 1330 (7th Cir. 2000); *United States v. Walters*, 913 F.2d 388, 392 (7th Cir. 1990); *United States v. Shinn*, 681 F.3d 924, 929 (8th Cir. 2012);

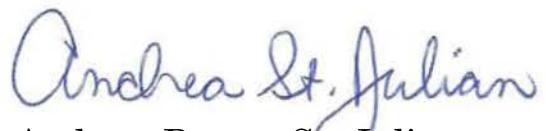
United States v. Dixon, 901 F.3d 1170, 1177 (10th Cir. 2018); United States v. Randall, 661 F.3d 1291, 1295-96 (10th Cir. 2011); United States v. Harting, 879 F.2d 765, 767 (10th Cir. 1989); United States v. Hopkins, 744 F.2d 716, 718 (10th Cir. 1984) (en banc); United States v. Williamson, 903 F.3d 124, 132 (D.C. Cir. 2018). Also, as this Court has recognized, the Due Process Clause requires that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479 (1984). Thus, the Memorandum's holding in this case violates the Due Process Clause.

CONCLUSION

The conflicts the instant Memorandum creates with the decisions of this Court, sister circuits, and the Due Process Clause are deep and important. Under these circumstances, this Court should grant the instant petition.

Dated: October 21, 2018

Respectfully submitted,



Andrea Renee St. Julian
Counsel of Record for Petitioner,
AMALYA CHERNIAVSKY

APPENDICES

APPENDIX A

FILED**NOT FOR PUBLICATION**

JUL 24 2018

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

No. 16-50060

Plaintiff-Appellee,

D.C. No.
2:13-cr-00668-TJH-2

v.

AMALYA CHERNIAVSKY, AKA
Amalya Surenovna Yegiyan,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted July 10, 2018
Pasadena, California

Before: BERZON and N.R. SMITH, Circuit Judges, and CASTEL,^{**} District Judge.

Amalya Cherniavsky appeals her conviction for multiple counts of healthcare fraud and conspiracy to commit healthcare fraud in violation of 18

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable P. Kevin Castel, United States District Judge for the Southern District of New York, sitting by designation.

U.S.C. §§ 1347, 1349. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Sufficiency of the Evidence. There was sufficient evidence to convict Cherniavsky. Cherniavsky (1) owned JC Medical Supply and filled out and signed the Medicare provider application; (2) was educated on the Medicare rules and regulations; (3) managed the office and the document filing system (which contained extensive missing paperwork and fraudulent documents); (4) handled Medicare inspections; (5) responded to audit requests with fraudulent documents; (6) signed a majority of the checks for JC Medical, including at least one of the kickback checks; and (7) lied to Medicare investigators when asked whether her husband owned a medical business, which he did when the question was initially asked. Although there is rarely “direct proof of one’s specific wrongful intent,” “willfulness may be inferred from circumstantial evidence of fraudulent intent.”

United States v. Dearing, 504 F.3d 897, 901 (9th Cir. 2007) (citation and quotation marks omitted). Here, “viewing the evidence in the light most favorable to the prosecution,” there was sufficient evidence such that “*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”

Jackson v. Virginia, 443 U.S. 307, 319 (1979).

2. Jury Instructions. The district court did not commit plain error by failing to instruct the jury that Medicare regulations do not require durable medical equipment (DME) providers to evaluate whether the medical equipment was necessary. Medicare's lack of a requirement that DME providers must investigate the medical necessity of a piece of equipment has no bearing on whether Cherniavsky violated or conspired to violate 18 U.S.C. § 1347. Cherniavsky was not charged with ordering medically unnecessary equipment, but, rather, knowingly and willfully participating in a scheme to procure and fabricate the documents necessary to defraud Medicare. As such, any defense by Cherniavsky on this basis would not have been "viable." *Cf. United States v. Bear*, 439 F.3d 565, 569-71 (9th Cir. 2006) (finding plain error where defense was "viable").

3. Federal Rule of Appellate Procedure 28(i). Cherniavsky may not adopt the arguments in her husband's briefing. "Rule 28(i) does not apply to cases which are not consolidated." *United States v. Carpenter*, 95 F.3d 773, 774 n.1 (9th Cir. 1996). Here, counsel was fully aware the cases were no longer consolidated, because Cherniavsky's and her husband's appeals were severed before counsel filed Cherniavsky's opening brief. Accordingly, Cherniavsky has waived her evidentiary claims because she failed to make independent arguments regarding those claims on appeal. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

4. Restitution. The district court did not plainly err in its restitution order.

Cherniavsky explicitly requested the restitution amount be \$615,418, and the district court imposed that amount. Affirmatively arguing for a specific restitution amount is clear waiver. *See United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997).

AFFIRMED.

APPENDIX B

United States District Court
Central District of California

UNITED STATES OF AMERICA vs.

Defendant 2) AMALYA CHERNIAVSKYAmalya Surenova Cherniavsky; Amalya Surenova
akas: YegiyanDocket No. CR 13-668-TJH-2Social Security No. 5 6 5 9

(Last 4 digits)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
JAN	29	2016

COUNSEL

Dominic Cantalupo

(Name of Counsel)

PLEA

 GUILTY, and the court being satisfied that there is a factual basis for the plea. NOLO NOT
CONTENDERE GUILTY

FINDING

There being a finding/verdict of GUILTY, defendant has been convicted as charged of the offense(s) of:
Conspiracy to Commit Heath Care Fraud, in violation of Title 18 U.S.C. §1349, as charged in Count 1 (one) of the Indictment; and Health Care Fraud, Causing an Act to be Done, in violation of Title 18 U.S.C. §1347, as charged in Counts 2 (two), 3 (three), 4 (four), 5 (five), and 6 (six) of the Indictment.

JUDGMENT
AND PROB/
COMM
ORDER

The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the a term of:

3 (three) YEARS OF PROBATION. This term consists of three years on each of Counts 1, 2, 3, 4, 5, and 6 of the Indictment, to be served concurrently. The defendant shall reside for a period of 6 (six) months in a residential reentry center (community corrections component), as directed by the Probation Officer, and shall observe the rules of that facility. Defendant shall also participate, for a period of 6 (six) months, in a home detention program which may include electronic monitoring, GPS, Alcohol Monitoring Unit or automated identification system and shall observe all rules of such program, as directed by the Probation Officer. The defendant shall maintain a residential telephone line without devices and/or services that may interrupt operation of the monitoring equipment. The defendant shall pay the costs of Location Monitoring to the contract vendor, not to exceed the sum of \$12.00 for each day of participation. The defendant shall provide payment and proof of payment as directed by the Probation Officer.

It is ordered that the defendant shall pay to the United States a special assessment of \$600, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

It is ordered that the defendant shall pay restitution in the total amount of \$615,418 pursuant to 18 U.S.C. § 3663A to victim MEDICARE. A partial payment of \$50,000 shall be paid immediately. Nominal monthly payments of at least 10% of defendant's gross monthly income but not less than \$100, whichever is greater, shall be made during the period of supervised release and shall begin 30 days after the commencement of supervision.

The defendant shall be held jointly and severally liable with codefendant Vladislav Tcherniavsky for the amount of restitution ordered in this judgment. The victim's recovery is limited to the amount of the victim's loss and the defendant's liability for restitution ceases if and when the victim receives full restitution. Pursuant to 18 U.S.C. § 3612(f)(3)(A), interest on the restitution ordered is waived because the defendant does not have the ability to pay interest. Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The defendant shall comply with General Order No. 01-05.

All fines are waived as it is found that the defendant does not have the ability to pay a fine in addition to restitution.

USA vs. 2) AMALYA CHERNIAVSKYDocket No.: CR 13-668-TJH-2

Upon release from Probation, the defendant shall be placed on supervised release for a term of three years. This term consists of three years on each of Counts 1, 2, 3, 4, 5, and 6 of the Indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation Office, General Order 05-02, and General Order 01-05, including the three special conditions delineated in General Order 01-05.
2. During the period of community supervision, the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment.
3. The defendant shall apply all monies received from income tax refunds to the outstanding court-ordered financial obligation. In addition, the defendant shall apply all monies received from lottery winnings, inheritance, judgments and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.
4. The defendant shall not engage, as whole or partial owner, employee or otherwise, in any business or profession that bills Medicare or any other publicly funded health care benefit program without the express written approval of the Probation Officer prior to engaging in such employment, business, or profession.
5. The defendant shall not be employed in any position that requires licensing and/or certification by any local, state, or federal agency without the prior written approval of the Probation Officer.
6. The defendant shall cooperate in the collection of a DNA sample from the defendant.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

Defendant advised of her right to appeal.

Bond exonerated.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

February 2, 2016

Date



U. S. District Judge/Magistrate Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

February 2, 2016

Filed Date

By Joseph Remigio

Deputy Clerk

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;
3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5. the defendant shall support his or her dependents and meet other family responsibilities;
6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7. the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;
8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
10. 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;
11. 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 by the probation officer;
12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
13. 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;
14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to conform the defendant's compliance with such notification requirement;
15. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours;
16. and, for felony cases only: not possess a firearm, destructive device, or any other dangerous weapon.

The defendant will also comply with the following special conditions pursuant to General Order 01-05 (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant shall pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment pursuant to 18 U.S.C. §3612(f)(1). Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed prior to April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant shall pay the balance as directed by the United States Attorney's Office. 18 U.S.C. §3613.

The defendant shall notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. §3612(b)(1)(F).

The defendant shall notify the Court through the Probation Office, and notify the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. §3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution-pursuant to 18 U.S.C. §3664(k). See also 18 U.S.C. §3572(d)(3) and for probation 18 U.S.C. §3563(a)(7).

Payments shall be applied in the following order:

1. Special assessments pursuant to 18 U.S.C. §3013;
2. Restitution, in this sequence (pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
 - Non-federal victims (individual and corporate),
 - Providers of compensation to non-federal victims,
 - The United States as victim;
3. Fine;
4. Community restitution, pursuant to 18 U.S.C. §3663(c); and
5. Other penalties and costs.

SPECIAL CONDITIONS FOR PROBATION AND SUPERVISED RELEASE

As directed by the Probation Officer, the defendant shall provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure; and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant shall maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds shall be deposited into this account, which shall be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, shall be disclosed to the Probation Officer upon request.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____
Defendant noted on appeal on _____
Defendant released on _____
Mandate issued on _____
Defendant's appeal determined on _____
Defendant delivered on _____ to _____
at _____
the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By _____

Date

Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By _____

Filed Date

Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____
Defendant

Date

U. S. Probation Officer/Designated Witness

Date