No.

IN THE SUPREME COURT OF THE UNITED STATES

SUSAN C. KEVRA-SHINER, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a well written verdict slip cure the confusion created when the Government's Closing Argument and the Court's Jury Instructions constructively amend an Indictment to include fraud against both persons and institutions when Defendant was only given notice of having committed a fraud against persons?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Brandon R. Reish, Esquire, court appointed counsel for Susan C. Kevra-Shiner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is unpublished.

JURISDICTION

Reconsideration of the Third Circuit's Order and Opinion was denied by Order of Court filed on August 3, 2018. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment of the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

Susan Kevra-Shiner was sentenced to 24 months imprisonment for each of 7 counts of consumer mail fraud to run concurrently after a Jury Trial. After the close of evidence at the Jury Trial, the Government argued that a fraud against persons and institutions occurred in the case and the Trial Judge's charge to the Jury mentioned both a fraud to

persons and institutions. The Indictment did not include fraud to an institution: it included only fraud to persons and the initials of seven named victims.

At Trial, the bulk of the testimony was from representatives of a title insurance company. That institution claimed that Kevra-Shiner wrote policies and failed to remit premiums after she signed a termination agreement. During Trial, the Government also presented the brief testimony from victims named in the Indictment.

At the close of evidence, the closing argument of the Government mentioned a fraud against a person or an institution. This constructively amended the Indictment and at the same time created confusion as to whether the jury was to deliberate as to fraud against persons and institutions or simply against persons.

The Third Circuit does not ordinarily require an augmented unanimity instruction in mail fraud cases, and no such instruction was given in this case. An augmented unanimity instruction should have been given in this case. Further, a verdict slip identifying the victims by initials should not be seen as a curative to this error.

REASONS FOR GRANTING THE PETITION

Since *United States v. Stirone*, 361 US 212 (1960), this Court has ruled that constructive amendments occur when the conduct described in the jury instructions was broader than the conduct set forth in the Indictment. In *Stirone,* the defendant was indicted for interfering with interstate commerce in relation to the importation of sand; however, the court instructed the jury that the effect on interstate commerce could come from either trade of sand or steel. In *United States v. Daraio,* 445 F.3d 253 (3rd Cir. 2002), the Third Circuit reasoned that a court cannot permit a defendant to be tried for conduct not set forth in the Indictment, and a jury is presumed to follow the instructions that a court has given to it. *Id.* at 260. This right is rooted in the Fifth Amendment.

The Third Circuit has reasoned that "An indictment is constructively amended when, in the absence of a formal amendment, the evidence and jury instructions at trial modify essential terms of the

charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *US v. Daraio*, 445 F. 3d 253, 260 (3rd Cir. 2006).

Here, the Indictment set forth seven counts against Kevra-Shiner solely alleging that she engaged in a scheme to defraud seven sets of persons identified by initials only. In the Indictment, Kevra-Shiner was accused of developing a scheme to defraud persons. Defendant was put on notice for a scheme to defraud persons, but that is not solely what the jury instructions told the jury about the case.

When the jury was given instructions on what the scheme to defraud included, the Government requested and the Court read an instruction that included a scheme to defraud a "persons and institutions." This would seemingly create a narrower scope of conduct, requiring the fraud to be against both persons and institutions. However, Kevra-Shiner was put on notice of a fraud against persons, but deliberations would have focused on fraud against persons and

institutions. The only issue which should have been before them is a fraud against persons, but it was not.

The Government contended that Kevra-Shiner withheld payment from the title insurance company for the policies that she was issuing. It argued that she was issuing policies for which the title insurance company was not being paid in kind. At Trial, the vice president of the title insurance company indicated that the company would decide whether or not to honor the policies on a case by case basis. Based upon the vice president's testimony, a juror could conflate whether or not the policy would be honored by the company which had been arguable defrauded itself with whether or not the person who purchased the policy was defrauded.

An augmented unanimity charge – i.e. Third Circuit Standard Criminal Instruction "**6.18.1341-2 Mail, Wire, or Bank Fraud - Unanimity Required**" was not given in this case, and the Third Circuit reasoned that it was not required.

When addressing whether an augmented unanimity charge is required, the Third Circuit has concluded that normally a general

unanimity charge will suffice. *US v. Ryan*, 828 F. 2d 1010, 1020 (3rd Cir. 1987). In *Ryan*, the Court held that:

> In any case where a count will be submitted to the jury on alternative theories, prudence counsels the trial court to give an augmented unanimity instruction if the defendant requests such a charge. 'Unanimity is an indispensable element of a federal jury trial.' *United States v. Scalzitti*, 578 F.2d 507, 512 (3d Cir.1978); *see* U.S. Const. art. III, § 2, cl. 3. The marginal time and inconvenience of giving an augmented instruction is a small price to assure that this indispensable element will be obtained and that a possible conviction will be upheld." *Id.*

As the jury in *Ryan* may have rested its conclusion on inconsistent theories, the Court reversed the judgment of conviction and remanded for a new trial. At the close of Trial in this case, the Government requested [Document 61, Government's Proposed Jury Instructions, p. 5] that the Court instruct as follows: "In this case, it so happens that the government does contend that the proof establishes that ***persons and institutions*** were defrauded and that the defendant profited."

This instruction matched with the tenor of the Government's argument during closing where it highlighted that Kevra-Shiner had never paid a dime to the title company:

> Still to this date she kept all of the money, the 15 percent that belongs to Stewart. Honestly it's not a lot of money. It's a couple thousand dollars. And this was the question Mr. Coughlin asked during the deposition. He asked, what happened to the title insurance premiums. They were put into the business operating account. Question, operating account for G. K. Abstract, the defendant's company, answer, yes. Question, including what would otherwise was to be remitted to Stewart, yes. Question, what were those funds used for, answer, to pay owed expenses. Question, why did you do that? Answer, I don't know, I don't have -- I don't have an answer for that, really don't. It was a mistake obviously. I think it was just things that -- like I said, there was, you know, going in my personal life, all the problems, all the computer problems I was having, and it's not an excuse. I mean, there's the answer right there, ladies and gentlemen.

[A43]. In closing, the Government argued both a scheme to defraud the title company and a scheme to defraud consumers. Here, because an augmented unanimity instruction was not given, some of the jurors could have believed that Kevra-Shiner defrauded persons and others in the jury could have believed that institutions were defrauded. The Third Circuit disagreed with this analysis because the Verdict Slip listed the victims by initials and the title company was not named as a victim on the verdict slip.

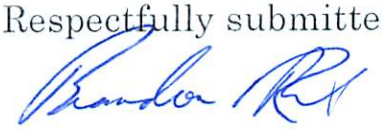
The Third Circuit reasoned that the Indictment and Verdict Slip, which both listed the initials of individual victims, made it clear that Kevra-Shiner was being charged with a crime against persons and not institutions. However, it has long been a principle that the jurors are presumed to follow the Court's Instructions.

The constructive amendment of the Indictment combined with the failure to give an augmented unanimity charge should have resulted in a reversal of the judgment of conviction and Defendant should have been awarded a new trial.

CONCLUSION

The petition for writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for a new trial.

Respectfully submitted.



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OCTOBER 31, 2018

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2655

UNITED STATES OF AMERICA

v.

SUSAN C. KEVRA-SHINER,

Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 3-14-cr-00257-001)
District Judge: Honorable Malachy E. Mannion

Submitted Under Third Circuit LAR 34.1(a)
June 4, 2018

Before: AMBRO, JORDAN, and VANASKIE, Circuit Judges

(Opinion filed: July 10, 2018)

OPINION*

AMBRO, Circuit Judge

Susan Kevra-Shiner was indicted and, following a jury trial, convicted for seven counts of mail fraud on seven individual consumers under 18 U.S.C. § 1341. Through

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

her company, GK Abstract, Inc. ("GKA"), she sold these seven individuals and sixty-two others title insurance as a purported agent of Stewart Title Guaranty Company, even though it had terminated her authorization to sell its insurance. Her central defense at trial was that she mistakenly believed she was still authorized to sell the policies despite contractually agreeing to the termination. On appeal, she challenges her conviction, the evidence admitted at trial, and her sentence.[1] Because the District Court did not err, we affirm.

Kevra-Shiner raises two arguments for the first time on appeal, which we review for plain error. Fed. R. Crim. P. 52(b). First, she asserts that the indictment, which charged fraud on consumers, was constructively amended after trial to include fraud on both consumers and institutions. She claims the Government requested and the District Court read a jury instruction that included fraud on institutions, but cites neither an explicit request nor an explicit instruction. Instead, Kevra-Shiner relies on the prosecutor's statement during closing argument that she did not pay Stewart Title its standard fees for the insurance policies in dispute—suggesting she was under no illusion that she could still issue those policies. Kevra-Shiner also points to the Court's comment, when instructing the jury that she need not profit from her fraudulent scheme to be liable for mail fraud, that "it so happens that the government does contend that the proof established that persons and institutions were defrauded and that the defendant profited [from] it." App. 57.

[1] The District Court had jurisdiction over the criminal proceeding under 18 U.S.C. § 3231, and we have jurisdiction over the appeal under 28 U.S.C. § 1291.

An indictment is constructively amended only if "the evidence and jury instructions at trial modify essential terms of the charged offense" such that "there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *United States v. Daraio*, 445 F.3d 253, 259–60 (3d Cir. 2006). Here the indictment listed seven counts of fraud on specific individual consumers. Those seven individuals testified at trial, and the verdict slip completed by the jury foreperson listed the same individuals in the seven counts of mail fraud for which Kevra-Shiner was convicted. Further, in its closing, the Government consistently described the victims of Kevra-Shiner's scheme as "people"—specifically, the homeowners who purchased title insurance from GKA. It is not substantially likely the jury could have convicted Kevra-Shiner for fraud on institutions. Thus the Court did not err, let alone plainly err.[2]

Second, Kevra-Shiner argues for the first time on appeal that the District Court erroneously permitted the Government to admit a certain email as evidence.[3] In it she

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[2] According to Kevra-Shiner, because the indictment was improperly amended to include fraud on both institutions and consumers, the District Court ought to have given an augmented unanimity instruction to ensure all the jurors agreed on the grounds for her conviction. This argument fails, however, because the indictment was not amended and no juror could have convicted for anything other than mail fraud on the seven consumers named in the indictment and verdict slip. *See United States v. Barel*, 939 F.2d 26, 35 (3d Cir. 1991).

[3] Kevra-Shiner claims she objected in part before the District Court, but because she did not preserve an objection on the record under Federal Rule of Evidence 106, we review for plain error. *See, e.g., United States v. Mitchell*, 365 F.3d 215, 257 (3d Cir. 2004). When the Government moved for the email's admission into evidence, the Court asked if Kevra-Shiner was familiar with the exhibit. App. 25. Her counsel answered, "I don't know how this came about being copied as an e-mail if it was part of a thread. I don't object that she believes this was sent to her, a copy of what she may have seen on a

appears to apologize to a Stewart Title employee after the company sued to enjoin her from issuing further policies without authorization. She claims the email was part of a larger chain that Stewart Title could not produce because, per its document retention policies, emails on its servers are automatically deleted after sixty days. She argues that the Court should have denied the lone email's admission altogether under Rule 106 of the Federal Rules of Evidence, which permits counsel to require that evidence submitted by an adversary be complete.

However, to establish plain error, Kevra-Shiner must show the admission of this email "affect[ed] [her] substantial rights." Fed. R. Crim. P. 52(b). In other words, she must show a "reasonable probability of a different outcome absent" its admission. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). She has not made this showing. At trial, her counsel challenged the email's reliability thoroughly when cross-examining the Stewart Title employee who received it. Kevra-Shiner's brief further acknowledges that the recipient could have described its content to the jury even if it were not admitted. And the email was but one piece of evidence, among others, that she knew she lacked authorization to act as Stewart Title's agent: for example, the termination agreement between Stewart Title and GKA, witness testimony that Stewart

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computer screen. But there may be more." *Id.* At no point did he mention Rule 106. The Government then stated its argument for the email's admission. *Id.* The Court asked Kevra-Shiner's counsel whether he wished to respond, and he replied, "I don't have any response to that, Judge. I will clarify in cross, points I would like to make." *Id.* Thus even assuming counsel initially preserved a Rule 106 objection, *see* Fed. R. Evid. 103(a)(1) (requiring counsel to raise a *specific* objection, or otherwise make the ground for objection apparent in context), he then waived it in favor of cross-examination, *see New York v. Hill*, 528 U.S. 110, 115 (2000) (noting counsel has the last word as to what evidentiary objections to raise).

Title confiscated its materials from GKA's offices, Kevra-Shiner's failure to remit a standard payment to Stewart Title for the policies, and her own deposition testimony in a separate civil case that she knew she lacked authorization. Thus she fails to show a reasonable probability that the email's admission caused prejudice, and there is no plain error.

Kevra-Shiner next challenges the District Court's application of a perjury enhancement and its loss calculation at sentencing. Both matters were preserved. We therefore review the Court's factual determinations in applying the Sentencing Guidelines for clear error and review its legal conclusions *de novo*. *United States v. Miller*, 527 F.3d 54, 75 (3d Cir. 2008); *United States v. Napier*, 273 F.3d 276, 278 (3d Cir. 2001).

Because Judge Kosik, who presided over the trial, was on inactive status and no longer available at sentencing, Judge Mannion determined Kevra-Shiner's sentence. He applied an obstruction-of-justice enhancement for perjury under U.S.S.G. § 3C1.1. Kevra-Shiner argues that a judge who was not present at trial to observe a testifying defendant's demeanor cannot properly impose a perjury enhancement.

It is well established that "a defendant's right to testify does not include a right to commit perjury." *United States v. Dunnigan*, 507 U.S. 87, 96 (1993). "A defendant who testifies under oath at trial commits perjury within § 3C1.1 if he 'gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.'" *United States v. Napolitan*, 762 F.3d 297, 312 (3d Cir. 2014) (quoting *Dunnigan*, 507 U.S. at 94). While the defendant's demeanor when testifying may play a role in the § 3C1.1 analysis, we are aware of no

binding case law precluding a perjury enhancement if the judge who presided over trial is no longer available to sentence the defendant. Kevra-Shiner cites none. Further, although Judge Mannion had only a cold record to review at sentencing, that record was surely sufficient here. As he noted, there was "overwhelming evidence" that Kevra-Shiner knew she could no longer issue Stewart Title policies. App. 83. She herself testified under oath during a civil deposition that she knew. Yet she took the stand at trial and told the jurors the opposite—a defense they roundly rejected. We find it incredible that Kevra-Shiner's demeanor alone could have led any judge to conclude she had not perjured herself.

Finally, Kevra-Shiner disputes the District Court's loss calculation under U.S.S.G. § 2B1.1, which Judge Mannion based on the aggregate amount her consumer victims paid for title insurance after she was no longer authorized to issue it. According to the Guideline's commentary, "loss is the greater of actual loss or intended loss," and "'actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense." U.S.S.G. § 2B1.1 cmt. n.3(A). Kevra-Shiner argues it is not clear here that any consumer victim suffered either an actual or intended loss because the record does not show whether Stewart Title might still honor the policies she fraudulently issued. This argument is unsupported by either the record or common sense. Stewart Title employees testified that the policies in question were invalid and legally ineffective. Kevra-Shiner's victims paid for valid, effective title insurance and did not receive it. The District Court did not err by calculating loss as the total amount Kevra-Shiner charged consumers for invalid policies, which was their actual loss.

We thus affirm.

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FOR THE THIRD CIRCUIT

No. 17-2655

UNITED STATES OF AMERICA

v.

SUSAN C. KEVRA-SHINER,
Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal Action No. 3-14-cr-00257-001)
District Judge: Honorable Malachy E. Mannion

Before: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and BIBAS, Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc*, is denied.

By the Court,

s/ Thomas L. Ambro, Circuit Judge

Dated: August 3, 2018
tmm/kr/cc: All Counsel of Record