Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TIMEIKI HEDSPETH,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TIMEIKI HEDSPETH,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Ms. Timeiki Hedspeth, who is incarcerated in a federal correctional facility, asks leave to file the attached Petition for a Writ of Certiorari to The Supreme Court of the United States of America without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 39 of this Court.

The Petitioner was previously granted leave to proceed in forma pauperis in the Court of Appeal for the Fourth Circuit. By order of the Court of Appeals dated May 24, 2018, the undersigned was appointed as counsel for the petitioner pursuant to the Criminal Justice Act, 18 USC § 3006A, which is why no affidavit from the petitioner is attached, pursuant to Supreme Court Rule 39(1).

Dated: April 9, 2019

/s/ Mark Diamond
MARK DIAMOND
Attorney for Petitioner

Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TIMEIKI HEDSPETH,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

April 9, 2019

MARK DIAMOND
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7400 Beaufont Springs Dr., Ste 300
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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court use an incorrect criminal history category to sentence Ms. Hedspeth?

2. Did the District Court use an incorrect offense level to sentence Ms. Hedspeth?

3. Did the District Court improperly order Ms. Hedspeth to pay restitution?

4. Did a confluence of evidentiary rulings deprive Ms. Hedspeth of a fair trial?

5. Was Ms. Hedspeth not proven guilty beyond a reasonable doubt?

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OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court in *United States v. Timeiki Hedspeth,* – Fed.Appx. – 2019 WL 638141(4th Cir. Va.). (Appendix -A-)

JURISDICTION

The final Order of the U.S. Court of Appeals, Fourth Circuit, was issued on February 14, 2019. This petition was filed within ninety days thereof. Jurisdiction in the trial court was based on 18 USC § 3231, since the appellant was charged with offenses against the laws of the United States of America. The jurisdiction of this Court is invoked under 28 USC § 1257(a) and Supreme Court Rule 10.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eight, and Fourteenth Amendments of the United States Constitution, as well as 18 USC §§ 2082 and 3664.

STATEMENT OF THE CASE

By affirming her conviction, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory

power. The Fourth Circuit's ruling also contradict rulings on the same issue rendered by the Supreme Court.

BACKGROUND OF THE CASE

On November 6, 2017, judgment was entered in District Court for the Eastern District of Virginia under 4:16-cr-00049-RAJ-LRL-6. The indictment alleged that the leader of the conspiracy, Babaijide Fadeyibi, sent numerous checks to the other defendants, including Ms. Hedspeth, for distribution to "mystery shoppers," who were patsies recruited to deposit the checks in their bank accounts, withdraw cash, wire the cash back to Fadeyibi or his overseas co-conspirator, and report on the ease of use and cleanliness of the facility used to send the cash. The checks Fadeyibi issued then bounced.

Following a jury trial, Ms. Hedspeth was convicted of conspiracy to commit mail, wire, and bank fraud; four counts of mail fraud; two counts of bank fraud; and two counts of identity fraud. She received an effective sentence of 175 months in prison, five years of supervised release, and $1,294,034 in restitution. The Court of Appeals affirmed judgment on February 14, 2019, and denied a motion for panel and *en banc* rehearing on April 9, 2019. (Appendix B)

REASONS FOR GRANTING THE WRIT

(1) In affirming the District Court's misapplication of a criminal history category and offense level when sentencing Ms. Hedspeth, and in imposing restitution, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Its rulings contradict rulings on the same issues from the Supreme Court.

(2) In failing to reverse judgment based on the District Court's incorrect evidentiary rulings that deprived Ms. Hedspeth of a fair trial, and because she was not proven guilty beyond a reasonable doubt, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Its rulings contradict rulings on the same issues from the Supreme Court.

ARGUMENT 1: THE DISTRICT COURT USED AN INCORRECT CRIMINAL HISTORY CATEGORY TO SENTENCE MS. HEDSPETH.

The District Court used criminal history category II based on the following:

1. One point added for a 2016 forgery conviction in Texas, for which Ms. Hedspeth she received three years of community supervision.

2. Two points added because she committed the instant offenses while under the Texas community supervision.

Based on a final offense level of 33 and criminal history category II, the sentence range on eight counts was 151 to 188 months, with a consecutive sentence range on two counts of 24 to 48 months. She received 151 plus 24 months, which is the minimum of the Guidelines range.

The relevant portion of USSG § 4A1.1(d) Application Note 4 states:

> Two points are added if the defendant committed any part of the instant offense (i.e., any relevant conduct) while under (*emphasis added*) any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

The District Court erred when determining Ms. Hedspeth's criminal history category because her instant offenses took place before, not while she was under community service. Correctly using criminal history category I would have led to a considerably lower sentencing range than the District Court used to sentence Ms. Hedspeth.

The superseding indictment charged the following:

Count 1: Conspiracy from late 2011 to at least Fall, 2015.

Count 4: Mail fraud on December 9, 2012.

Count 14: Mail fraud on May 28, 2014.

Count 16: Bank fraud December 14, 2012.

Count 24: Bank fraud on June 6, 2014.

Count 26: Wire fraud on December 14, 2012.

Count 33: Wire fraud on June 6, 2014.

Count 35: Bank fraud on December 14, 2012.

Count 43: Bank fraud on June 6, 2014.

All of the charged crimes took place from 2012 to 2015. But Ms. Hedspeth was sentenced in Texas for forgery on June 26, 2016, long after the last of the instant crimes took place. Defense counsel objected to the sentence. (Transcript of 11/3/17 p. 4, USDC 24) To the extent he did not sufficiently specify his objection, he rendered ineffective assistance of counsel. (*Strickland v. Washington*, 466 U.S. 668 (1984); U.S. Const. 5th, 6th, 14th Amends) The error was reviewable on direct appeal since it conclusively appears on the record. (*United States v. Baldovinos*, 434 F.3d 233, 239 (4th Cir. 2006)

Counsel's representation afforded Ms. Hedspeth fell below an objective standard of reasonableness. No reasonable criminal trial attorney would have missed this obvious sentencing error. Had he objected, the District Court would

have had to base its sentence on criminal history category I, not II, leading to a lower sentence. Counsel's failures warranted appellate relief. (*Tice v. Johnson*, 647 F.3d 87 (4th Cir. 2011) Ms. Hedspeth's sentence was the result of obvious ineffective assistance of counsel.

The sentencing error was also reviewable as plain error. (U.S. Const. 5th, 8th Amends.; *Puckett v. United States*, 556 U.S. 129 (2009) The error was obvious, as discussed. It cannot be said beyond reason that the court would not have imposed a lower sentence had it been aware of its error. The error seriously affected the judicial proceedings since, when "a defendant is sentenced under an incorrect Guidelines range," the error will usually result in prejudice to the defendant. (*Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345 (2016); see also, 18 USC § 2082; Fed.R.Crim.P. 52[b]) For these reasons, Ms. Hedspeth's sentence should have been vacated and the case remanded for resentencing.

ARGUMENT 2: THE DISTRICT COURT USED AN INCORRECT OFFENSE LEVEL TO SENTENCE MS. HEDSPETH.

In fraud cases, the Government bears the burden of proving the amount of loss for sentencing purposes by a preponderance of evidence. (*United States v. Pierce*, 409 F.3d 228, 234 (4th Cir. 2005) The District Court imposed 22 additional offense levels for sentencing purposes under USG § 2B1.1(b)(1)(L) based upon "intended loss" to the victims of $48 million (although the PSR said it was $25

million.) The court did not explain how it arrived at this number. [Of note is the fact that both the District Court and PSR both agreed that the "actual loss" to the victims was only $1.2 million and the court awarded only $1,294,034 in restitution; see, PSR pp. 7-10, USDC 209; Transcript of 11/3/17 pp. 45-46, USDC 224.]

The relevant portion of USSG § 2B1.1 "Application Note 3" states the following:

> (C) Estimation of Loss. – The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).
>
> The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:
>
> (i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.
>
> (ii) In the case of proprietary information (e.g., trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense.
>
> (iii) The cost of repairs to damaged property.
>
> (iv) The approximate number of victims multiplied by the average loss to each victim.
>
> (v) The reduction that resulted from the offense in the value of equity securities or other corporate assets.

> (vi) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

Nothing in the record shows that the District Court took any of these six factors into consideration when determining intended loss for its sentence enhancement. As for amount of loss, the District Court had only this to say:

> THE COURT: You ran this scheme so extensively that the intended loss is nearly $38 million. You had hundreds of victims in this case and you were prepared to continue going because you had hundreds, hundreds of phony cashier's checks and other material so that you could continue this fraud. (Transcript of 11/3/17 p. 39, USDC 224)

The District Court's decision to use intended rather than actual loss was wrong because it was purely speculative. Conversely, the amount of actual loss was specified in the PSR and based on the evidence. In addition, the amount of intended loss was never presented to the jurors. (*United States v. Hagen*, 468 F. App'x 373, 389 (4th Cir. 2012)

The District Court did not make a reasonable estimate of loss for sentencing purposes. (*United States v. Cloud*, 680 F.3d 396, 409 (4th Cir. 2012) Defense counsel objected to the court's reliance on intended rather than actual loss. (Transcript of 11/3/17 p. 4, USDC 224) For these reasons, Ms. Hedspeth's sentence should have been vacated and the case remanded for resentencing.

ARGUMENT 3: THE DISTRICT COURT IMPROPERLY ORDERED MS. HEDSPETH TO PAY RESTITUTION.

The District Court ordered restitution of over a million dollars. The Government has the burden of proving by a preponderance of the evidence the status of the victims and the amount of restitution. (*United States v. Freeman*, 741 F.3d 426, 435 (4th Cir. 2014)

In *United States v. Molen*, 9 F.3d 1084, 1086 (4th Cir.1993) the Court held, "In order to assure effective appellate review of restitution orders, this circuit requires sentencing courts to make specific, explicit findings of fact on each of the factors set forth in § 3664(a)." In *United States v. Watlington*, 287 F. App'x 257, 268 (4th Cir. 2008) it held, "The court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. [18 USC § 3664(a)] In *United States v. Molen*, we explained that 'these findings of fact must key a defendant's financial resources, financial needs, and earning ability to the type and amount of restitution."

In Ms. Hedspeth's case, the PSR contains no review or consideration of restitution other than the statement, "Restitution: $1,294,034.52" "Count 1." (PSR

p. 22, USDC 209) Nor did the District Court hold a hearing concerning the appropriate amount of restitution. In *United States v. Benjamin*, 117 F.3d 1414 (4th Cir. 1997) the Fourth Circuit held, "(W)e note the presentence report contained no findings or recommendations about Benjamin's future earning ability and therefore cannot be adopted to support a restitution award."

Since the PSR did not specify the basis for its determination of restitution and the District Court held no fact-finding hearing on the proper amount of restitution, the sentence should have been vacated and the case remanded for resentencing. The Court of Appeals failed to honor its own precedent in denying Ms. Hedspeth relief on direct appeal.

ARGUMENT 4: A CONFLUENCE OF EVIDENTIARY RULINGS DEPRIVED MS. HEDSPETH OF A FAIR TRIAL.

The District Court committed several evidentiary ruling errors that deprived Ms. Hedspeth of a fair trial and the right to present her defense. The prosecutor called Ms Hedspeth's ex-husband, Mr. Punch, as a witness. On cross examination, counsel attempted to show that Punch was not credible because he had motive to lie to get back at Hedspeth, who had won custody of their children in a court battle two years earlier. At first, the district court permitted the cross but then quickly forbid defense counsel from showing that Punch was not a credible witness. (6/28 pp. 240-244, USDC 254)

Then, homeland security agent Mirarchi testified at length about Hedspeth's inculpatory emails and chats. On cross, counsel attempted to impeach her by showing she did not know if Hedspeth actually received or sent the emails and chats imputed to her. The District Court prohibited this legitimate cross. (6/29 pp. 499-502, USDC 255)

It cannot be said on hindsight with reasonable certainty that Punch's and/or Mirarchi's testimony did not lead to Hedspeth's conviction. The District Court acted arbitrarily and disproportionately to the purpose of insuring that the trial proceed in an orderly and fair manner when it forbid Hedspeth's cross examination of these witnesses. (*Michigan v. Lucas*, 500 U.S. 145 (1991); *Quinn v. Haynes*, 234 F.3d 837 (4th Cir. 2000)

The District Court also erred when it overruled Hedspeth's objection to the admission of non-original copies of hundreds of checks and money orders because they were not the originals. (6/28 p. 88, USDC 254) The prosecutor offered the items as proof of their contents concerning the identities of the drawers and drawees, including Ms. Hedspeth. Yet Agent Nelson, the witness used to lay a foundation for the evidence, did not identify the photocopies as accurate copies of the originals, nor did the prosecutor elicit any other evidence to show that the photocopies were reliable duplicates of the originals. Hedspeth objected to admission of the duplicates and asked that the originals be provided as evidence.

Her objections were incorrectly overruled. (*United States v. Smith*, 566 F.3d 410, 414 (4th Cir. 2009)

Fed. R. Evid. 1003 states that a duplicate is "admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Ms. Hedspeth did exactly that. Her defense was to challenge the authenticity of the proffered documents.

Fed. R. Evid. 1004 states that the original is not required if "all the originals are lost or destroyed, and not by the proponent acting in bad faith; an original cannot be obtained by any available judicial process; the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or the writing, recording, or photograph is not closely related to a controlling issue." The prosecutor made no such claim and no evidence was offered that any of these exceptions applied.

The District Court's evidentiary rulings deprived Ms. Hedspeth of her right to confront her accusers and fairly present her defense. (*United States v. Scheffer*, 523 U.S. 303 (1998) For these reasons, judgment should have been reversed.

ARGUMENT 5: MS. HEDSPETH WAS NOT PROVEN GUILTY BEYOND A REASONABLE DOUBT.

Ms. Hedspeth moved twice to dismiss the indictment. Immediately following the verdict, she moved to set aside the verdict. All her motions were denied. Accepting the evidence in a light most favorable to the prosecutor, there was legally insufficient evidence to convict Ms. Hedspeth and the factual weight of the credible evidence did not prove her guilty beyond a reasonable doubt. (*In re Winship*, 397 U.S. 358 (1970)

The result of four days of trial and 23 witnesses was this:

1. Ms. Hedspeth bought over $660 worth of check paper from Raycor Company.

2 She sent several Western Union payments of under $1000 to Mandy Camerra and Camerra once sent Hedspeth $600.

3. It was imputed co-conspirator Odoffin's understanding from the person who ran the scheme that Hedspeth was a dispatcher, although Odoffin had no knowledge that this was true and never met or spoke with Hedspeth.

4. Imputed co-conspirator Williams had no knowledge of Hedspeth at all and the person who ran the scheme never mentioned her.

5. Secret shopper Rayfield dealt only with dispatcher Dennis Beckett.

6. Wachovia investigator Morgan gave no testimony about Hedspeth.

7. Homeland security agent Mirarchi testified about apparently inculpatory emails and chats between Hedspeth and the person who ran the scheme. But she had no direct knowledge of any wrongdoing by Hedspeth.

8. MoneyGram employee Grant testified that Hedspeth received two MoneyGrams between December 16, 2010, and August 26, 2014, and sent an unstated number of unstated things from December, 2012, though September 27, 2016.

Lots of lists of names of people who were alleged victims of the charged crimes were admitted. But the witnesses upon whose testimony these lists were admitted had no knowledge of the truth or falsity of the information contained in those lists. The only real evidence offered against Hedspeth was third-party testimony about her admissions by Internet and phone with the alleged leader of the crimes. But that witness had no direct knowledge of the accuracy of any of the communications or whether they were actually sent or received by Ms. Hedspeth.

In addition, in his summation, the prosecutor claimed that Ms. Hedspeth's two identity thefts consisted of using Lawrence Cake and Glenn Rayfield to cash checks and send money. (6/30 p. 567, USDC 270) That is not identity theft, because there was no evidence that Hedspeth held herself out as Cake or Rayfield or that she transferred, possessed, or used their identifications. (*United States v. Mitchell*, 518 F.3d 230, 233 (4th Cir. 2008) While it was alleged that her co-conspirators used these two men to fraudulently cash negotiable instruments, there

was no evidence that they – or Hedspeth – ever transferred, possessed, or used their identifications to do so.

"Criminal statutes 'are to be strictly construed and should not be interpreted to extend criminal liability beyond that which Congress has 'plainly and unmistakenly' proscribed.'" (*United States v. Childress*, 104 F.3d 47, 50 (4th Cir. 1996) The essential elements of the crimes were not proven beyond a reasonable doubt. (*Jackson v. Virginia*, 443 U.S. 307 (1979) For these reasons, judgment should have been reversed.

CONCLUSION

The Order of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. The Fourth Circuit's ruling also contradict rulings on the same issue rendered by the Supreme Court. For these reasons, the petitioner respectfully asks this Court to issue a writ of certiorari to review the Court of Appeals for the Fourth Circuit's decision to affirm judgment, and for such further relief as this Court deems proper.

Respectfully submitted,

/s/ Mark Diamond
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IN THE SUPREME COURT OF THE UNITED STATES

TIMEIKI HEDSPETH,
Petitioner,

-vs-
UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

Mark Diamond swears that on April 9, 2019, pursuant to Supreme Court Rules 29.3 and 29.4, he served the attached Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari on every person or his counsel who is required to be served by first-class mail through the U.S. Postal Service. The following were served:

(1) Mr. Brian Samuels, Office of U.S. Attorney, Fountain Plaza 3, Suite 300, 721 Lakefront Commons, Newport News, VA 23606

(2) Ms. Timeiki Hedspeth, 19023-479, FMC Bryan, Box 2149, Bryan, TX 77805

(3) Hon. Noel Francisco, Solicitor General, Department of Justice, 950 Pennsylvania Ave. N.W., Washington, DC 20530

/s/ Mark Diamond
MARK DIAMOND
Attorney for Petitioner

FILED: February 14, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4038
(4:16-cr-00049-RAJ-LRL-6)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TIMEIKI HEDSPETH

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix A

FILED: February 14, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4038
(4:16-cr-00049-RAJ-LRL-6)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TIMEIKI HEDSPETH

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4038

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TIMEIKI HEDSPETH,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Raymond A. Jackson, District Judge. (4:16-cr-00049-RAJ-LRL-6)

Submitted: January 31, 2019 Decided: February 14, 2019

Before KING and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Mark Diamond, Richmond, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Alexandria, Virginia, Brian J. Samuels, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Newport News, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Timeiki Hedspeth for her participation in a "Mystery Shopper" scheme in which Hedspeth and her coconspirators caused unsuspecting victims to negotiate counterfeit money orders and cashier's checks at financial institutions under the guise that they had been chosen to evaluate the quality of certain money transmission services.[1] Hedspeth now appeals, challenging the district court's denial of her Fed. R. Crim. P. 29 motion for a judgment of acquittal and certain evidentiary rulings made at trial. She also contests the calculation of her Sentencing Guidelines range and the order of restitution imposed by the district court. For the reasons that follow, we affirm.

"We review de novo a district court's denial of a Rule 29 motion." *United States v. Burfoot*, 899 F.3d 326, 334 (4th Cir. 2018). "We must sustain a guilty verdict if, viewing the evidence in the light most favorable to the prosecution, the verdict is supported by substantial evidence." *Id.* (defining substantial evidence). "Reversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *United States v. Wolf*, 860 F.3d 175, 194 (4th Cir. 2017) (internal quotation marks omitted).

With little specificity, Hedspeth broadly challenges the sufficiency of the evidence supporting her convictions. However, our review of the record leads us to conclude that

[1] Specifically, the jury convicted Hedspeth of conspiracy to commit mail fraud, bank fraud, and wire fraud and two counts each of mail fraud, bank fraud, wire fraud, and aggravated identity theft. The district court sentenced Hedspeth to 175 months' imprisonment and ordered her to pay $1,294,034.52 in restitution.

the Government produced ample evidence of Hedspeth's participation in the conspiracy, including testimony from two of her coconspirators, extensive incriminating email correspondence between Hedspeth and Babajide Fabiye ("Jide"), the conspiracy's mastermind, and proof that Hedspeth ordered over 1.5 million specialty checks and was the intended recipient of hundreds of counterfeit money orders intercepted by law enforcement. In addition, with respect to the two victims relevant to Hedspeth's charges,[2] the evidence showed that the victims' names were among the names of potential victims sent by email from Jide to Hedspeth; that Jide also sent a printable mailing label for one victim and a printable cashier's check for another; that counterfeit money orders received by one victim contained Hedspeth's handwriting; and that the fraudulent cashier's check cashed by the other victim was printed on specialty check paper that Hedspeth had ordered. In view of this evidence, we also reject Hedspeth's claims that her email correspondence with Jide was insufficient to prove her involvement in the conspiracy and that the jury convicted her based solely on her admissions and the testimony of her coconspirators. Finally, contrary to Hedspeth's argument, we conclude that the Government presented sufficient evidence from which the jury could find that Hedspeth used the victims' means of identification—a necessary element of her convictions for aggravated identity theft. *See* 18 U.S.C. § 1028A(a)(1) (2012).

[2] The Government prosecuted Hedspeth for her conduct relating to 2 victims; the conspiracy actually defrauded 492 people.

Next, we turn to the district court's evidentiary rulings, which we review for abuse of discretion. *United States v. Hassan*, 742 F.3d 104, 130 (4th Cir. 2014). In assessing whether the district court properly limited a witness' testimony, "we consider whether the district court acted in an arbitrary fashion, or restricted [the witness'] testimony to a degree not warranted by the demands of evidentiary and trial management." *United States v. Woods*, 710 F.3d 195, 201 (4th Cir. 2013). In addition, "[d]istrict courts . . . retain wide latitude" to limit cross-examination "that is repetitive or only marginally relevant." *United States v. Ayala*, 601 F.3d 256, 273 (4th Cir. 2010) (internal quotation marks omitted).

We discern no abuse of discretion in the district court's decision to limit defense counsel's line of questioning that, as counsel conceded, was meant to be confusing and was only marginally relevant. We also detect no impropriety in the court's management of counsel's cross-examination of Hedspeth's ex-husband. Hedspeth complains that defense counsel was unable to fully cross-examine her ex-husband about a child custody dispute that, in counsel's view, provided the ex-husband with a motive to lie when identifying Hedspeth's handwriting. However, while making clear its desire to avoid relitigating the custody battle, the district court did permit defense counsel to briefly explore this issue, thus exposing the jury to Hedspeth's concerns about her ex-husband's credibility. Lastly, we are unpersuaded by Hedspeth's challenge to the admission of copies of various checks and money orders introduced at trial. Because Hedspeth did not genuinely dispute their authenticity, the duplicates were "admissible to the same extent as the original[s]." Fed. R. Evid. 1003.

As to Hedspeth's sentencing arguments, we review only for plain error because she failed to raise these issues in the district court. *United States v. Fluker*, 891 F.3d 541, 552 n.6 (4th Cir. 2018) (criminal history points); *United States v. Stone*, 866 F.3d 219, 225 (4th Cir. 2017) (restitution); *United States v. Davis*, 855 F.3d 587, 595 (4th Cir.) (amount of loss), *cert. denied*, 138 S. Ct. 268 (2017). To establish plain error, Hedspeth must demonstrate "(1) that the district court erred, (2) that the error was plain, and (3) that the error affected [her] substantial rights." *United States v. Cohen*, 888 F.3d 667, 685 (4th Cir. 2018). Even if she satisfies these requirements, we should not notice the error unless it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted).

Hedspeth first contests the addition of two criminal history points under U.S. Sentencing Guidelines Manual § 4A1.1(d) (2016), arguing that she did not participate in the conspiracy while under a term of supervision. "Section 4A1.1(d) of the Guidelines adds two points to a defendant's criminal history score if the defendant committed the instant offense while under any criminal justice sentence, including . . . supervised release . . . ." *United States v. Brown*, 909 F.3d 698, 700 (4th Cir. 2018) (internal quotation marks omitted). Here, except for one conclusory objection, Hedspeth did not oppose the presentence report, which the district court adopted without change. In the PSR, the probation officer alleged that a state court placed Hedspeth on community supervision in June 2016 and that she continued her involvement in the Mystery Shopper scheme through August 2016. Because Hedspeth did not introduce any evidence at sentencing, she failed to carry her burden of rebutting the PSR's allegation that her

participation in the underlying conspiracy overlapped with her supervision term. *See United States v. Mondragon*, 860 F.3d 227, 233 (4th Cir. 2017) ("[T]he defendant bears an affirmative duty to show that the information in the presentence report is unreliable, and articulate the reasons why the facts contained therein are untrue or inaccurate." (internal quotation marks omitted)). As a result, the district court was "free to adopt the findings of the presentence report without more specific inquiry or explanation." *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (brackets and internal quotation marks omitted). Accordingly, the court did not plainly err in adding two criminal history points under § 4A1.1(d).

Hedspeth also disputes the offense level calculation, arguing that the district court miscalculated the loss amount. "[Section] 2B1.1(b) escalates the applicable offense level based on the amount of total loss attributable to the defendant's conduct." *United States v. Jones*, 716 F.3d 851, 859 (4th Cir. 2013). "In calculating the total loss attribution, a district court 'need only make a reasonable estimate of the loss.'" *Id.* at 860 (quoting USSG § 2B1.1 cmt. n.3(C)). Generally, "loss is the greater of actual loss or intended loss," USSG § 2B1.1 cmt. 3(A), and "'[i]ntended loss' . . . means the pecuniary harm that the defendant purposely sought to inflict," USSG § 2B1.1 cmt. 3(A)(ii).

Based on the value of counterfeit checks and money orders attached to over 1600 emails received by Hedspeth, the PSR indicated an intended loss of approximately $38 million. We conclude that this was a reasonable estimate of the intended loss and that the

district court therefore committed no plain error in imposing a 22-level enhancement for a loss exceeding $25 million. *See* USSG § 2B1.1(b)(1)(L).[3]

Lastly, Hedspeth asserts that the district court neglected to consider her ability to pay restitution. However, because restitution was required under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A (2012), Hedspeth's financial circumstances were irrelevant to the court's restitution determination. *United States v. Grant*, 715 F.3d 552, 558 (4th Cir. 2013). We also detect no plain error in the amount of restitution ordered, given that the court adopted the unopposed findings of the PSR, which indicated the loss amount incurred by each of the conspiracy's 492 victims.

Accordingly, we affirm the district court's judgment and restitution order. We deny Hedspeth's motion for release pending appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

[3] Hedspeth contends that her trial counsel rendered ineffective assistance by failing to preserve her Guidelines arguments for our review. However, "[u]nless an attorney's ineffectiveness conclusively appears on the face of the record," ineffective assistance claims generally are not cognizable on direct appeal. *United States v. Faulls*, 821 F.3d 502, 507-08 (4th Cir. 2016). Here, because the record does not conclusively establish ineffective assistance of counsel, "this claim should be raised, if at all, in a 28 U.S.C. § 2255 [(2012)] motion." *Id.* at 508.

FILED: April 9, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4038
(4:16-cr-00049-RAJ-LRL-6)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TIMEIKI HEDSPETH

Defendant - Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Quattlebaum, and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix B