No. 19-

IN THE

Supreme Court of the United States

TREVON GROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Government be able to convert an expert witness into a summary witness by supplying one of several possible accounting methodologies, and thereby evade the notice requirements of Federal Rule of Criminal Procedure 16 and avoid scrutiny under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 597 (1993), as the Second Circuit held below?
2. In a multi-defendant, multi-object conspiracy, if a defendant undisputedly and unequivocally severs all ties with a declarant, can the declarant's statements be introduced against the defendant as non-hearsay co-conspirator statements simply because the defendant continues to associate with a third-party tangentially linked to the conspiracy, or must an ongoing agency relationship between the declarant and the defendant exist to qualify the statements for the co-conspirator exception to the hearsay rule?
3. Is it a violation of a defendant's due process rights for the Government to abuse its prosecutorial discretion to intimidate all defense witnesses who otherwise would have provided exculpatory testimony by strategically claiming that those witnesses had criminal exposure at the close of the Government's four-week trial, even though several of the witnesses had previously been on the Government's own witness list?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Trevon Gross is the Petitioner filing this petition for certiorari.
2. Yuri Lebedev appealed his conviction to the United States Court of Appeals for the Second Circuit, and his appeal was decided together with Mr. Gross's appeal by the Second Circuit. However, Mr. Lebedev is not a Petitioner in this action. Therefore, he should be considered a Respondent.
3. Anthony Murgio also appealed his conviction to the Second Circuit and his appeal was pending together with Mr. Gross's appeal before Mr. Murgio withdrew it. Mr. Murgio should therefore be considered a Respondent in this action.
4. The United States of America is also a Respondent in this action.

RELATED CASES

United States v. Yuri Lebedev and Trevon Gross, Nos. 17-3691-cr (L), 17-3758-cr (Con), 17-3808-cr (Con), U.S. Court of Appeals for the Second Circuit, Judgment entered July 26, 2019.

United States v. Anthony Murgio, No. 17-3691-cr (L), U.S. Court of Appeals for the Second Circuit, Appeal dismissed on May 16, 2018.

United States v. Trevon Gross, No. 15-CR-769-03 (AJN), U.S. District Court for the Southern District of New York. Amended judgment entered March 1, 2019.

United States v. Trevon Gross, No. 15-CR-769-03 (AJN), U.S. District Court for the Southern District of New York. Judgment entered November 16, 2017.

United States v. Anthony Murgio, No. 15-CR-769-01 (AJN), U.S. District Court for the Southern District of New York. Judgment entered October 25, 2017.

United States v. Anthony Murgio, No. 15-CR-769-01 (AJN), U.S. District Court for the Southern District of New York. Amended judgment entered March 1, 2019.

Anthony Murgio v. United States, No. 18-cv-04761 (AJN), U.S. District Court for the Southern District of New York, Motion to Vacate Conviction Pursuant to 28 U.S.C. § 2255 Pending.

United States v. Yuri Lebedev, No. 15-CR-769-02 (AJN), U.S. District Court for the Southern District of New York. Judgment entered November 1, 2017.

United States v. Yuri Lebedev, No. 15-CR-769-02 (AJN), U.S. District Court for the Southern District of New York. Amended judgment entered March 1, 2019.

United States v. Michael Murgio, No. 15-CR-769-04 (AJN), U.S. District Court for the Southern District of New York. Judgment entered February 1, 2017.

United States v. Jose M. Freundt, No. 15-CR-769-05 (AJN), U.S. District Court for the Southern District of New York. Judgment entered December 20, 2017.

United States v. Ricardo Hill, No. 15-CR-769-06 (AJN), U.S. District Court for the Southern District of New York. Judgment entered January 30, 2018.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not published, and appears in the Petitioner's appendix as Appendix A. The orders of the United States District Court for the Southern District of New York are not published, but appear in the Petitioner's appendix as Appendix B and C. The opinion of the United States Court of Appeals for the Second Circuit denying Petitioner's request for panel rehearing, or in the alternative, for rehearing *en banc*, is not published, but appears in Petitioner's appendix as Appendix D.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered a judgment on November 16, 2017, and an amended judgment on March 1, 2019. The Second Circuit had jurisdiction under 28 U.S.C. § 1291, and affirmed the judgment in an opinion dated July 26, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution:

> 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 offence [sic] 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.

Federal Rule of Evidence 702. Testimony by Expert Witnesses

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Federal Rule of Evidence 801. **Definitions That Apply to This Article; Exclusions from Hearsay**

The following definitions apply under this article:

. . .

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

. . .

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Federal Rule of Evidence 1006. Summaries to Prove Content:

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

Federal Rule of Criminal Procedure 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure.

. . .

> (G) Expert Witnesses. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

STATEMENT OF THE CASE

Factual Background

Trevon Gross was a full-time Pastor at Hope Cathedral in Jackson, New Jersey and the part-time, volunteer Chairman and Chief Executive Officer of the Helping Other People Excel Federal Credit Union (the "Hope FCU") when the events underlying this case transpired. A-3207; A-3214.[1] Hope FCU was a 107-member, struggling, low-income credit union run by volunteer board members when Michael Murgio and his son Anthony Murgio approached Gross and Hope FCU, purporting to act on behalf of the Collectables Club, a memorabilia association with over 14,000 members. A-4271; A-3220-23. The Collectables Club was a sham front-company for Coin.mx, an unlawful Bitcoin exchange, but there was no evidence introduced at trial that Gross ever knew the Collectables Club was a fiction, or that Anthony Murgio and his associates were engaged in illegal activity at Coin.mx. A-231-232; A-3224. The Murgios expressed an interest in Collectables Club bringing its resources, members and technology to the credit union, and in exchange sought majority representation on the board of Hope FCU. A-

[1] The "A" references are to the appendix submitted by Trevon Gross to the Second Circuit on May 31, 2018. The "Apx" references are to the appendix submitted to the Supreme Court in conjunction with this petition for certiorari.

4271; A-3225-3226. In addition, Collectables Club offered to make a donation to Hope Cathedral, which had financed Hope FCU for years. A-3215-16; A-3237-38.

Gross and other volunteer board members of Hope FCU (the "Legacy Board Members") agreed to this partnership through a vote of the board, and Collectables Club members ultimately joined the board of Hope FCU (the "CC Board Members") and made donations to Hope Cathedral, the institution that financially supported the Hope FCU for years. A-4467; A-4471; A-3230-31.

The CC Board Members served for less than five months before Gross and the Legacy Board Members severed all ties with them, removing them from the Hope FCU Board through a vote of the board. On November 22, 2014, the CC Board Members and Gross had a meeting, which culminated in a falling-out with Gross. A-4353-4391. After the falling out, the relationship between Anthony Murgio and Gross became hostile because Gross disagreed with the direction that Murgio wanted to take Hope FCU. Shortly after the November 22, 2014 meeting, Gross unequivocally communicated to Anthony Murgio and other members of the Collectables Club that he wanted to have no further business dealings with them. A- 4423-49. Despite Gross's unequivocal statements, Anthony Murgio and other CC Board Members continued to try to rejoin the credit union and discussed Gross amongst themselves over emails and chats. A-4423-49. Gross was steadfast in his commitment to severing the relationship, revoking from the CC Board Members all access to Hope FCU. A-1293-94; A-4562-63.

Kapcharge, a third-party payment processing company with a distinct business model and its own interests, was also a party to the transactions among Gross, Hope FCU and the Collectables Club. Kapcharge contributed to the initial donation made to Hope Cathedral and began processing a large volume of transactions through Hope FCU. A-3330-34. While

Anthony Murgio initially introduced Kapcharge to Gross and the Hope FCU, after the falling out between Gross and the Collectables Club, Kapcharge maintained a business relationship with Hope FCU, and continued to try to process smaller volumes of transactions for Kapcharge clients that had no affiliation to the Collectables Club using a different business model. A-3330-34.

The Government charged Gross with accepting a bribe as an officer of a financial institution under 18 U.S.C. § 215 (Count Five), and conspiracy to make and accept bribes under 18 U.S.C. § 215, to obstruct an examination under 18 U.S.C. § 1517 and to make false statements under 18 U.S.C. § 1001 (Count Three), contending that the donations to Hope Cathedral were bribes. A-62-89.

The Trial

Trial began on February 15, 2017 and lasted approximately four weeks. Gross presented a multi-faceted good faith defense at trial, including arguments that: he believed in good faith that the partnership with Collectables Club was a legitimate business transaction and it was in the best interest of the credit union; there was nothing improper or unlawful about accepting donations to Hope Cathedral, as the church had financially supported Hope FCU for years; Gross did not personally profit from the donations; and he had not intentionally made false statements or obstructed an examination. A-3215-6; A-3237-38; A-3225-26; A-3813-14.

Multiple Legacy Board Members, church bookkeeper Loretta Larkins, and Hope FCU CEO Charles Blue could have corroborated Gross's good faith defense. Despite the fact that the Government had included multiple Legacy Board Members on its own witness list, the Government, for strategic advantage, took the position at the close of its 4-week case that all of

the witnesses with exculpatory information had criminal exposure, intimidating them all from testifying. *See* SDNY Dkt. No. 422 at 2; A-2401.

On March 17, 2017, the jury returned a verdict of guilty on both counts. At the close of the Government's case, Gross moved for a judgment of acquittal. A-3175; 3297-98. After trial, Gross filed motions for a judgment of acquittal and a new trial. *See* SDNY Dkt. No. 455. The District Court denied the motions on October 18, 2017. A-4537. On November 16, 2017, the Court imposed a sentence of 60 months, a term of three years of supervised release, a $12,000 fine and restitution of $194,293.72. *See* SDNY Dkt. No. 657. The District Court amended the restitution order to change the amount to $126,771.82 on February 26, 2019. *See* SDNY Dkt. No. 747.

Gross's Appeal and The Second Circuit's Opinion

Gross filed a timely appeal with the Second Circuit, raising three issues related to this petition for certiorari, and the Second Circuit affirmed the District Court's decisions on July 26, 2019. *See* Apx-1-37.

First, Gross argued in his appeal that the District Court erred in admitting the unreliable, unnoticed expert testimony of John Rollins, a forensic accountant, on a critical issue – whether Gross used the donations to Hope Cathedral to pay for personal expenses. *See* Second Circuit Dkt. No. 162, at 21-33. Over Gross's objection and in direct contravention of the notice provisions of Federal Rule of Criminal Procedure 16 and the District Court's gatekeeping function under *Daubert*, the District Court permitted the Government to present Rollins's testimony to establish a one-to-one correlation between the donations and particular personal expenses for Gross, even though Rollins himself acknowledged that such a correlation was

"impossible." The District Court determined that, since the Government supplied the accounting methodology, the witness could be treated as a summary witness and not an expert witness.

The District Court's error permitted the Government to argue, with the unwarranted weight of expert corroboration, that Gross spent the donations on trivial luxury items, such as massages, dinners, pool supplies and Broadway tickets, when there was no evidentiary basis for these arguments. In a case that turned on whether Gross was acting in good faith, Gross argued that this was reversible error. The Second Circuit determined that it was within the District Court's discretion to determine that Rollins was a summary witness and not an expert because the Government supplied the methodology. Apx-17. The Second Circuit then determined that, since Rollins was a summary witness, his testimony did not violate Federal Rule of Criminal Procedure 16's notice requirement. Apx-17.

Second, Gross argued that the District Court erred in admitting as co-conspirator statements numerous prejudicial comments made by CC Board Members denigrating Gross's integrity and implicating him in criminal conduct, when these comments were made after Gross unequivocally communicated to the CC Board Members that he wanted no further contact with them, effectively withdrawing from any alleged conspiracy with them and severing any agency relationship with them. *See* Second Circuit Dkt. No. 162, at 33-39. The Second Circuit ruled that the District Court did not clearly err by admitting, as non-hearsay, the statements of the Collectables Club members because, despite his falling out with those individuals, Gross continued his involvement with third-party Kapcharge and continued his efforts to conceal the conspiracy with the Collectables Club from the credit union's regulator after the fact. Apx-19.

Third, Gross argued on appeal that his due process right to a fair trial was compromised when the Government, for strategic advantage, took the position that all of the witnesses who

could corroborate Gross's good faith defense had criminal exposure, intimidating them from testifying. *See* Second Circuit Dkt. No. 162, at 68-81. The Second Circuit, focusing predominantly on whether the Government had improperly intimidated one witness – church bookkeeper Loretta Larkins – found that Gross's due process claim lacked merit. Apx- 30. The Second Circuit decision, by failing to address the full scope of the Government's effort to distort the truth-seeking function of Gross's trial, erred and created a precedent emboldening the Government to abuse its power to prosecute to intimidate defense witnesses.

We submit that the Second Circuit's rulings in this regard were erroneous, conflict with Supreme Court precedent and the decisions of other Circuits, and raise important questions of federal law.

REASONS FOR GRANTING THE PETITION

A. The Second Circuit's determination that a forensic accountant could be treated as a summary witness and not an expert witness because the Government supplied the methodology raises an important federal question, and conflicts with other Circuits and the plain language of Federal Rule of Evidence 1006

The Second Circuit's determination that John Rollins – a forensic accountant who traced funds through multiple bank accounts and credit card statements based on voluminous records – was a summary witness and not an expert, was erroneous and conflicts with the decisions of other Circuits, as well as the plain language of Federal Rule of Evidence 1006. The Second Circuit's decision also raises an important question of federal law because its finding that Rollins was a summary witness and not an expert because the Government dictated the methodology to be used creates precedent permitting the Government to circumvent the notice provisions of Federal Rule of Criminal Procedure 16 and the gatekeeping function of the courts under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 597 (1993).

1. **The Second Circuit's decision conflicts with the plain language of Federal Rule of Evidence 1006 and decisions of the Ninth and Eleventh Circuits**.

Rollins, a forensic accountant, applied the "first in first out" or "FIFO" accounting methodology to voluminous bank records across multiple accounts to purportedly trace the disposition of the donations to Gross's church. A-3001-02; A-3024-3110. While Rollins could have used other methodologies to conduct the tracing analysis, the Government directed him to use FIFO because it allowed the Government to correlate the donations to particular expenses, including massages, dinners, pool supplies and Broadway tickets, in a prejudicial manner. At trial, Gross objected to the unnoticed unreliable expert testimony. A-2991-95. The District Court overruled the objection, noting that defense counsel was on notice of the issue and failed to timely raise the matter, despite the Government's failure to properly notice the expert pretrial and defense counsel's repeated objections. A-2998; A-3041-61. The Second Circuit interpreted the District Court's ruling as concluding that, since the Government supplied the formula to be used, and not the expert, Rollins was really a lay, summary witness and not an expert witness. *See* Apx-17. The Second Circuit erroneously concluded that these facts took Rollins out of the realm of being an expert, and instead made him a summary witness. In its opinion, the Second Circuit stated:

> Once the court clarified to the jury that Rollins was not endorsing the FIFO methodology, it was within its discretion to conclude that Rollins's application of the method was not an expert opinion but rather merely a summary of the relevant financial records. The jury could have applied the assumption inherent in the FIFO methodology to the financial records without Rollins's testimony. The district court was thus within its discretion to determine that Rollins's testimony did not constitute expert testimony and did not violate Rule 16's notice requirement.

Apx- 17.[2]

The Second Circuit's decision, however, cannot be squared with the language of Federal Rule of Evidence 1006 and conflicts with the decisions of other Circuits. Rule 1006 provides: "The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Rollins did no such thing – he conducted a tracing analysis of funds through multiple bank accounts and credit card statements using one of several possible accounting methodologies. Other Circuits evaluating nearly identical testimony have concluded that such testimony is expert testimony.

In *Fed. Trade Comm'n v. Am. Precious Metals, LLC*, 726 F. App'x 729, 732–33 (11th Cir. 2018), the Eleventh Circuit considered whether an analysis by a forensic accountant purporting to trace fraudulently obtained funds was a summary chart under Rule 1006, and rejected the contention, finding that it was an expert opinion. The court reasoned:

> Contrary to Goldman's assertion, Davis's declaration is not a "summary, chart, or calculation" under Rule 1006. Although Davis reviewed Goldman's bank records in conducting her analysis, her declaration was not offered to "prove the content" of [the] bank records (or any other records, for that matter). Instead, it was offered to present her expert conclusions to the district court. Specifically, she conducted a tracing analysis to determine whether Goldman used any fraudulently-obtained funds to pay his mortgage or other expenses related to his home, and the district court accepted her conclusions. We therefore reject Goldman's argument that the district court relied on Rule 1006 in accepting Davis's declaration.

[2] The Second Circuit's conclusion that Rollins was a summary witness, and not an expert witness, conflicts with the District Court's own factual finding on the matter. The District Court Judge concluded, after hearing the testimony of Mr. Rollins, that although the government stated in advance that he would be a summary witness, he in fact provided expert testimony. *See* A-3047 ("in the course of testimony with this person's credentials and the process that they used, it's an expert providing summary testimony…it's not simply summary."); A- 3044 ("it's not lay [testimony]. It's not."); A-3041 ("[Rollins] added that it's what sort of makes sense, which, given his expert background, suggests a vouching for a particular methodology, and then when he specifically discussed counsel giving it to him, he described it as in the course of a colloquy and a conversation. So it's not just a plug-and-play. He testified to his qualifications. It adds a level of vouching to the methodology selected.").

Id. at 733.

Likewise, in *United States v. Fox,* 119 F. App'x 142, 144 (9th Cir. 2005), the Government introduced a tracing analysis through an FBI agent who was an expert in accounting, and the defendant challenged the introduction of the evidence on appeal. The defendant argued that the agent's "testimony consisted entirely of a summary and inferences that the jury could have reached independently of expert testimony." The Ninth Circuit rejected the argument, and concluded that the agent was both an expert and a summary witness because of the "conclusions he drew from the data." *Id*. at 144. The Ninth Circuit noted that, where there were voluminous bank records:

> The tracing of money from the individual investors to their ultimate disposition is anything but simple. The analysis is not…"something which [the witness] was no more qualified to do than the jury." Instead, the district court permissibly relied on [the witness's] testimony as that of an expert able to make these complex transactions more accessible to the jury through both summary and analysis.

Id. at 144 (emphasis added).

These cases from the Ninth and Eleventh Circuits demonstrate that Rollins was not just a summary witness because he was not simply seeking to summarize the contents of the bank records at issue as is permitted under Rule 1006. He was conducting a tracing analysis using one of several potential methodologies, which a lay jury was not equipped to do. These decisions squarely conflict with the Second Circuit's determination that the District Court was within its discretion to determine that the forensic accountant's tracing analysis did not constitute expert testimony.

2. **This is an important question of federal law because the Second Circuit's decision permits the Government to circumvent the expert notice requirements of Federal Rule of Criminal Procedure 16 and *Daubert*.**

This is an important question of federal law, not only because it conflicts with the analysis of other Circuits and the plain language of Rule 1006, but also because the Second Circuit's decision permits the Government to circumvent the expert notice requirements of Federal Rule of Criminal Procedure 16 by simply instructing an expert to apply a particular methodology, thereby turning that expert into a summary witness. This would eviscerate the notice provisions of Federal Rule of Criminal Procedure 16, which serve an important function prior to trial.

When parties seek to introduce expert testimony in accordance with Federal Rule of Evidence 702, "a district court must serve as a gatekeeper." *United States v. Cruz*, 363 F.3d 187, 192 (2d Cir. 2004). The Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597. Additionally, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G), "the government must give to the defendant a written summary of any [expert] testimony that the government intends to use . . . during its case-in-chief at trial." The requisite notice "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G). The rule "is intended to minimize [the] surprise that often results from unexpected testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." *Cruz*, 363 F.3d at 196, n. 2 (citations omitted). Moreover, "[t]he disclosure requirement creates an incentive for the government to limit its use of experts to

proper subject matters of expert testimony, lest broader expert testimony require broader pre-trial disclosure." *Id*. (citations omitted).

In its opinion, the Second Circuit found that Rollins "was not identified before trial as an expert witness, and no expert report was provided to the defense pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G)." Apx-15. The Second Circuit excused this failing based on the erroneous conclusion that Rollins was not really an expert, so no notice was necessary. Apx-17.

Additionally, the Second Circuit's opinion excused the District Court from fulfilling its gatekeeping function under *Daubert* because the Government dictated the methodology. The defense at trial had objected not only to the failure to provide notice to the defense as to the basis for the expert's conclusions, but also to the reliability of the method. A-2991-3001. The District Court refused to hear the defense's objections to the reliability of the expert's methodology. *Id*. The Second Circuit, in turn, found that the failure of the District Court to perform its gatekeeping function was not erroneous because Rollins was not really an expert. Apx-17. The Second Circuit's opinion thus has the effect of insulating the Government's strategically chosen methodology from scrutiny as to its reliability under *Daubert*.

Although courts are given wide discretion on *how* they conduct the *Daubert* inquiry, the Supreme Court has made clear that a trial court does not have discretion "to abandon [its] gatekeeping function" entirely, which is exactly what occurred here. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158–59 (1999) (Scalia, concurring); *see also Dodge v. Cotter Corp*., 328 F.3d 1212, 1223 (10th Cir. 2003) ("Though the district court has discretion in *how* it conducts the gatekeeper function, we have recognized that it has no discretion to avoid performing the gatekeeper function.") (emphasis in original). Despite the District Court's initial recognition that Rollins was in fact providing expert testimony (*see* n. 2 *supra*), a *Daubert*

inquiry was never conducted. The Second Circuit excused this error by concluding that Rollins was merely a summary witness, and thus a *Daubert* analysis was unnecessary. Apx-17.

If left standing, the Second Circuit's Opinion creates the danger that the Government will be able to circumvent the notice provisions of Rule 16 and evade scrutiny under *Daubert* simply by dictating the methodology to be used.

B. The Second Circuit's decision that statements made by declarants with no continuing relationship with the defendant were admissible as co-conspirator statements raises an issue of exceptional importance and squarely conflicts with Supreme Court precedent and the decisions of other Circuits.

The Second Circuit determined that it was not erroneous for the District Court to admit statements of the Collectables Club members as co-conspirator statements even though it was undisputed that Gross had severed all ties with the declarants. Apx-19. The Second Circuit's decision raises an issue of exceptional importance because it undermines the fundamental rationale for permitting co-conspirator statements to be introduced against defendants – the implied agency relationship between the declarant and the defendant. The Second Circuit's decision also conflicts with Supreme Court precedent, decisions from other Circuits, and the plain language of Federal Rule of Evidence 801(d)(2)(E) providing that the declarant and the party against whom statements are admitted must both be in the conspiracy together when the statements are made.

On appeal, Gross argued that the District Court erred in admitting statements of Collectables Club members as co-conspirator statements because he had withdrawn from any conspiracy with them. Second Circuit Dkt. No. 162, at 33-39. Although there was ample

evidence of Gross's severance of all ties with members of the Collectables Club,[3] the District Court found that the conspiracy was still ongoing on November 24, and 25, 2014 based on Gross's continued involvement with third party Kapcharge, and Gross's continued efforts to obstruct the NCUA's examination of the credit union. *See* Apx-19. The Second Circuit affirmed, finding that it was not error to admit the statements. *Id*.

As a preliminary matter, the Second Circuit's ruling directly conflicts with established precedent of this Court which has squarely held that acts taken to conceal a conspiracy do not extend the life of the conspiracy or the corresponding period during which co-conspirator statements are admissible. *Krulewitch v. United States*, 336 U.S. 440, 444 (1949) (finding that a declaration, not made in furtherance of the charged conspiracy, but made in furtherance of an alleged implied but uncharged conspiracy aimed at concealment of the crime did not fit within the hearsay exemption); *see also Grunewald v. United States*, 353 U.S. 391, 402 (1957) (permitting acts of covering up to extend a conspiracy would "extend indefinitely the time within which hearsay declarations will bind co-conspirators."). Here, any alleged acts of concealment post-dating the falling-out that Gross had with the Collectables Club did not extend Gross's

[3] At trial, ample contemporaneous documents and the Government's own cooperators established that Gross unequivocally severed all ties with members of the Collectables Club, informing them that he wanted nothing to do with them on November 24, 2014. In a chat between Anthony Murgio and the CC Board Members on November 24, 2014, there is abundant, unambiguous evidence of withdrawal. *See, e.g.*, A-4423 (Hill: "[Gross] is not interested in renegotiating."); A-4424 (Freundt: "He informed me he is done playing games and renegotiating."); A-4428 (Freundt: "I don't see a way forward."); A-4430 (Freundt: "I asked him if the relationship between our group and his is salvageable to which he responded 'no' in not sooo little words.") Reviewing this chat, Freundt testified: "at that point in time, I understood [Gross] to be done with us." A-1825. Further documents and testimony demonstrated that the rift between Gross and the Collectables Club was permanent. *See* A-1293 (Hill testifying that he tried to reach out to Gross after the fallout, and "[h]e let me know that he wouldn't be negotiating with us anymore, that we should not try to wire funds into the credit union anymore, basically that we were done."); A-1293-94 (Hill noting that Gross cut off all access to the credit union by November 25, 2014.); A-1295 (Gross rejecting calls for a special board meeting, and telling the CC Board Members on November 25: "as non-members of the Credit union, you have no standing on the board to request a board meeting."); A-4452 (Gross to Anthony Murgio: "you know the status of things. We are not moving forward together.").

involvement in a conspiracy with the Collectables Club – therefore, its members' post fall-out statements should not have been admissible against Gross.

More fundamentally for the purposes of this petition, Gross's ongoing relationship with third party Kapcharge did not extend his conspiracy with members of the Collectables Club and make statements of members of Collectables Club admissible against Gross as co-conspirator statements. Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it is offered against an opposing party and "was made by the party's coconspirator during and in furtherance of the conspiracy." *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) (To qualify as a co-conspirator statement, "[t]here must be evidence that there was a conspiracy involving *the declarant* and the nonoffering party, and that the statement was made 'during the course and in furtherance of the conspiracy.'") (emphasis added); *United States v. Nelson*, 603 F.2d 42, 44 (8th Cir. 1979) ("Under Fed. R. Evid. 801(d)(2)(E) …, such declarations are not hearsay and are admissible if they are shown by the preponderance of the independent evidence to have been made during the course and in furtherance of a conspiracy *to which the defendant and the declarant were parties*.") (emphasis added). This hearsay exemption is based on the assumption that the co-conspirator and the declarant are in an agency relationship and the co-conspirator authorized the statements. *See Lutwak v. United States*, 344 U.S. 604, 617 (1953) ("Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both . . . ."); *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980) ("The requirement that the statements have been in furtherance of the conspiracy is designed both to assure their reliability and to be consistent with the presumption that the coconspirator would have authorized them.")

Here, the facts unequivocally showed that any conspiracy between the declarants and Gross had ended, and he never would have authorized their statements maligning and incriminating him after the falling out. *See* n. 3 *supra*. The Second Circuit's decision concluding that it was not error to allow the statements to be admitted against Gross because he continued a relationship with a third party, but not the declarants, is inconsistent with the agency principles that justify the co-conspirator exception under Rule 801(d)(2)(E) in the first instance. Correcting this flawed application of the co-conspirator exception to the hearsay rule is a matter of exceptional importance because the Opinion left standing could result in the widespread introduction of statements against defendants that are unauthorized and therefore unreliable, particularly in light of the sprawling, multi-object, multi-defendant conspiracies the Government so routinely charges.

C. The Government's intimidation of witnesses violated Gross's due process right to a fair trial.

Gross's due process rights were violated when the Government intimidated eight witnesses who would otherwise have provided exculpatory testimony on his behalf by strategically claiming that they had criminal exposure at the close of the Government's four-week case. The Second Circuit's conclusion that Gross's due process claim was meritless conflicts with precedents of this Court and other Circuits.

It is elementary that criminal defendants have a right to establish a defense by presenting witnesses and that this right "is a fundamental element of due process of law." *Webb v. Texas*, 409 U.S. 95, 98 (1972) (citations omitted). This includes "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (citations omitted). Circuit

courts have found that "prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under certain circumstances, violate the defendant's right to present a defense." *United States v. Williams*, 205 F.3d 23, 29 (2d Cir. 2000). *See also United States v. Golding*, 168 F.3d 700, 705 (4th Cir.1999) (government intimidation dissuaded witness from testifying and prosecutor further abused her power by commenting on witness's failure to testify); *United States v. Vavages*, 151 F.3d 1185, 1190–92 (9th Cir. 1998) (reversing conviction where prosecutor dissuaded witness from testifying and commented on defendant's failure to present corroborating witnesses, and trial judge failed to scrutinize basis for witness's invocation of Fifth Amendment right against self-incrimination); *United States v. Heller*, 830 F.2d 150, 153–54 (11th Cir. 1987) (granting new trial where government intimidation deprived defendant of an important defense witness and induced witness to provide false testimony against defendant).

In order to establish a violation of the right to present a defense, a criminal defendant must generally show: 1) that he was deprived of material and exculpatory evidence that could not be reasonably obtained by other means; 2) bad faith on the part of the government; and 3) that the acts complained of were "of such quality as necessarily prevent[ed] a fair trial." *Williams*, 205 F.3d at 29–30. All of these elements were satisfied here.

Here, Gross was deprived of material and exculpatory evidence that could not be obtained by other means because the Government's actions caused eight separate witnesses, all of whom would have otherwise provided exculpatory testimony on Gross's behalf, to decline to testify by strategically claiming that they had criminal exposure. While the Government introduced the unnoticed expert testimony of Rollins to establish that Gross personally benefited from the donations that the Collectables Club made to the Hope

Cathedral, one of the intimidated witnesses, Loretta Larkins, could have testified that all of the funds were used to benefit Hope Cathedral. *See* SDNY Dkt. No. 611, at 5 ("The $150,000 that was deposited into HOPE CATHEDRAL'S operating account did not pay Gross's salary, pay Gross's unpaid salary, or benefit Gross personally. The money was used solely to benefit HOPE CATHEDRAL.")

Some of the other witnesses, in particular, the Legacy Board Members, were also critical to corroborate Gross's good faith defense, including Gross's belief that the Collectables Club was a legitimate memorabilia association that would benefit the credit union by bringing its members, resources and technology. For example, one Legacy Board Member, Joseph Lane, was aware of the donation to the church and participated in meetings and votes. He could have testified that the donation was discussed at a Hope FCU board meeting and the Legacy Board Members "felt [the donation] was appropriate because anyone could make a donation to the church. The donation would be made to the church because the church occasionally provided financial assistance to HOPE FCU when HOPE FCU needed funds to maintain certain ratings." Confidential Appendix, filed with the Second Circuit, at 12.

Second, Gross demonstrated that the Government acted in bad faith. The Government's shifting and selective position regarding which potential witnesses had criminal exposure demonstrated its bad faith. Even before trial began, the Government selectively chose which Legacy Board Members it intended to call, offering them the potential for a non-prosecution agreement. *See* SDNY Dkt. No. 375 at 2. The Government claimed that similarly-situated witnesses who were more helpful to Gross had criminal exposure, but did not offer them the potential for a non-prosecution agreement. *Id.*; *see also*

A-2387-88. This pre-trial tactic demonstrated that the Government intended to distort the truth-seeking function of the trial.

At trial, the Government placed several Legacy Board Members on its witness list. However, near the end of the four-week trial, the Government decided not to call these witnesses as a strategic matter. *See* SDNY Dkt. No. 422 ("During the third week of trial, on February 28, 2017, the Government indicated that it no longer intended to call any members of the HOPE FCU Board, or HOPE FCU's former CEO, in its case-in-chief, nor offer any of them non-prosecution agreements or use immunity.") To prevent Gross from calling these witnesses in his own defense, the Government changed its position and took the position that all of the Legacy Board Members who could provide exculpatory information had criminal exposure. *Id*.; *see also* A-2387-88.

The Government specifically shifted its position with regard to Loretta Larkins. On March 1, 2017, the Government specifically carved out Loretta Larkins as being a witness who was not on the board of Hope FCU, so she did not have criminal exposure. A-2389-90. On the next trial date, days before the Government rested and the defense case began, the Government suddenly took the position that Loretta Larkins too had criminal exposure. A-2401-2404. After the Government's change of position, none of the witnesses would testify for the defense.

Finally, the acts complained of were "of such quality as necessarily prevent[ed] a fair trial," *Williams*, 205 F.3d at 29–30, because the Government's tactics prevented Gross from being able to call any witnesses from the legacy board or his church at trial. In addition, the Government exploited the absence of corroborating evidence as to Gross's good faith in its summation. The Government was well aware that Loretta Larkins, as the church's

bookkeeper, would have been in a position to testify that Gross did not use the donations from the Collectables Club to benefit himself, and she and other witnesses would have been able to testify that the church in fact paid expenses for the credit union over the years. Nonetheless, after having procured the absence of corroborating witnesses, the Government argued in rebuttal summations:

> Trevon Gross told you that the church had paid credit union expenses. There's no evidence of that. There is no documentary evidence, not a shred, to support Gross's testimony that the church had paid $150,000 in expenses for the credit union. All you have is the word of Trevon Gross. And, as you saw in his answers that he gave on cross-examination, you can't trust a single word that man says.

A-3909.

It was misconduct to comment on the absence of corroborating evidence when the Government went to such great lengths to prevent all Legacy Board Members and Larkins from testifying and corroborating Gross's defense. In *United States v. Golding*, 168 F.3d 700, 703 (4th Cir.1999), the Court reversed a conviction where the Government intimidated a witness from testifying and the "prosecutor further abused her power" by commenting on the witness's failure to testify. The Court noted that "[t]he authorities are uniform that threatening a witness with prosecution and comment[ing] about the absence of a witness who has a privilege not to testify are a violation of the Sixth Amendment right of a defendant to obtain witnesses in his favor." *Id*.

Without any Legacy Board Members available to corroborate Gross's testimony that he thought the business transaction with the Collectables Club and ACH processing would have benefits to the credit union, the Government also argued that: "[t]his deal did not benefit the credit union or its members at all. This was Gross selling out the credit union and its members to Lebedev, and Murgio, and the others, so that they could use it to process

transactions for Coin.mx." A-3906. And further, "for Gross, it was also about the money, to secretly make money for himself and his church by selling out the credit union." A-3907. In a case that turned on whether Gross was acting with a corrupt intent, the jury's inability to hear testimony from key witnesses who could have corroborated Gross's good faith defense and countered the Government's devastating narrative undermined the fairness of the trial, warranting reversal.

The Second Circuit's ruling on this matter conflicts with the fundamental due process right of a defendant to present witnesses in his defense, as recognized by the Supreme Court in *Washington v. Texas*, 388 U.S. 14, 19 (1967). *See also United States v. Williams*, 205 F.3d 23, 29 (2d Cir. 2000) ("It is elementary that criminal defendants have a right to establish a defense by presenting witnesses.") If this Court does not correct the error, the Government will continue to intimidate defense witnesses who have valuable exculpatory information with impunity, distorting the truth seeking function of federal criminal trials.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Dated: New York, New York
January 7, 2020

Respectfully submitted,

/s/ Kristen Santillo

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APPENDIX A

17-3691-cr(L)
United States v. Lebedev et al.

In the
United States Court of Appeals
For the Second Circuit

August Term, 2018
Nos. 17-3691-cr(L), 17-3758-cr(Con), 17-3808-cr(Con)

UNITED STATES OF AMERICA,
Appellee,

v.

YURI LEBEDEV and TREVON GROSS,
Defendants-Appellants,

ANTHONY R. MURGIO, also known as Sealed Defendant 1, MICHAEL J. MURGIO, JOSE M. FREUNDT, and RICARDO HILL, also known as Rico,
Defendants.[*]

Appeal from the United States District Court
for the Southern District of New York.
Nos. 15-cr-769-1, 15-cr-769-2, 15-cr-769-3 — Alison J. Nathan, *Judge*.

ARGUED: DECEMBER 5, 2018
DECIDED: JULY 26, 2019

Before: CABRANES, POOLER, and DRONEY, *Circuit Judges*.

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[*] The Clerk of Court is directed to adopt the caption as set forth above.

Appeal from the November 1, 2017 and November 16, 2017 judgments of the United States District Court for the Southern District of New York (Alison J. Nathan, *Judge*), convicting the Defendants-Appellants, after a jury trial, of multiple counts arising out of their roles in the operation of an illegal Bitcoin exchange and a scheme to use a federal credit union for illegal purposes. They argue, among other things, that the district court made various evidentiary errors, including improperly limiting the examination of a witness called to impeach a key government witness. Defendant Lebedev further argues that insufficient evidence was presented at trial to sustain his convictions, while defendant Gross argues that the evidence presented at trial so differed from the allegations of the superseding indictment that the government impermissibly constructively amended the indictment. Defendant Gross also challenges his 60-month prison sentence and order of restitution, arguing that the court misapplied certain sentencing enhancements in calculating the Guidelines range, and abused its discretion in determining restitution. We AFFIRM.

TILLMAN J. BRECKENRIDGE, Pierce Bainbridge Beck Price & Hecht LLP, Washington, DC, (Eric M. Creizman, Melissa Madrigal, Creizman PLLC, New York, NY *on the brief*) *for* Defendant-Appellant Lebedev.

KRISTEN M. SANTILLO, Gelber & Santillo PLLC, New York, NY, *for* Defendant-Appellant Gross.

DANIEL S. NOBLE, Assistant United States Attorney, (Won S. Shin, Eun Young Choi, Sarah K. Eddy, Assistant United States Attorneys, *on the brief*) for Geoffrey S. Berman, United States Attorney for the Southern District of New York, New York, NY.

DRONEY, *Circuit Judge*:

This is a consolidated appeal of two defendants convicted in a joint jury trial of offenses arising out of their roles in an illegal Bitcoin exchange and a scheme to use a federal credit union for illegal purposes.[1] Yuri Lebedev was convicted of wire fraud in violation of 18 U.S.C. § 1343, bank fraud in violation of 18 U.S.C. § 1344, conspiracy to commit wire and bank fraud in violation of 18 U.S.C. § 1349, and making corrupt payments with the intent to influence an officer of a financial institution in violation of 18 U.S.C. § 215(a)(1). Trevon Gross was convicted of receiving corrupt payments as an officer of a financial institution in violation of 18 U.S.C. § 215(a)(2). Both Lebedev and Gross were also convicted of conspiracy in violation of 18 U.S.C. § 371.

Lebedev and Gross appeal their judgments of conviction, raising various constitutional and evidentiary challenges. Gross also appeals the district court's application of several provisions of the Sentencing Guidelines in imposing his sentence and his order of restitution.

[1] This appeal was consolidated with that of a third defendant, Anthony R. Murgio. On May 16, 2018, the Court granted Murgio's motion to voluntarily dismiss his appeal.

I. BACKGROUND

The evidence presented by the government at trial concerned the activities of an internet-based Bitcoin exchange service located in Florida, known as "Coin.mx." Coin.mx's customers used the exchange to purchase Bitcoins, a digital currency, with traditional currency. Although the purpose of Coin.mx was to allow the purchase and sale of Bitcoins, Coin.mx concealed that fact from the banks and credit card companies processing its transactions.[2] Coin.mx opened bank accounts in the name of "the Collectables Club," which falsely purported to be a private members' association dedicated to collecting and exchanging memorabilia. Coin.mx also processed credit card transactions listing the Collectables Club as the merchant. Neither Coin.mx nor the Collectables Club registered with federal regulators as a money-transmitting entity or obtained state licensure for that purpose.

[2] Bitcoin offers users increased anonymity compared with many other virtual and traditional currencies, "mak[ing] it more difficult for law enforcement to quickly and efficiently obtain information on users . . . engaged in criminal activity." Kevin V. Tu, Michael W. Meredith, *Rethinking Virtual Currency Regulation in the Bitcoin Age*, 90 WASH. L. REV. 271, 299 (2015). Because of its susceptibility to use for illegal transactions, many banks refuse to transact with businesses dealing in Bitcoins.

Coin.mx employed Lebedev to manage information technology operations. One of Lebedev's responsibilities was to set up various Internet Protocol ("IP") addresses to make it appear to banks and payment processors that Coin.mx's transactions were legitimate Collectables Club transactions.

Eventually, Coin.mx sought control of a credit union to process its transactions.[3] In April 2014, Coin.mx representatives contacted Gross to discuss the possibility of taking control of the Helping Other People Excel Federal Credit Union ("HOPE FCU" or the "credit union"). Gross was then the chairman of HOPE FCU, as well as the head pastor of the nearby Hope Cathedral in Jackson, New Jersey.

Negotiations ensued between HOPE FCU, represented by Gross, and Coin.mx's front company, the Collectables Club, represented primarily by Anthony Murgio. Gross promised that HOPE FCU would appoint to its board of directors six members selected by the Collectables Club, giving the Collectables Club a majority of the board seats. In return, Gross required that three donations

[3] By taking control of a credit union, Coin.mx no longer risked being shut down by banks that uncovered the true nature of the Bitcoin transactions. Customers could open accounts at the credit union and use their accounts to buy Bitcoins from Coin.mx.

be made to Hope Cathedral: two for $15,000 each and a third for $120,000. Evidence at trial demonstrated that Gross frequently used those "donations" for personal expenses.

One of Coin.mx's other front companies, Currency Enthusiasts, made the first two $15,000 donations to Hope Cathedral. HOPE FCU's executive board nominated the six Collectables Club board members, and Gross promised that the board members they were replacing would resign at the annual meeting. Lebedev was one of the six new members nominated. At the annual meeting in June 2014, the nominees were elected, although the former board members remained on the board for a few additional months to help HOPE FCU avoid scrutiny from its regulator, the National Credit Union Administration ("NCUA").

The third donation was made by a company known as "Kapcharge." Kapcharge was a third-party payment processing company that processed electronic payments for its clients through its own accounts at financial institutions.[4] Murgio was affiliated with Kapcharge. Murgio approached Gross

[4] While Kapcharge did not seek to work with the credit union to process risky Bitcoin transactions, it did seek to process a large volume of transactions—in the tens of millions of dollars.

in June 2014 about allowing Kapcharge to process third-party transactions, known as automated clearing house transactions ("ACH transactions"), through an account at HOPE FCU. Kapcharge, which was a Canadian company, became a member of HOPE FCU, even though HOPE FCU's membership was limited to persons and organizations within the local community. HOPE FCU was substantially undercapitalized to process the high volume of transactions Kapcharge used it to process. Shortly after becoming a member, Kapcharge wired $120,000 to Hope Cathedral.

In addition to the "donations" used by Gross for personal expenses, Kapcharge and its co-conspirators paid Gross $12,000 in so-called "consulting fees."

Ultimately, Gross had a falling out with Murgio, Lebedev, and the other Coin.mx representatives, which resulted in Gross expelling them from the credit union and terminating their relationship.[5] Thereafter, Gross refused to

[5] On November 22, 2014, Gross demanded an additional $50,000 donation to the church in exchange for the resignation of the remaining board members who predated Coin.mx's takeover of the credit union. Although the remaining board members resigned, Coin.mx failed to make the $50,000 payment by Gross's deadline.

communicate or transact with the Coin.mx agents, directed them to stop wiring funds into the credit union, locked them out of computer access to their accounts, and informed them that they were not members of the credit union and thus lacked standing to call a board meeting. However, Gross continued to allow Kapcharge to process transactions through its account after Coin.mx was no longer involved in the credit union. In 2015, Kapcharge wired an additional $80,000 into credit union accounts that Gross controlled.

HOPE FCU eventually came under regulatory scrutiny from the NCUA. During the NCUA's examination of the credit union, Gross failed to disclose a number of transactions, including the "donations" that Currency Enthusiasts and Kapcharge paid to Hope Cathedral, that HOPE FCU had opened a branch in Florida, and that Kapcharge was paying the salary of the credit union's new CEO and the legal fees of Gross and the credit union. Gross further misrepresented that Kapcharge had an office in New Jersey that qualified it for membership in the credit union, and failed to disclose Coin.mx agents' email accounts after the NCUA requested all of the credit union's email accounts. NCUA placed HOPE FCU into a conservatorship in October 2015.

A superseding indictment was filed on December 22, 2016, in the United States District Court for the Southern District of New York. Following a four-week jury trial, Murgio, Lebedev, and Gross were convicted of all counts on March 17, 2017. Following the denial of post-trial motions, Lebedev was sentenced to 16 months' imprisonment, supervised release, and forfeiture. Gross was sentenced to 60 months' imprisonment and three years' supervised release. Lebedev and Gross were ordered to pay $126,771.82 in restitution jointly and severally with their convicted codefendants.

Lebedev and Gross appealed their judgments of conviction. Gross, but not Lebedev, also challenges his sentence on appeal.

II. ANALYSIS

We consider Lebedev's and Gross's claims on appeal in turn.

A. Lebedev's Claims on Appeal

1. *Sufficiency of the Evidence*

Lebedev challenges the sufficiency of the evidence underlying his convictions for wire fraud under 18 U.S.C. § 1343, bank fraud under 18 U.S.C. § 1344, and conspiracy to commit wire and bank fraud under 18 U.S.C. § 1349.

We review *de novo* a challenge to the sufficiency of the evidence underlying a criminal conviction. *United States v. Corbett*, 750 F.3d 245, 250 (2d Cir. 2014). We "view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (internal quotation marks omitted). "[W]e will uphold the judgments of conviction if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

a. Wire Fraud

Lebedev argues that there was insufficient evidence that he committed wire fraud because his role in Coin.mx's scheme—deceiving financial institutions concerning the nature of Coin.mx's business—did not harm or risk harming those financial institutions.

The elements of wire fraud are "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the . . . wires to further the

scheme." *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015) (internal quotation marks omitted). "Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests protected by the . . . wire fraud statute[] include the interest of a victim in controlling his or her own assets." *Id.* at 570 (alteration omitted) (quoting *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007)). For this reason, a wire fraud charge under a right-to-control theory can be predicated on a showing that the defendant, through the "withholding or inaccurate reporting of information that could impact on economic decisions," deprived "some person or entity . . . of potentially valuable economic information." *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017) (internal quotation marks omitted).

At trial, the government presented testimony from witnesses to establish the significance of Coin.mx's misrepresentations about the nature of its business, including Erika Heinrich, who worked in the fraud investigations group at Chase Bank USA ("Chase"). Heinrich testified that Chase decides whether to process pending credit card transactions based in part on information it receives about the merchant. Chase evaluates regulatory risk, including potential fines for doing

business that is illegal, as well as economic risk posed by fraudulent transactions, and considers transactions with money services or money-transmitting businesses to carry a higher risk of fraud.

The evidence at trial demonstrated that Coin.mx was a money service business that was both unlawful and carried a higher risk of fraudulent transactions. The evidence also showed that Lebedev's role in Coin.mx's scheme was to disguise Coin.mx's Bitcoin transactions through front entities such as the Collectables Club, so the institutions processing those transactions would be more likely to process and approve them. On this basis, a reasonable jury could conclude that Lebedev deprived the financial institutions of the right to control their assets by misrepresenting potentially valuable economic information.

b. Bank Fraud

Lebedev also argues that the government failed to prove he committed bank fraud because he did not intend to defraud either the bank or the customers who purchased Bitcoin. He argues that because Coin.mx's customers willingly purchased Bitcoin, the banks were not deprived of any property interest in the customers' accounts.

Bank fraud is defined in relevant part as "a scheme or artifice—(1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Lebedev was indicted and convicted under § 1344(2). Subsection (2) requires that the defendant intend to obtain a financial institution's property, and that the "envisioned result . . . occur by means of false or fraudulent pretenses, representations, or promises," but does not require that "a defendant have a specific intent to deceive a bank." *Loughrin v. United States*, 573 U.S. 351, 356–57 (2014) (internal quotation marks omitted).

As discussed above, there was sufficient evidence showing that Lebedev caused false information to be sent to financial institutions to disguise the fact that their customers were transacting business with an unregistered Bitcoin exchange. Moreover, he did so with the intent to obtain funds under those institutions' custody and control; namely, funds in the customers' accounts. In addition, by approving credit-card transactions, banks advanced Coin.mx their own funds that

would later be paid back by customers. On these bases, a reasonable jury could conclude that Lebedev violated 18 U.S.C. § 1344(2).

* * *

Accordingly, sufficient evidence supported Lebedev's convictions for wire fraud, bank fraud, and conspiracy to commit wire and bank fraud.

B. Gross's Claims on Appeal

1. *The District Court's Evidentiary Rulings*

Gross challenges several evidentiary rulings the district court made at trial. Lebedev joins one such challenge, as noted below. We review evidentiary rulings by the district court for abuse of discretion. *United States v. Litvak*, 808 F.3d 160, 179 (2d Cir. 2015).

a. Testimony of John Rollins

First, Gross challenges the district court's decision to admit the testimony of John Rollins, which he contends was expert testimony that did not comply with the prior notice requirement of Federal Rule of Criminal Procedure 16.

Rollins is an accountant and litigation consultant whom the government retained in connection with its investigation into Coin.mx and HOPE FCU.

Rollins was not identified before trial as an expert witness, and no expert report was provided to the defense pursuant to Federal Rule of Criminal Procedure 16(a)(1)(G). Rather, he was identified by the government as a witness who would summarize various financial records.

At trial, Rollins testified about deposits made by the Collectables Club and Kapcharge into Hope Cathedral's bank account and withdrawals made by Gross from the same account to pay for Gross's personal expenses. Rollins testified that the funds Gross withdrew were the same funds that the Collectables Club and Kapcharge had deposited. In effect, he testified that Gross used some of the purported donations to the church from the Collectables Club and Kapcharge for his own expenses.

Rollins based his testimony on an accounting methodology referred to as "first-in-first-out" or "FIFO." The FIFO methodology assumes that the first funds deposited into an account are the funds used to pay for the first withdrawals from the account. Rollins testified that FIFO was only one of several methods he could have used, but the government instructed him to use it. He also testified

that "intuitively, [FIFO] makes sense" in light of "how most people handle their finances." App'x 3036.

After Rollins testified that the method "makes sense," defense counsel objected that he was giving an expert opinion, and the district court expressed concern that Rollins had improperly opined that FIFO was the correct accounting method for analyzing payments of Gross's expenses. The district court allowed Rollins to testify using the FIFO methodology after Rollins clarified that the government had specifically directed him to use it. The court also later instructed the jury that Rollins was not an expert witness and that they should not rely on his testimony to establish that using FIFO was proper.

Under Federal Rule of Evidence 702, expert witnesses provide opinions when "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). By contrast, summary witnesses may testify using "a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006; *see also Fagiola v. Nat'l Gypsum Co. AC & S, Inc.*, 906 F.2d 53, 57 (2d. Cir. 1990)

(explaining a summary witness's role as providing "foundation testimony connecting [a summary] with the underlying evidence summarized").

The district court did not abuse its discretion by admitting Rollins's testimony. Once the court clarified to the jury that Rollins was not endorsing the FIFO methodology, it was within its discretion to conclude that Rollins's application of the method was not an expert opinion but rather merely a summary of the relevant financial records. The jury could have applied the assumption inherent in the FIFO methodology to the financial records without Rollins's testimony. The district court was thus within its discretion to determine that Rollins's testimony did not constitute expert testimony and did not violate Rule 16's notice requirement.

b. Co-conspirator Hearsay Testimony

Next, Gross challenges the admission of hearsay statements by Coin.mx agents under Federal Rule of Evidence 801(d)(2)(E) that he contends were made after he had withdrawn from the conspiracy. Specifically, Gross contends that the district court erroneously admitted inculpatory messages sent between Coin.mx's agents after he had a falling out with them.

Under the co-conspirator exception to the hearsay rule, the government may offer hearsay statements "made by the [defendant's] co-conspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). However, "[o]nce a party withdraws from a conspiracy subsequent statements by a co-conspirator do not fall within this exemption." *United States v. Nerlinger*, 862 F.2d 967, 974 (2d Cir. 1988). Withdrawal "requires affirmative action . . . to disavow or defeat the purpose of the conspiracy." *Id.* (internal quotation marks omitted). "That members of a conspiracy have had a disagreement or a falling out is not, however, sufficient to establish withdrawal from the conspiracy." *United States v. James*, 712 F.3d 79, 106 (2d Cir. 2013); *see also United States v. Berger*, 224 F.3d 107, 118 (2d Cir. 2000) ("[R]esignation from a criminal enterprise, standing alone, does not constitute withdrawal as a matter of law . . . ."). "[A]bsent withdrawal, a conspirator's participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators." *United States v. Salmonese*, 352 F.3d 608, 615 (2d Cir. 2003) (internal quotation marks omitted). Because of the factual nature of the inquiry, "we will reverse a decision to admit co-conspirator statements only

if it is clearly erroneous." *James*, 712 F.3d at 106 (internal quotation marks omitted).

The district court ruled that there was not sufficient evidence that Gross had withdrawn from the conspiracy when the challenged co-conspirator statements were made to preclude the admission of the messages. Despite Gross's dispute with Coin.mx's agents, the court did not clearly err by concluding that the conspiracy was still ongoing on November 24, and 25, 2014, based on Gross's continued involvement with Kapcharge and Gross's continued efforts to obstruct the NCUA's examination of the credit union. Therefore, it was not error to admit the statements.

c. Limitation on the Examination of Agent Beyer

Next, both Gross and Lebedev contend that the district court improperly restricted their examination of a defense witness, Special Agent Emily Beyer of the United States Secret Service.

At trial, the government called Jose Freundt, an employee of Coin.mx, as a cooperating witness. On cross-examination, Freundt testified about his July 2015 meeting with Agent Beyer concerning the government's investigation into

Coin.mx. He testified that, at this meeting, Agent Beyer had told him Coin.mx was going to be shut down. When Freundt stated that Coin.mx still owed him compensation, Agent Beyer, according to Freundt, stated that he should "withdraw [his] salary [from a Coin.mx account] and actually give [him]self a nice little bonus." App'x 1913.

The defense sought to impeach Freundt's credibility by attacking the truthfulness of this testimony. After Freundt testified, Agent Beyer told the FBI that she would not have instructed Freundt to take any money from Coin.mx. Her statement was memorialized in an FBI report that was produced to defense counsel.

The district court then allowed Gross to call Agent Beyer as a witness and question her "in a very tailored and narrow way" to help the jury determine "whether a key cooperating witness testified falsely." App'x 3004. Agent Beyer testified that, while she did not recall the conversation, she would never have told Freundt to take a salary or bonus to which he was not entitled. However, she also stated that she told Freundt that Coin.mx was not being shut down at that point and that he was permitted to continue operating the business.

Defense counsel sought to ask Agent Beyer about her prior statement to the FBI, arguing that it contradicted her testimony, and to use the FBI report to refresh her recollection about whether Coin.mx was being shut down. The district court disallowed that questioning, finding no contradiction between Agent Beyer's testimony and her prior statement and concluding that such questions would be irrelevant to whether Freundt had lied in his testimony.

We review a district court's limitation on the scope of examination of witnesses for abuse of discretion. *In re Peters*, 642 F.3d 381, 389 (2d Cir. 2011) (per curiam). "As long as a defendant's right to confront the witnesses against him is not violated" a district court's decision to limit examination is not grounds for reversal. *United States v. Roldan-Zapata*, 916 F.2d 795, 806 (2d Cir. 1990). In particular, questioning is not "improperly curtailed if the jury is in possession of facts sufficient to make a discriminating appraisal of the particular witness's credibility." *Id.* (internal quotation marks omitted).

The district court did not abuse its discretion by restricting defense counsel's questioning of Agent Beyer. Freundt testified that Agent Beyer instructed him to pay himself salary and a bonus from Coin.mx's account. The purpose of calling

Agent Beyer was to impeach Freundt's testimony, and Agent Beyer unequivocally testified that she would not have instructed him to do this. Agent Beyer's statement to the FBI that she had not told Freundt to take money from Coin.mx's account does not contradict her testimony, and the court reasonably concluded that it was not necessary for the jury to learn of this statement to evaluate either Freundt's or Agent Beyer's credibility. We also agree with the district court that it was not necessary to clarify whether Coin.mx was being shut down for the jury to determine whether Freundt had testified truthfully about Agent Beyer's suggestion to take money from the Coin.mx account.

d. Testimony about Insider Loans

Gross next contends that the government offered prior act evidence under Federal Rule of Evidence 404(b) without providing the required notice. Specifically, Gross points to testimony by two NCUA examiners that insider loans were taken out by Hope Cathedral, Gross, and a board member to cover negative share balances in the church's account at HOPE FCU. The district court overruled Gross's objection, finding that the testimony provided direct evidence of the crimes with which Gross had been charged.

Rule 404(b) allows evidence of a "crime, wrong, or other act" to be admitted if relevant, so long as it is not used as evidence of a character trait and that a person acted in conformity with that trait on a particular occasion. Fed. R. Evid. 404(b). The government must give "reasonable notice" to the defendant that it is offering prior act evidence under this Rule. Fed. R. Evid. 404(b)(2)(A). However, Rule 404(b) does not encompass acts that "arose out of the same transaction or series of transactions as the charged offense," are "inextricably intertwined with the evidence regarding the charged offense," or are "necessary to complete the story of the crime on trial." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (internal quotation marks omitted).

Here, Gross was charged with conspiring to accept bribes as an officer of the credit union and disguising those bribes as "donations" to the Hope Cathedral account. The government's theory was that Gross used money from the Hope Cathedral account for his personal expenses, a theory he contested at trial. The jury was free to consider the challenged testimony to establish that Gross both deposited his own money into the account and received money from it personally.

Thus, this evidence was "necessary to complete the story of the crime[s] on trial." *See id.* (internal quotation marks omitted).

Accordingly, the district court did not abuse its discretion in concluding that this was not Rule 404(b) evidence and that the government was therefore not subject to the Rule's notice requirement.[6]

2. *Constructive Amendment or Variance of the Indictment*

Gross next contends that the evidence at trial so differed from the conduct for which he was indicted that it constructively amended the indictment. Specifically, Gross points to the indictment's omission of any mention of Kapcharge and its ACH transaction processing through HOPE FCU.

We review *de novo* a properly preserved claim that an indictment was constructively amended or prejudicially varied. *United States v. Dove*, 884 F.3d 138, 146, 149 (2d Cir. 2018).

[6] To the extent Gross argues that this evidence was used substantively for an impermissible "propensity" purpose, we reject this argument. To support his contention, Gross notes that the government referred to these loans as additional deceitful conduct for the court to consider at sentencing. But the purpose for which the evidence was used at sentencing is irrelevant to the purpose for which it was admitted at trial.

"A constructive amendment occurs when the charge upon which the defendant is tried differs significantly from the charge upon which the grand jury voted." *Id.* at 146. To succeed on such a claim, a defendant must demonstrate that "the proof at trial or the trial court's jury instructions so altered an *essential element* of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *Id.* (internal quotation marks omitted). We have "consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality* to be proven at trial." *United States v. D'Amelio*, 683 F.3d 412, 417 (2d Cir. 2012) (internal quotation marks omitted).

Gross was charged with receiving corrupt payments as an officer of a financial institution with the intent to be influenced in violation of 18 U.S.C. § 215(a)(2), as well as conspiracy to violate § 215(a), to make false statements to the executive branch in violation of 18 U.S.C. § 1001, and to obstruct the examination of a financial institution in violation of 18 U.S.C. § 1517. The conduct set forth in the indictment consists of Gross's agreement with Murgio, Lebedev, and the other Coin.mx agents to transfer control of the credit union in exchange for over

$150,000, including the $120,000 payment that the government later proved came from Kapcharge. The indictment further details Gross's efforts to mislead the NCUA about that transfer of power and about the credit union's financial health.

At the end of the trial, the district court instructed the jury as follows:

> Count One charges Yuri Lebedev and Trevon Gross with conspiring with others, from in or about April 2014 to in or about 2015, to achieve four unlawful objectives in an effort to further the operations of Coin.mx or the Collectables Club: Number one, to make corrupt payments to Trevon Gross with the intent to influence Trevon Gross in connection with the business of HOPE FCU; number two, to have Trevon Gross receive or agree to receive corrupt payments with the intent to be influenced in connection with the business of HOPE FCU; number three, to obstruct an examination of HOPE FCU by the NCUA; and number four, to make false statements to the NCUA in connection with the NCUA's examinations of HOPE FCU.

App'x 3947.

No constructive amendment occurred. The jury instructions described a conspiracy substantially the same as the one charged in the indictment. Moreover, the evidence at trial directly addressed the core of criminality charged in the indictment: Gross's conspiracy with Coin.mx to transfer control of the credit union in exchange for bribes and to evade the NCUA's scrutiny thereafter. The evidence and testimony about Kapcharge merely elaborated on how the

bribery conspiracy was accomplished; namely, that Murgio enlisted Kapcharge to pay the bulk of the bribes in exchange for access to a financial institution through which it could process ACH transactions.[7]

Gross contends, in the alternative, that the evidence about Kapcharge constituted a prejudicial variance from the conduct charged in the indictment. "A variance occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." *Dove*, 884 F.3d at 149 (internal quotation marks omitted). "[R]eversal is only warranted for a variance if the defendant shows both: (1) the existence of a variance, and (2) that substantial prejudice occurred at trial as a result." *Id.* (internal quotation marks omitted).

Gross contends he was prejudiced by the introduction of evidence about Coin.mx's conspiracy to operate an illegal Bitcoin exchange. But this evidence does not constitute a variance because Coin.mx's illegal Bitcoin exchange was charged in the indictment. Gross also argues the evidence about Kapcharge

[7] There was also no constructive amendment as to the misrepresentations to the NCUA. The misrepresentations presented to the jury were well within the allegations of obstruction in the indictment.

prejudiced him due to "unfair surprise" at trial because it involved alleged regulatory violations not identified in the government's bill of particulars. But this was not unfairly and substantially prejudicial. The government disclosed the evidence and exhibits concerning Kapcharge four weeks prior to trial, and much of this proof was the subject of motions in limine.

3. *Witness Intimidation*

Gross next contends that the government violated his right to present witnesses by intimidating other HOPE FCU employees to prevent them from testifying for him.

A group of former HOPE FCU board members and employees retained a single attorney to represent them in matters relating to this case. On March 1, 2017, the district court and counsel discussed which of the former board members Gross wished to call as witnesses. The purpose of that discussion was to determine whether any of those individuals were on the government's list of board members with potential criminal exposure, and thus would need independent representation to ensure counsel did not have conflicts. Gross's counsel asked if a person named Loretta Larkins was on the list. Although counsel for the

government initially indicated that she was, counsel almost immediately corrected this, saying, "[s]orry, I'm getting confused. Bernard Larkins. Loretta Larkins is not a board member."[8] App'x 2390.

The same day, the court ordered a hearing for March 3, 2017, requiring former board members who were potential witnesses to appear in court to consult with court-appointed counsel, and, if necessary, participate in a hearing to resolve whether their counsel had conflicts in representation. Despite the court's order, none of the former board members attended the March 3 hearing or indicated they were willing to testify.

On March 3, 2017, Gross indicated that he intended to call Loretta Larkins as a witness because, as bookkeeper for Hope Cathedral, she could testify about the separation between Gross's personal expenses and church expenses. The government recommended that Larkins would need independent counsel because she may have criminal liability, explaining that if Larkins testified about the church's payments for Gross's personal expenses, the government would cross-examine her on whether she reported these payments on tax returns she prepared

[8] Bernard Larkins was a member of the Board.

for Gross. The district court appointed independent counsel for Loretta Larkins. Ultimately, she did not testify.

To demonstrate a due process violation based on the government's intimidation of witnesses, the defendant must show three elements: (1) "that he was deprived of material and exculpatory evidence that could not be reasonably obtained by other means," (2) "bad faith on the part of the government," and (3) that "the absence of fundamental fairness infected the trial." *United States v. Williams*, 205 F.3d 23, 29 (2d Cir. 2000) (internal quotation marks omitted). The standard of review for such a decision on appeal is clear error. *United States v. Pinto*, 850 F.2d 927, 932 (2d Cir. 1988).

Gross's due process claim is meritless. First, Gross failed to show that Larkins was unable to testify because of government "intimidation," thus depriving him of material and exculpatory evidence. The government's only concern was that she be properly represented by unconflicted counsel. That legitimate concern did not prevent Gross from calling Larkins to testify. Nor does Gross show that the government acted in bad faith. The government's concern about former HOPE FCU board members' and employees' potential

criminal exposure arose in the context of determining whether the attorney for Hope FCU could represent them all without a conflict of interest, and the court order notifying them of the March 3 hearing addressed this concern. Although Gross contends that the government implicitly held the threat of prosecution over the former board members and Larkins to dissuade them from testifying, there is no evidence that the government's concern about their potential criminal exposure was designed to prevent Gross from calling witnesses in his defense.

Gross contends that the government acted in bad faith when it apparently changed its position about Larkins's criminal exposure between March 1 and March 3, 2017. The record does not support any such suggestion. On March 1, the government represented that Larkins was not on the list of board members with potential criminal exposure based on their knowledge of the payments to Hope Cathedral, because Larkins was not a board member. On March 3, the government represented that Larkins may have criminal exposure on a different basis—namely, that her anticipated testimony about Hope Cathedral's payments to Gross could expose her to criminal liability if it did not match the tax forms she had prepared on Gross's behalf.

* * *

Because we find no error in the district court's evidentiary and constitutional rulings, we also reject Gross's contention that the cumulative effect of the court's errors was to deprive him of a fair trial. We affirm both Gross's and Lebedev's convictions.

4. *Gross's Sentence*

Finally, Gross challenges several aspects of his sentence. On November 16, 2017, Gross was sentenced principally to 60 months' imprisonment and three years of supervised release.

a. Appropriateness of Sentencing Enhancements

"We review the district court's interpretations of the Sentencing Guidelines de novo and its related findings of fact for clear error." *United States v. Cain*, 671 F.3d 271, 301 (2d Cir. 2012).

Gross first argues that the district court erred in applying a 4-level leadership enhancement under U.S.S.G. § 3B1.1 for "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). The guidelines "only require that the defendant

be an organizer or leader of one or more of those participants for the section 3B1.1(a) enhancement to be appropriate." *United States v. Si Lu Tian*, 339 F.3d 143, 156 (2d Cir. 2003). Gross contends that the government failed to show that he was an organizer or leader.

At sentencing, the district court concluded that Gross supervised at least one other individual who processed ACH transactions, that he remained the chairman of the credit union even after the Coin.mx board members were elected, that he never relinquished his influence over the credit union, and that he was able to expel the Coin.mx agents from the credit union. Moreover, the court noted that Gross met repeatedly with the NCUA throughout the course of the conspiracy.

These factual findings by the district court are not clearly erroneous. As discussed above, the evidence at trial demonstrated that Gross was essential to the conspiracy to transfer control of the credit union to Coin.mx and to mislead the NCUA about that transfer of power.

Next, Gross contends that the district court erred in applying an enhancement under U.S.S.G. § 2B4.1 for commercial bribery that "substantially jeopardized the safety and soundness of a financial institution." U.S.S.G.

§ 2B4.1(b)(2)(B). A financial institution is considered "substantially jeopardized," if it "became insolvent" or "was placed in substantial jeopardy" of becoming insolvent. U.S.S.G. § 2B4.1 cmt. n.5.

The district court concluded at sentencing that Kapcharge's ACH transactions created a substantial risk of insolvency because, among other reasons, HOPE FCU was severely undercapitalized to support these transactions. This conclusion by the district court is also not clearly erroneous. Indeed, the evidence at trial demonstrated that Gross himself believed HOPE FCU had insufficient capitalization to support the volume of transactions that Kapcharge was processing.

Next, Gross challenges the district court's imposition of a two-level enhancement under U.S.S.G. § 3B1.3 for an abuse of a position of trust by use of a special skill "in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. A position of trust "is held by one who was accorded discretion by the victim and abused a position of fiduciary or quasi-fiduciary status." *United States v. Huggins*, 844 F.3d 118, 124 (2d Cir. 2016).

At sentencing, the district court determined that, among other things, Gross abused his position of trust toward the members of his credit union by allowing bribery payments to influence him to make decisions that jeopardized the credit union's financial health. This finding was not clearly erroneous. As discussed above, Gross's decision to allow Kapcharge to continue processing high volumes of ACH transactions put the credit union at significant risk of insolvency, which could have negatively affected the members.

b. Restitution Order

Finally, Gross challenges the district court's order of restitution requiring him to pay $126,771.82 to the NCUA for the losses it incurred following the liquidation of HOPE FCU. We review orders of restitution for abuse of discretion. *United States v. Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006). "To identify such abuse, we must conclude that a challenged ruling 'rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions.'" *Id.* (quoting *United States v. Gonzalez*, 420 F.3d 111, 120 (2d Cir. 2005)).

The district court ordered restitution pursuant to 18 U.S.C. § 3663

and § 3663A. Gross's sole argument is that the NCUA's losses were caused in large part by conduct postdating the conspiracy for which he was convicted—namely, the credit union's continued processing of ACH transactions for Kapcharge.

At sentencing, in imposing restitution for NCUA's total losses, the district court found that,

> but for the bribery, which involved KapCharge, and pursuant to which Mr. Murgio and the Collectables Club facilitated unsafe volumes of ACH transactions at the credit union, the credit union would not ultimately have adopted a business model relying on fees from ACH transactions, would not have partnered with KapCharge and implemented unsafe ACH processes, would not have ended up in a state where all of its directors were ethically compromised, and would not have adopted a model incurring high and unsustainable operating costs. Additionally, I find that, but for the obstruction and false statement objects, the bribery would have been discovered, which would have both ended unsafe practices earlier and prevented the continuation of Gross and KapCharge's relationship, such discovery could have prevented the losses the NCUA ultimately sustained.

App'x 4059-60. These findings are not clearly erroneous. The district court was well within its discretion to conclude that HOPE FCU's financial difficulties proximately flowed from Coin.mx's bribery of Gross and the related processing of Kapcharge transactions.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgments of the district court.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: July 26, 2019
Docket #: 17-3758cr
Short Title: United States of America v. Murgio (Lebedev)

DC Docket #: 1:15-cr-769-2
DC Court: SDNY (NEW YORK CITY)DC Docket #: 1:15-cr-769-3
DC Court: SDNY (NEW YORK CITY)
DC Judge: Nathan

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
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DC Court: SDNY (NEW YORK CITY)
DC Judge: Nathan

VERIFIED ITEMIZED BILL OF COSTS

Counsel for
_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the
_____

and in favor of
_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____

Signature

APPENDIX B

AO 245C (Rev. 09/17) Amended Judgment in a Criminal Case Sheet 1 (NOTE: Identify Changes with Asterisks (*))

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
TREVON GROSS

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 1:S6 15CR00769-03 (AJN)
USM Number: 77229-054
Kristen M. Santillo & Henry E. Klingerman
Defendant's Attorney

Date of Original Judgment: 10/30/2017
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☑ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☑ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s) _____
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☑ was found guilty on count(s) 3 and 5 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 371	Conspiracy to Commit Financial Institution Bribery, to Make False Statements, and to Obstruct the Examination of a Financial Institution	3/3/2016	3

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

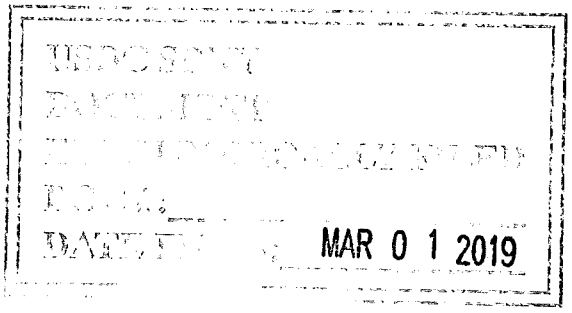
- ☐ The defendant has been found not guilty on count(s) _____
- ☑ Count(s) underlying indictment ☑ is ☐ are dismissed on the motion of the United States.

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

2/26/2019
Date of Imposition of Judgment

Signature of Judge
Hon. Alison J. Nathan U.S.D.J.
Name and Title of Judge

3/1/19
Date



AO 245C (Rev. 09/17) Amended Judgment in a Criminal Case Sheet 1A

(NOTE: Identify Changes with Asterisks (*))

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 215(a)(2)	Receiving Corrupt Payments as an Officer of a Financial Institution With the Intent to be Influenced	3/3/2016	5

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

60 months on count 3 and 5 to run concurrently.

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

That the defendant be consider for placement in the Fort Dix facility or FCI Fairton, New Jersey, If not close to the New Jersey area as possible to help facilitate maintenance of ties with his family.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 2/12/2018 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245C (Rev. 09/17) Amended Judgment in a Criminal Case
Sheet 3 — Supervised Release (NOTE: Identify Changes with Asterisks (*))

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

3 years on count 3 and 5 to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

SPECIAL CONDITIONS OF SUPERVISION

The defendant must provide the probation officer with access to any requested financial information. Any requested financial information specifically includes "any financial information of HOPE Cathedral if Trevon Gross and/or his wife have access to any financial accounts of HOPE Cathedral while the defendant is on supervised release.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

It is recommend that the defendant be supervised in his district of residence.

AO 245C (Rev. 09/17) Amended Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties (NOTE: Identify Changes with Asterisks (*))

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$	$ 12,000.00	$ 126,771.82

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
National Credit Union Administrati	$126,771.82	$126,771.82	

TOTALS	$ 126,771.82	$ 126,771.82

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245C (Rev. 09/17) Amended Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

(NOTE: Identify Changes with Asterisks (*))

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Anthony Murgio;15-cr-00769-01(AJN), 126,771.82. Yuri Lebedev; 15-cr-00769-02(AJN), 126,771.82. Trevon Gross; 15-cr-00769-03(AJN), 126,771.82.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX C

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
TREVON GROSS

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:S6 15CR00769-03 (AJN)

USM Number: 77229-054

Kristen M. Santillo & Henry E. Klingerman
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 3 and 5 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 371	Conspiracy to Commit Financial Institution Bribery, to Make False Statements, and to Obstruct the Examination of a Financial Institution	3/3/2016	3

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) underlying indictment ☐ is ☑ are dismissed on the motion of the United States.

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

10/30/2017
Date of Imposition of Judgment

Signature of Judge

HON. ALISON J. NATHAN, U.S.D.J.
Name and Title of Judge

11/16/17
Date

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 215(a)(2)	Receiving Corrupt Payments as an Officer of a Financial Institution With the Intent to be Influenced	3/3/2016	5

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

60 months on count 3 and 5 to run concurrently.

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

That the defendant be consider for placement in the Fort Dix facility or FCI Fairton, New Jersey, If not close to the New Jersey area as possible to help facilitate maintenance of ties with his family.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☑ before 2 p.m. on 1/5/2018 .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

3 years on count 3 and 5 to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

SPECIAL CONDITIONS OF SUPERVISION

The defendant must provide the probation officer with access to any requested financial information. Any requested financial information specifically includes "any financial information of HOPE Cathedral if Trevon Gross and/or his wife have access to any financial accounts of HOPE Cathedral while the defendant is on supervised release.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

It is recommend that the defendant be supervised in his district of residence.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$	$ 12,000.00	$ 194,293.72

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
National Credit Union Administration	$194,293.72	$194,293.72	

TOTALS	$ 194,293.72	$ 194,293.72

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: TREVON GROSS
CASE NUMBER: 1:S6 15CR00769-03 (AJN)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Anthony Murgio;15-cr-00769-01(AJN), 194,293.72. Yuri Lebedev; 15-cr-00769-02(AJN), 194.293.72. Trevon Gross; 15-cr-00769-03(AJN), 194.293.72.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of October, two thousand nineteen.

United States of America,

Appellee,

v.

Michael J. Murgio, Jose M. Freundt, Ricardo Hill, AKA Rico,

Defendants,

Anthony R. Murgio, AKA Sealed Defendant 1, Yuri Lebedev, Trevon Gross,

Defendants - Appellants.

ORDER

Docket Nos: 17-3691 (L)
17-3758 (Con)
17-3808 (Con)

Appellant, Trevon Gross, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk