No. _____

In the

Supreme Court of the United States

EDWARD SHEVTSOV, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Appendix in Support of the Petition for the Writ of Certiorari

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FILED

MAY 28 2019

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NADIA KUZMENKO, AKA Naida Reyes, Defendant-Appellant.	No. 15-10526 D.C. No. 2:11-cr-00210-JAM-2 MEMORANDUM*
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD SHEVTSOV, Defendant-Appellant.	Nos. 15-10527 16-10122 D.C. No. 2:11-cr-00210-JAM-5
UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 15-10528 D.C. No.

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

v. PETER KUZMENKO, Defendant-Appellant.	2:11-cr-00210-JAM-6

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AARON NEW, Defendant-Appellant.	No. 15-10536 D.C. No. 2:11-cr-00210-JAM-3

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted February 5, 2019
San Francisco, California

Before: THOMAS, Chief Judge, and PAEZ and BERZON, Circuit Judges.

Nadia Kuzmenko, Peter Kuzmenko, Aaron New, and Edward Shevtsov appeal their jury convictions for mail fraud, wire fraud, money laundering, and witness tampering. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the convictions, but remand to the district court for resentencing of Aaron New and reconsideration of an order directing Edward Shevtsov to pay $191,570.05 in

attorney's fees. Because the parties are familiar with the facts and the procedural history, we need not recount it here.

We review the district court's decision to preclude a defendant's proffered defense de novo. *United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017). We review the alleged introduction of false evidence and perjured testimony, unobjected to below, for plain error. *United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011). We review the allegation that the district court constructively amended the indictment, not raised below, for plain error. *United States v. Hartz*, 458 F.3d 1011, 1019 (9th Cir. 2006). We review the district court's method of loss calculation de novo, and the factual finding on the amount of loss for clear error. *United States v. Blitz*, 151 F.3d 1002, 1009 (9th Cir. 1998).

I

The district court did not err when it precluded Appellants from introducing proffered expert testimony at trial. While "evidence of the lending standards generally applied in the mortgage industry" remains relevant on the question of materiality, neither individual victim lender negligence or an individual victim lender's intentional disregard of relevant information are defenses to wire fraud. *Lindsey*, 850 F.3d at 1015-16. Appellants' notice of expert testimony and the supplement filed after the government moved to exclude the testimony reveals that

Appellants' expert intended to testify about the complicity and motives of the particular victim lenders, not about the general practices of mortgage lenders. Under these circumstances, the district court did not err in excluding the expert testimony.

II

The government did not violate Appellants' due process rights in its tender of testimony and evidence. To demonstrate a due process violation under *Napue v. Illinois*, 360 U.S. 264 (1959), Appellants must demonstrate that the testimony or evidence presented "was actually false," that "the prosecution knew or should have known that the testimony [or evidence] was actually false," and "that the false testimony [or evidence] was material." *United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011) (citation omitted). "In assessing materiality under *Napue*, we determine whether there is'any reasonable likelihood that the false testimony could have affected the judgment of the jury[.]" *Id*. (quoting *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc)).

On plain error review, the introduction of the residential loan applications bearing challenged signatures does not offend due process. Federal Rule of Evidence 901(b)(3) affords the jury discretion to make handwriting comparisons, and draw conclusions from those comparisons, "either in the presence or absence

of expert opinion." *United States v. Woodson*, 526 F.2d 550, 551 (9th Cir. 1975). The record reflects that the government repeatedly identified the signature on the forms, but explicitly left the authenticity of the signature for the jury to determine. *United States v. Estrada*, 441 F.2d 873, 877 (9th Cir. 1971) does not compel a different conclusion. *Estrada* concerned whether the prosecution laid the proper foundation for introduction of purported signatures, whereas Appellants here stipulated to the introduction of the loan documents at trial.

Appellants likewise have failed to demonstrate that the testimony of a government witness was actually false. Witness credibility, including whether the witness "lied, or erred in their perceptions or recollections" generally represent questions properly left to the jury. *United States v. Zuno-Arce*, 44 F.3d 1420, 1422 (9th Cir. 1995). Additionally, it remains unlikely that the testimony could have affected the judgment of the jury because the witness was adequately cross-examined by the defense on the allegedly perjurious aspects of her testimony. *Houston*, 648 F.3d at 814.

III

The district court did not constructively amend the indictment when it offered our pattern jury instructions on mail fraud and wire fraud. Actual reliance is not an element of mail fraud or wire fraud. *United States v Blixt*, 548 F.3d 882,

889 (9th Cir. 2008). "'We have repeatedly held that language that describes elements beyond what is required under the statute is surplusage and need not be proved at trial.'" *United States v. Renzi*, 769 F.3d 731, 756 (9th Cir. 2014) (quoting *Bargas v. Burns*, 179 F.3d 1207, 1216 n.6 (9th Cir. 1999)). Therefore, the Grand Jury's singular inclusion of "reliance" in the indictment constituted surplusage, and the court did not err in providing model instructions that did not require the jury to find reliance to convict Appellants of mail fraud and wire fraud.

IV

The district court did not employ an erroneous method to calculate loss for purposes of calculating the Sentencing Guidelines. In mortgage fraud cases, loss is calculated by deducting "any amount recovered or recoverable by the creditor from the sale of the collateral" from "the greater of actual or intended loss, where actual loss is the reasonably foreseeable pecuniary harm from the fraud." *United States v. Morris*, 744 F.3d 1373, 1375 (9th Cir. 2014). This approach "ensure[s] that defendants who fraudulently induce financial institutions to assume the risk of lending to an unqualified borrower are responsible for the natural consequences of their fraudulent conduct." *Id*. (quoting *United States v. Mallory*, 709 F.Supp.2d 455, 459 (E.D. Va. 2010)). "The court need only make a reasonable estimate of the loss. . . based on available information[.]" U.S.S.G. § 2B1.1 cmt. n.3(C). The

district court's calculation subtracted the amounts recovered in foreclosure sales from the amounts originally borrowed. This calculation reflects a reasonable estimate of the natural consequences of Appellants' fraudulent conduct.

V

Because we affirm the district court on the issues above, we need not reach the issue of prejudicial spillover with regard to Nadia Kuzmenko's witness tampering conviction.

VI

The government concedes error where the district court assessed Edward Shevtsov $191,570.05 in legal fees without a contemporaneous finding on Shevtsov's ability to pay. We vacate the order and remand to the district court for consideration of Shevtsov's current ability to pay.

The government also concedes error where the district court used Aaron New's testimony against him to impose a two-level obstruction of justice enhancement based on perjury, without finding that each of the elements of perjury were met. We vacate New's sentence and remand to the district court for resentencing.

AFFIRMED in part, **VACATED** in part, and **REMANDED**.

United States v. Kuzmenko, No. 15-10526+

BERZON, Circuit Judge, concurring in part, and concurring in judgment:

I concur in the memorandum disposition except with regard to one issue: In my view, appellants should have been able to introduce their proffered expert at trial. Denying them the opportunity to do so was, however, harmless error.

United States v. Lindsey holds that the materiality of false statements should be proved or disproved using "evidence of the lending standards generally applied in the mortgage industry" at the time of the alleged wire fraud, not the practices of the specific lenders named as the victims of the alleged scheme. 850 F.3d 1009, 1016 (9th Cir. 2017); *see also id.* at 1017. Although appellants' proffer indicated that their expert would have opined in large part on the practices of First Franklin Financial, the specific lender in the named indictment, the proffer also indicates that their expert would to a degree have opined on "the lending standards generally applied in the mortgage industry." *Id.* at 1016.

I nonetheless agree with the majority that the judgment should be affirmed, but for a different reason—the exclusion of the defendants' expert was harmless. There was overwhelming evidence that the defendants made material misrepresentations when they sought to obtain mortgages from First Franklin. The defendants lied about almost everything on their mortgage applications, including the core information in a mortgage application: the borrower's assets, income, and

intent to occupy the mortgaged property as a primary residence. They also attached forged and doctored documents in support of their applications.

The proffered expert testimony would do nothing to negate the impact of this evidence on the materiality issue. The defendants clearly understood that to get the loans they needed to misrepresent the core mortgage information and submit false documents. And, although the defendant's expert could have testified that mortgage lenders did not care whether the information in loan applications was accurate, nothing in the proffer suggests that he would have testified that mortgage lenders were not influenced by the inclusion of the core mortgage statements, accurate or false, in a loan application and attached documents.

Take, as one example, the testimony elicited by the government that First Franklin would only issue a loan for 100 percent of the value of the property if a borrower represented that she would live in that property. The defendants' expert may have testified that First Franklin and other lenders did not care whether a borrower's representation that she would live in the property was truthful. But nothing in the proffer suggests that he would have testified that First Franklin would issue a loan for 100 percent of the property's value if the borrower did not represent that she would live at the property.

Thus, even if the proffered testimony had been admitted, no jury could reasonably have found that the defendants did not make material

misrepresentations as part of their scheme to defraud. *See Neder v. United States*, 527 U.S. 1, 16 (1999).

then motion joined in by the defendants.

And so, Mr. Chastaine, I'll begin with you. I did also receive from you a filing on January 9th, a supplemental support to the opposition of the government's motion in limine regarding the expert witness.

Okay. Where are you?

MR. CHASTAINE: I'm here, your Honor.

THE COURT: You're blocked. There you go. Okay. I can see you.

MR. CHASTAINE: Your Honor, I believe that we've briefed the case as thoroughly as we can, so we'll just submit it.

THE COURT: Okay. Any other defense lawyers want to be heard on that?

MR. TEDMON: No, your Honor.

MR. GABLE: No, your Honor.

MR. MANNING: No, your Honor.

THE COURT: Okay. For purposes of those motions, let me make a little more complete record in terms of the analysis behind the Court's rulings.

The issue of this lender fraud or complicity is central to several motions in limine, including the government's motion in limine number 3 which sought to exclude evidence of lender fault or negligence and any reference to the Bank of America settlement, government's motion in limine

number 6 which seeks to exclude the testimony of Mr. Partnoy, Frank Partnoy, an expert proffered by the defense, and then government's motion in limine number 7 which seeks to exclude evidence of whether the lenders or their agents have been criminally charged or targeted in civil lawsuits.

The issue is whether the conduct of the lender is relevant to the element of materiality in the charges of mail and wire fraud.

The United States Supreme Court has held that a false statement is material if it has a natural tendency to influence, or was capable of influencing, the decision-making body to which it was addressed. That's Kungys vs. United States, 485 U.S. 759, a 1988 Supreme Court case.

In the Ninth Circuit, the Ninth Circuit has found that "capable of influencing" is an objective test which looks at the intrinsic capabilities of the false statement itself rather than the possibility of the actual attainment of its end. That's United States vs. Peterson, 538 F.3d 1064, a Ninth Circuit case from 2008. Actual reliance by the victim -- in this case it's alleged to be First Franklin Financial -- is irrelevant to the element of materiality. And the court references the parties to United States vs. Blixt, B-L-I-X-T, 548 F.3d 882, a Ninth Circuit case from 2008 in which the Ninth Circuit held and noted that the Supreme Court has confirmed that the government need not prove reliance to

establish materiality.

In the context of mortgage fraud, there is at least one district court -- it is an out-of-circuit court -- that has applied these rules in nearly identical circumstances to this case before the Court today. That's United States vs. Litos, L-I-T-O-S, a case from the Northern District of Indiana. In that case, in Litos, the defendants were charged with mortgage fraud for making material misrepresentations in loan applications submitted to Bank of America. The defendants had hoped to argue at trial that under Bank of America's policies, the allegedly false information on the applications was disregarded, so even if the information was false, it couldn't possibly have influenced the bank's decision to issue the risky loans. In denying a motion to compel the production of documents -- again, similar to what Judge Drozd did in this case before this Court -- the court in Indiana reasoned as follows: Litos can't get a free pass on false statements of a kind that would normally matter in a lending decision, made because they are normally important, and made in order to induce banks to lend money, simply because, unknown to Litos, the statements didn't actually affect the decisions at issue in this case. Put simply, the fact that the fraud was a lot easier to commit than the defendants expected doesn't mean that the defendants didn't intend to commit fraud or that the information wasn't

objectively material with respect to a loan application.

A number of other district courts within the Ninth Circuit have similarly concluded that evidence of lender negligence is inadmissible in a mortgage fraud criminal case. That includes United States vs. Haischer, H-A-I-S-C-H-E-R, a 2012 case from the District of Nevada which excluded evidence of lender negligence as irrelevant to the objective standard used to determine the element of materiality. United States vs. Maximov, M-A-X-I-M-O-V, a 2011 case out of the District of Arizona in which the court noted that the defendant clearly cannot point to loose lending practices of the victim financial institutions to establish a defense to the charges of wire fraud or conspiracy to commit wire fraud and bank fraud and that, to the extent defendant seeks to argue that he is not guilty of wire fraud or of conspiracy to commit wire fraud and bank fraud because the financial institutions did not rely on his false statements, the argument is inappropriate.

In the case before the Court today, the defendants have sought to offer evidence that the lenders were complicit in the fraud through expert testimony from Mr. Frank Partnoy as to the circumstances surrounding the "mortgage meltdown" and evidence as to whether or not the lenders or their agents have been criminally charged or targeted in civil lawsuits. As with the evidence considered in Litos, this information is

not relevant to the objective standard of materiality developed by higher courts. Rather, this evidence would tend to show the absence of actual reliance by the lenders which the Ninth Circuit has expressly held is irrelevant.

For those reasons, the Court has granted the government's motions in limine number 3, 6 and 7 and denied the defense motions with respect to this evidence.

Two other comments. In thinking about this, I keep thinking about -- I can't remember whose brief it was -- the example given of someone leaving a whole pile of cash on the steps of their home and another person coming by and stealing the cash and the fact that the person was negligent somehow in leaving that entire pile of cash on their porch didn't excuse the second act which was the taking of the cash. This sticks in my mild. And in thinking about this a little more, I think it tends to go to really an issue possibly of restitution. And if this were a civil case, it really is more a question of damages as opposed to liability, just, again, thinking about this issue.

I also went back and looked at Judge Karlton's decision to allow similar expert testimony, and I didn't see anything that was said -- and again, I don't have the transcripts, but I looked particularly at the jury instructions, and he didn't give any instruction to the jury -- I found that interesting -- that focused on this

defense or this testimony. He actually gave the same standard instructions that are normally given in a mail fraud and wire fraud case.

And so I'm not certain as to his legal justification for allowing that testimony. Again, I obviously didn't observe that trial. I'm not certain what the exact issues were that were raised in that trial. But in review of that record, I found little, if any, assistance in reaching the decision in this case. And again, each case has to stand on its own facts and the law that the Court believes is applicable to those facts.

So for those reasons, so the record's clear and to make the record complete, the Court has added the comments this morning.

In terms of the other motions in limine, I want to make sure the government, on your documents motion, that there will be certifications as I requested, there will be certifications available so we can get, hopefully, all those documents in.

MS. BICKLEY: I believe if the four defendants are going to be remaining, we'll be stipulating to most of the bank records and escrow records.

THE COURT: Okay.

MS. BICKLEY: So hopefully we won't even need to go to the certifications. Otherwise, we'll got to the

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NADIA KUZMENKO, AKA Naida Reyes, Defendant-Appellant.	No. 15-10526 D.C. No. 2:11-cr-00210-JAM-2 Eastern District of California, Sacramento ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. AARON NEW, Defendant-Appellant.	No. 15-10536 D.C. No. 2:11-cr-00210-JAM-3 Eastern District of California, Sacramento

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD SHEVTSOV, Defendant-Appellant.	Nos. 16-10122 15-10527 D.C. No. 2:11-cr-00210-JAM-5 Eastern District of California, Sacramento

Before: THOMAS, Chief Judge, and PAEZ and BERZON, Circuit Judges.

The panel has voted to deny Nadia Kuzmenko's, Aaron New's and Edward Shevtsov's petitions for rehearing.

The full court has been advised of their petitions for rehearing en banc, and no judge of the court has requested a vote on the petitions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing and the petitions for rehearing en banc are denied.

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December 3, 2014

Lee S. Bickley
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Re: United States v. Kuzmenko, et al.
11 CR 210 JAM
Disclosure of expert

Dear Ms. Bickley:

Pursuant to Fed. R. Crim. P. 16 (b)(1)(C), this letter is to inform you that, subject to Court final authorization,[1] the defense intends to call Frank Partnoy as an expert witness. This disclosure is on behalf of counsel for Vera Kuzmenko, Aaron New, Nadia Kuzmenko, Edward Shevtsov, Rachel Siders and Peter Kuzmenko. Mr. Partnoy's CV is enclosed.

Professor Partnoy will testify as an expert on the mortgage meltdown involving the lending institutions described in the indictment and discovery. Mr. Partnoy is a recognized expert in this field. He is a George E. Barrett Professor of Law and Finance at the University of San Diego. He is a graduate of Yale Law School. Mr. Partnoy worked as a derivatives structurer at Morgan Stanley during the mid-1990's. He is the co-director of the USD's Center for Corporate and Securities Law. He has testified as an expert regarding various aspects of the financial markets and regulations before both houses of Congress and frequently advises regulators and major corporations. He writes for the New York Times and the Financial Times and has appeared on numerous media programs, such as 60 minutes. Mr. Partnoy's publications include *F.I.A.S.C.O.: Blood in the Water on Wall Street* (W.W. Norton and Company, 2009) and *Infectious Greed: How Deceit and Risk Corrupted the Financial Markets* (Public Affairs, 2009.)

[1] As of the writing of this letter, the court has not yet granted approval of the funds to retain this expert. However, it is anticipated that the Court is going to approve such funding.

In summary, Professor Partnoy will testify why the falsified documents alleged to have been used in this case are not material. Professor Partnoy will explain the conduct of the lending institutions as well as the securitization process and what happened in the financial market during the time frame outlined in the indictment. Further, he will explain why the lending institutions would accept loans that were clearly falsified. He will opine that the alleged victims in this indictment (the lending intuitions) were not defrauded. He will opine that, in fact, the lending institutions encouraged this conduct and allowed it to occur. He will opine that without the complicity of the lending institutions this type of conduct would not have been able to occur. He will further discuss the profit incentive that the top executives had at this time and how they reaped huge profits from accepting loans that were clearly falsified. He will discuss the fact that the lending institutions charged premium rates for poor credit loans which increased the institutions profits and the executives' income.

If you have any questions, please be sure to give me a call.

Yours very truly,

//Michael Chastaine
MICHAEL CHASTAINE

MC

Defendant Vera Kuzmenko's Proposed Jury Instruction No. 2

The defendants are charged in Counts Twenty-Four through Twenty-Seven of the Indictment with mail fraud in violation of Section 1341 of Title 18 of the United States Code. In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises to the lender;

Second, the statements made or facts omitted as part of the scheme were material. In determining whether the false statements or facts omitted were material, you must first determine

1. What decision the mortgage lending institutions were making;
2. Then you must determine whether the false statements or facts omitted had a natural tendency to influence, or were capable of influencing the mortgage lending institutions to part with money or property, during the time period between December 2006 and September 2007;

You must consider, among other things the time period in which the statements were made.

Third, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat the lender; and

Fourth, the defendant used, or caused to be used, the mails communication to carry out or attempt to carry out an essential part of the scheme to defraud the lender.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

AUTHORITY:

See Ninth Circuit Model Crim. Jury Instr. 8.121 (modified in accordance with *United States v. Gaudin*, 515 U.S. 506, 509 (1995)).

SACRAMENTO, CALIFORNIA

WEDNESDAY, JANUARY 14, 2015, 1:00 P.M.

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(Jury not present.)

THE COURT: Outside the presence of the jury. Mr. Chastaine, you wanted to raise something?

MR. CHASTAINE: Yes, your Honor. I'm asking leave of the Court to give me a little bit of latitude to cross-examine this witness on the issue of the fact that First Franklin sold off these loans and therefore First Franklin didn't have any skin in the game. And the reason that I'm making that request is I think the Court has acknowledged that --

MS. BICKLEY: Can the witness be excused from this conversation?

THE COURT: If you want. It's up to you.

MS. BICKLEY: Why don't we excuse you.

THE COURT: Go ahead.

(Witness left the courtroom.)

MR. CHASTAINE: The Court had I think all but indicated that this case could have been tried by simply the admission of the documents that were presented in the loan package and the admission of documents that showed those documents were untrue based on the idea that that would impact a reasonable bank. But the government decided that they wanted to not only do that, but they wanted to deal with

reliance. So they have put this witness on who has said on at least a half dozen occasions, and probably more, that certain information was important to them to determine whether the person could pay the loan back to the lender. They've gone over that numerous times. They asked about the significance of this information, which they may or may not have been required to do. Under the Court's ruling, they would not have been required to do. But once they've done that and they've put that at issue and we are of the position that that is, in fact, not the case, and we've provided the Court with our basis for that, I think that -- I am requesting that I be able at least to cross-examine this witness on the fact that First Franklin, within 30 to 90 days, which she's already testified, sold these to an outside lender and then was no longer involved in the loan, and therefore as a result of that, they simply didn't care about that beyond the appraisal which they did.

I've asked a number of questions about that, which the government has objected to and the Court has heretofore sustained, and I'm simply asking for some leave to cross-examine her on that issue.

The other thing that just is somewhat baffling to me is that as the vice president of the legal department, she just doesn't seem to have much information, and I'd like to be able to delve into that as well.

THE COURT: Do you wish to be heard, Ms. Bickley?

MS. BICKLEY: Your Honor, we have not established reliance. We've talked about the significance, but we have never said whether First Franklin relied on any of these representations. We just had an explanation of what the significance could be to a lender in deciding to part with money. In addition, this information is completely outside the scope of our direct. It's also irrelevant and likely to confuse the jury, and we think it should be excluded.

THE COURT: All right. The motion in limine ruling will stand. I'm not going to give you the leeway, Mr. Chastaine, that you're asking. Your objection is noted, but the in limine motion stands. It just does not matter in terms of materiality what happened once this loan closed in terms of what the bank did with it. This isn't a case about securitization. It is a focus on what the defendants did, not what the bank did.

All these arguments, as I said, probably go more to restitution if there is a finding of guilt but not to, again, whether these defendants themselves committed a criminal act. I know the defense disagrees. You've made your record. But I will not give you that leeway.

In terms of her experience and what she knows as someone who works for B of A in the litigation department, again, I don't see the relevance in terms of this case as to what she's

doing now. As to what she did back in 2005 to 2008 when she worked with First Franklin, you can ask her questions about that. She did say she worked in the audit department or she reviewed audits. So I'll give you leeway to ask her about those answers, but we're not getting into securitization or what happened after the fact, folks.

That's the Court's ruling. I allowed that one question. I'm not going to keep allowing questions like that. You know what the motion in limine ruling was, so be careful about questions like were you aware about something that happened in 2008 with respect to First Franklin.

Again, I know the defense disagrees. You've made your record. This trial isn't going to be about what happened after the fact. This is going to focus on these defendants and what they did.

Okay. Let's bring in Ms. Hansen. Let's bring in the jury.

(Jury present.)

THE COURT: All the jurors are present. All parties are present.

Mr. Chastaine, you may continue your cross-examination.

MR. CHASTAINE: Your Honor, we would ask to admit off the government's exhibit list 10E1, 16E, 17E, and 30E1.

MS. BICKLEY: Can you go over those again?

of establishing the guilt of defendant Edward Shevtsov, following all of my other instructions. Therefore, you must consider it only for that limited purpose and not for any other purpose.

You may not consider the statements made by defendant Edward Shevtsov to determine the guilt of any other defendant.

The defendants are charged in Counts 1 through 23 of the indictment with wire fraud, in violation of Section 1343 of Title 18 of the United States Code. In order for a defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly participated in, devised, or intended to devise a scheme or plan to defraud or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property.

Third, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat.

And, fourth, the defendant used or caused to be used an interstate wire communication to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may

consider not only the defendant's words and statements but also the circumstances in which they were used as a whole.

A wiring is caused when one knows that that wire will be used in the ordinary course of business or where one can reasonably foresee such use.

It need not have been reasonably foreseeable to the defendant that the wire communication would be interstate in nature. Rather, it must have been reasonably foreseeable to the defendant that some wire communication would occur in furtherance of the scheme, and an interstate wire communication must have actually occurred in furtherance of the scheme.

The defendants are charged in Counts 24 through 26 of the indictment with mail fraud, in violation of Section 1341 of Title 18 of the United States Code. In order for a defendant to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly participated in, devised, or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property.

residence, occupation, over $19,000 that month in income, assets, rental income, fake rental agreement, fake tax letter from Edward Shevtsov, fake verification of deposit. Nadia Kuzmenko's name is on the fax for the fake verification of deposit. And with respect to that verification of deposit, he testified that it was fake because Vera or Nadia had given him the money to bolster his bank account so that when it was checked, it would seem like it had more money.

Now, where does money from his transaction go? $5,532 goes to Pete's Pool Service. Once again, for a property with no pool.

Now, in this case -- there are a lot of other ones. I'm not going to bore you to death with going over each one of them. Here's the list. Chart 6, you can go to it as a go-to chart. The charged properties on the first page. Some of the other properties are on the next page. And at the bottom is a grand total of the amount of money funded. Over $26 million in loans coming from this scheme.

The other two numbers deal with money going out of escrow to people related to the defendants or to people related to the buyers in this scheme, over $3 million.

So we've talked about the basis of what the scheme is. Now, one of the elements the United States needs to prove is that the false statements or omissions must be material. That means that they had a natural tendency to influence or were

capable of influencing a person to part with money or property. Don't get stuck on the person. Person can mean an entity, like a bank.

Now, were these statements material? You heard Vivian Hansen, the representative of the lender, come in, and she talked about how various things could be significant to First Franklin. For example, primary residence and income. But do you really need her to tell you that? Doesn't common sense tell you that a person is going to pay his or her mortgage first for the house that he sleeps in? That makes sense. If he has an investment property, that's probably going to be the second check he writes. And doesn't it make sense to you that income might matter to a lender, that income was capable of influencing? Because the standard is capable of influencing. It's not did influence.

Would assets truly not be capable of influencing a bank? Would a bank truly not care that Anna Sorokina was making no money whatsoever when she bought a $1 million house at 4119 Tyrone Way? Would a bank truly not care that Nikolay Savchenko was making $27,000 a year when he bought a million dollar house? Would a bank truly not care that Marina Pukhkan made no money when she bought a $1.3 million house? Just ask yourself if the lies as you have seen here were capable of influencing First Franklin and the other banks and make a decision from your own common sense.

And here are a couple more questions to ask yourself. Why lie if the answers to the question were not material? If the individuals buying these houses really could have bought them with no income, why would they have to lie? They weren't lying about the gender. It's not like these lies were about oh, I'm a man when I'm really a woman. These were lies about things like primary residence, income, assets. The things that would matter to a bank.

And then also ask yourself if the lies here were not material, why go to so much work and effort to fake documents if the answers were not material to the bank? If it wasn't capable of influencing, why fake bank statements? Why fake rental agreements? If a bank didn't care, why put money in someone's bank account so that when the bank checked the deposits, it seemed like they had more? If banks really didn't care, why create tax returns? It seems like a lot of work was done to support the representations in those loan applications. And just ask yourself if it didn't matter, why fake it?

Now, we're going to move on to probably what's going to be the heart of this case. I doubt that you're going to hear -- and after I go, all four of the defense attorneys are going to have a chance to speak with you. I doubt you're going to hear from any of those people that there weren't lies in this case.

What you're going to have to be focusing on is whether the