No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NADIA KUZMENKO, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VICKI MAROLT BUCHANAN
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APPENDIX A

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NOT FOR PUBLICATION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).

APPENDIX B

NOT FOR PUBLICATION

FILED

MAY 30 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SVETLANA MARKEVICH, Defendant-Appellant.	No. 15-10457 D.C. No. 2:11-cr-00490-JAM-5 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. IRINA MARKEVICH, Defendant-Appellant.	No. 15-10550 D.C. No. 2:11-cr-00490-JAM-1

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALEX MARKEVICH,	No. 15-10551 D.C. No. 2:11-cr-00490-JAM-2

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

Defendant-Appellant.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DANIIL MARKEVICH, Defendant-Appellant.	No. 15-10552 D.C. No. 2:11-cr-00490-JAM-4

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANATOLIY MARKEVICH, Defendant-Appellant.	No. 15-10558 D.C. No. 2:11-cr-00490-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.

The five defendants in this case each obtained a mortgage loan in 2006 or 2007 from First Franklin Financial Corp., then one of the nation's largest subprime mortgage lenders. Much of the information the defendants told First Franklin

when applying for loans was false. For example, each defendant falsely represented that he or she would live at the house they were purchasing. Each defendant also drastically misrepresented his or her assets and monthly income, and provided First Franklin with fabricated documents to support these misrepresentations. Soon after the loans were originated, the defendants stopped making payments on the loans, and their properties were eventually foreclosed.

In 2011, the government charged the defendants with wire fraud under 18 U.S.C. § 1343. A jury convicted the defendants on all charged counts in May 2015. They raise four issues on appeal.

1. The defendants first argue that the district court improperly excluded proffered testimony by two experts, William Black and Henry Pontell. *United States v. Lindsey*, a decision that post-dates the trial in this case, sets forth a "bright-line rule" for the admission and exclusion of expert testimony regarding the materiality of false statements made during mortgage fraud schemes. 850 F.3d 1009, 1017 (9th Cir. 2017). Under *Lindsey* a defendant cannot offer expert testimony on a specific lender's behavior to disprove the materiality of a defendant's false statements, *id.* at 1018, but a defendant can offer evidence of "lending standards generally present in the industry," *id.*, to prove that a defendant's misstatements were not "capable of influencing" a lender's decision to originate a loan. *Id.* at 1015.

Under this standard, some of the proposed expert testimony should have been admitted. Although the defendants indicated that Black and Pontell would have testified as to First Franklin's lending practices during the period when the defendants obtained their mortgages, the defendants also indicated that Black and Pontell would have testified as to the generally applicable lending standards in the mortgage industry at the time of the indictment. And because the government sought to establish that the defendants' statements were material by showing that they could have influenced First Franklin's decision to fund the loan, Black and Pontell's proffered testimony regarding the First Franklin's lending practices likely should have also been admitted in this case. *See id.* at 1019.

But this error was harmless.[1] The defendants attempted to introduce Black and Pontell's testimony regarding lending standards to show that the defendants' false statements were not material. Black and Pontell would have testified that First Franklin and other subprime lenders knew that borrowers were providing them false representations as part of their mortgage loan applications and made no effort to test the validity of those representations.

This testimony suggests that many lenders did not care whether applicants provided truthful statements about their intent to occupy the mortgaged property,

[1] We need not determine whether the *Chapman* standard for harmless error or a less stringent standard applies, as this error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 23 (1967).

their income, and their assets. But it does not suggest that lenders would fund a loan even if an applicant omitted that misrepresentation. In the world of mortgage financing during the mid-2000s, a borrower's representations could influence a decision to fund a loan even if a lender recognized that those representations could be false, or did not care whether or not they were. In testimony submitted by the defendants, for example, Black stated that where a loan application originally stated the applicant made $16,741 in monthly income, instead representing that the applicant in fact made $4,000 in monthly income would "tend to prevent the funding of the loan." Thus, if the jurors accepted Black and Pontell's understanding of the mortgage financing industry during this time period, the jurors would still have to conclude that the defendants' misrepresentations were material.

2. The defendants also argue that the district court abused its discretion and violated the defendants' Confrontation Clause rights by preventing them from cross-examining Vivian Hansen, a former First Franklin employee called by the government. The government relied on Hansen's testimony to establish that certain representations in a loan application, such as a borrower's assets and income, would influence First Franklin's decision to fund a loan.

The district court abused its discretion and violated the defendants' Confrontation Clause rights by severely restricting the defendants' ability to probe

Hansen on cross-examination. Even though the government elicited extensive testimony from Hansen about First Franklin's lending standards to establish the materiality of the defendants' misrepresentations, the district court prevented the defendants from cross-examining Hansen about how First Franklin actually operated. By "prohibit[ing] *all* inquiry into" a central subject of Hansen's testimony, *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), the district court denied the defendants the opportunity to effectively cross-examine Hansen.

But, as with the district court's erroneous exclusion of expert testimony, this error was harmless. There is simply no doubt that the defendants would not have received the loans originated by First Franklin had they truthfully represented their lack of intent to occupy the purchase properties, and accurately represented their assets and income. Thus, further cross-examination of Hansen could not have changed the jury's determination that the defendants' misrepresentations were material.[2]

3. The defendants also assert that the district court improperly denied a

[2] Take, as one example, the defendants' false representations that they planned to live at the purchased homes. The defendants received mortgages for approximately the full value of these properties. They would not have received such large mortgages had they not misrepresented their intent to occupy the homes. Hansen testified that First Franklin only provided mortgages for the full value of a home to borrowers who attested that they would be living in the home; otherwise, First Franklin would only offer loans up to 80 percent of the property's value. And the defendants have offered no reason to believe any cross examination would have undermined this portion of Hansen's testimony.

motion for a mistrial after Alex Markevich's paralegal spoke to one of the jurors in a courthouse elevator during a lunch break. "'We review alleged jury misconduct independently, in the context of the entire record' but 'accord substantial weight to the trial judge's conclusion as to the effect of alleged juror misconduct.'" *United States v. Stinson*, 647 F.3d 1196, 1216 (9th Cir. 2011) (quoting *United States v. Madrid*, 842 F.2d 1090, 1092 (9th Cir.1988)).

The district court responded to this ex-parte communication appropriately. Because the discussion between the paralegal and the juror was improper and "possibly prejudicial," the court correctly held a hearing to determine whether the exchange was prejudicial to the defendants. *Godoy v. Spearman*, 861 F.3d 956, 967 (9th Cir. 2017) (en banc) (quoting *Mattox v. United States*, 146 U.S. 140, 150 (1892)). After that hearing, the district court properly concluded that there was "no reasonable possibility that the communication . . . influenced the verdict," *id.* at 968, or "materially affected" the deliberations, *United States v. Dutkel*, 192 F.3d 893, 899 (9th Cir. 1999), as each juror stated that he or she could remain impartial and decide the case based on the evidence alone.

4. Defendant Irina Markevich also challenges the district court's decision to admit her joint tax return with her husband, Veniamin Markevich, under the public records exception to the rule against hearsay. The district court abused its discretion by admitting these returns under the public records exception. Tax

returns are not made by a public office; they are made by the person who filed the return or that person's agent. *Greenbaum v. United States*, 80 F.2d 113, 125 (9th Cir. 1935); Fed. R. Evid. 803 advisory committee's note to 2014 amendment.

Although the government argued only that the tax returns were admissible as a public record, the returns were almost certainly admissible as opposing party admissions under Federal Rule of Evidence 801(2). *See Greenbaum*, 80 F.2d at 125. Regardless, if any error occurred, it was harmless, as there was other uncontroverted evidence establishing that Irina Markevich's stated monthly income of $35,000 was wildly inaccurate.

AFFIRMED.

APPENDIX C

NOT FOR PUBLICATION

FILED

JUN 5 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VERA KUZMENKO, Defendant-Appellant.	No. 16-10129 D.C. No. 2:11-cr-00210-JAM-1 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RACHEL SIDERS, Defendant-Appellant.	No. 16-10419 D.C. No. 2:11-cr-00210-JAM-9

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.

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

Vera Kuzmenko and Rachel Siders appeal their convictions for mail and wire fraud. Kuzmenko also appeals her conviction for money laundering and witness tampering. Kuzmenko and Siders argue that the district court violated their constitutional right to present a complete defense by excluding certain expert testimony. They also argue that the district court used an improper methodology in determining the amount of loss at sentencing. Finally, Kuzmenko argues that if her wire fraud and mail fraud convictions are reversed, her witness tampering conviction should also be reversed. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

1. Defendants contend that the district court erroneously excluded their expert testimony regarding lending standards under *United States v. Lindsey*.[1] In *Lindsey*—which was filed during the course of this appeal—we addressed the admissibility of certain evidence in criminal mortgage fraud cases. 850 F.3d 1009, 1011 (9th Cir. 2017). The court concluded that while "evidence of general lending standards in the mortgage industry is admissible to disprove materiality," evidence of individual lender behavior, including evidence of lender negligence and

[1] We review "for abuse of discretion the district court's decision whether to exclude expert testimony." *United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997) (citations omitted). We review de novo "a district court's decision to preclude a defendant's proffered defense." *Lindsey*, 850 F.3d at 1014 (citation omitted).

intentional disregard of relevant information, is not admissible as a defense to mortgage fraud. *Id.* at 1019.

Here, after the government filed a motion in limine to exclude irrelevant expert testimony, Kuzmenko filed a response memorandum "solely to note a continuing objection to exclusion of evidence of lender participation or fault in the charged fraudulent scheme."[2] Kuzmenko proffered the expert report of Professor Shaun P. Martin and noted that Professor Martin would provide expert testimony in support of lender criminal liability as a defense if permitted. Nowhere did Kuzmenko propose to offer evidence of the state of the mortgage industry so that the jury could evaluate materiality. Under these circumstances, the district court did not err. *See Lindsey*, 850 F.3d at 1011–12.

Furthermore, even if the proffer could be understood as encompassing evidence of general lending standards to disprove materiality, any error in excluding the expert testimony was harmless. There was overwhelming evidence that the false statements in the loan applications were material to the lenders'

[2] Kuzmenko preserved this issue for appeal because she objected to the government's motion to exclude expert testimony and proffered proposed testimony. Siders did not preserve this issue for appeal as she filed a statement of non-opposition to the government's motion. Because we conclude the district court did not err, we need not address plain error review. *See United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015).

decision-making process.[3] As part of their scheme, Defendants made extensive misrepresentations on loan applications regarding, inter alia, income, employment, residence, assets, and liabilities. This information was valuable to lenders as they repeatedly asked for it throughout the application process, requested supporting documentation, and hired underwriters to review loan packages and verify information.

Moreover, a First Franklin employee testified to the importance of certain aspects of the loan application including income, employment, assets, liabilities, and primary residence. And, Defendants, who were both experienced in the real estate industry, believed the false statements were material to the lenders' decision-making process. In light of the overwhelming evidence of materiality, any error was harmless. *See Neder v. United States*, 527 U.S. 1, 19 (1999).

2. Defendants argue that district court used an improper methodology in determining the amount of loss under U.S.S.G. § 2B1.1(b)(1).[4] In *United States v. Hymas*, we concluded that the district court correctly calculated loss by "taking the

[3] Materiality is evaluated objectively; the government need not prove actual reliance upon the misrepresentations. *Lindsey*, 850 F.3d at 1014

[4] We review de novo a "district court's interpretation of the Sentencing Guidelines," *United States v. Rivera*, 527 F.3d 891, 908 (9th Cir. 2008) (citation omitted), and review "the district court's factual findings used in sentencing, including the calculation of loss to the victims, for clear error," *United States v. Blitz*, 151 F.3d 1002, 1009 (9th Cir. 1998) (citation omitted).

principal amount of the loan and subtracting any credits from the subsequent sale of the property." 780 F.3d 1285, 1293 (9th Cir. 2015) (citing *United States v. Morris*, 744 F.3d 1373, 1375 (9th Cir. 2014)). We noted that "the district court did not err by considering the losses submitted by successor lenders who had purchased the loans." *Id.* Accordingly, here, the district court correctly used the principal amount of the loan minus the amount of foreclosure to calculate the asserted loss amounts.

Further, we reject Defendants' challenge to the sufficiency of the evidence. The record adequately supports the loss amounts determined by the district court. *See United States v. Zolp*, 479 F.3d 715, 719 (9th Cir. 2007) (citations omitted) (The district court "need not make its loss calculation with absolute precision; rather, it need only make a reasonable estimate of the loss based on the available information.").

3. Kuzmenko argues that if the district court erred in excluding the expert testimony, her entire conviction, including the witness tampering count, should be reversed "because of the spillover effect from the other counts." As we conclude the district court did not err in excluding the expert testimony, we need not address this argument.

AFFIRMED.

APPENDIX D

FILED

OCT 24 2019

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

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.

APPENDIX E

United States District Court
Eastern District of California

UNITED STATES OF AMERICA
v.
NADIA KUZMENKO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: **2:11CR00210 -02**

SCOTT L. TEDMON, ESQ.
Defendant's Attorney

THE DEFENDANT:

[✔] was found guilty on counts 1-6, 15-23, 24-26, AND 33 of the Superseding Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
See next page.			

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[✔] Appeal rights given.

IT IS FURTHER ORDERED that the defendant shall 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.

10/20/2015
Date of Imposition of Judgment

/s/ John A. Mendez
Signature of Judicial Officer

JOHN A. MENDEZ, United States District Judge
Name & Title of Judicial Officer

10/27/2015
Date

CASE NUMBER: 2:11CR00210 -02
DEFENDANT: NADIA KUZMENKO

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 USC 1343	WIRE FRAUD (Class C Felony)	3/6/2007; 9/17/2007	1-6; 15-23
18 USC 1341	MAIL FRAUD (Class C Felony)	12/21/2006	24-26
18 USC 1512(b)(3)	WITNESS TAMPERING (Class C Felony)	6/2010	33

CASE NUMBER: 2:11CR00210 -02
DEFENDANT: NADIA KUZMENKO

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 96 MONTHS ON EACH COUNT, TO RUN CONCURRENT, FOR A TOTAL TERM OF 96 MONTHS.

[] No TSR: Defendant shall cooperate in the collection of DNA.

[✔] The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be incarcerated in a Colorado facility, but only insofar as this accords with security classification and space availability.

[ ] 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 ___ 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 2:00 P.M. on 6/1/2016 .
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.
If no such institution has been designated, to the United States Marshal for this district.

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 U.S. Marshal

CASE NUMBER: 2:11CR00210 -02
DEFENDANT: NADIA KUZMENKO

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 MONTHS ON EACH COUNT, TO RUN CONCURRENT, FOR A TOTAL TERM OF 36 MONTHS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed four (4) drug tests per month.

[✔] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[✔] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✔] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall 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 which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of her person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

2. The defendant shall not dispose of or otherwise dissipate any of her assets until the fine and/or restitution order by this Judgment is paid in full, unless the defendant obtains approval of the Court or the probation officer.

3. The defendant shall provide the probation officer with access to any requested financial information.

4. The defendant shall not open additional lines of credit without the approval of the probation officer.

5. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any anticipated or unexpected financial gains to any unpaid resitution ordered by this judgment.

6. The defendant shall be restricted from employment as a tax preparer or real estate agent.

7. The defendant shall not be self-employed nor shall the defendant be employed by friends, relatives, associates or persons previously known to the defendant, unless approved by the U.S. Probation Officer. The defendant will not accept or begin employment without prior approval by the U.S. Probation Officer and employment shall be subject to continuous review and verification by the U.S. Probation Office. The defendant shall not work for cash and the defendant's employment shall provide regular pay stubs with the appropriate deductions for taxes.

CASE NUMBER: 2:11CR00210 -02
DEFENDANT: NADIA KUZMENKO

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$ 1,900	$ 25,000	$ TBD at hearing

[ ] 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**
TOTALS:	$ ___	$___	

[] 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:

[ ] If incarcerated, payment of the fine is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

[✔] If incarcerated, payment of restitution is due during imprisonment at the rate of not less than $25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

** 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.

CASE NUMBER: 2:11CR00210 -02
DEFENDANT: NADIA KUZMENKO

SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [ ] Lump sum payment of $ __ 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 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:

[ ] 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: