No.

IN THE SUPREME COURT OF THE UNITED STATES

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OLGA PALAMARCHULK

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

_____

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

_____

PETITION FOR WRIT OF CERTIORARI

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Michael B. Bigelow
Attorney at Law
SB No. 65211
1621 McClaren Drive
Carmichael CA 95608
Telephone: (916) 201-8766
Email: LawOffice.mbigelow@gmail.com

QUESTIONS PRESENTED

1. This case raises questions concerning the standard by materiality in a mail fraud case is to be determined. The United States Supreme Court in *Univ. Health Serv. Inc. v. United States ex.re. Escobar*, 136 S. Ct. 1989, 2003-2004, has made it clear that materiality may be determined by evidence of the "likely behavior of the recipient of the alleged misrepresentations." *Escobar*, 136 S. Ct. at 2002. Conversely, the Ninth Circuit Court of Appeals has ruled in this case and in *United States v. Lindsey*, 805 F.3d 1009 (9th Cir. 2017 that evidence of specific lender conduct or behavior is inadmissible to establish materiality.

LIST OF PARTIES

Petitioner, Olga Palamarchuk, is represented by Michael B. Bigelow, Esq., of Carmichael, California.

Respondent, United States of America, is represented by Assistant United States Attorney, Lee Bickley, Esq.

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Petitioner, OLGA PALAMACHUK, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished order of the court of appeals filed November 8, 2019, denying petitioner's appeal is attached here at Appendix A.

JURISDICTION

This petition for certiorari is filed within the 90 day period allowed by Supreme Court Rule 13.1 and Rule 29 and is timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner's principal defense in this mortgage fraud case was that whatever misrepresentations there were, were immaterial to neither the lending industry nor to the originating victim lenders. A single reason predominated: the mortgage industry at the time was total indifference and profound apathy in the face of pervasive borrower falsifications.

The district court construed the defense proffer of expert testimony to include testimony that related individual victim lending practices, their conduct in the face of misrepresentations and, or, intentional disregard of relevant information. Relying on *United States v. Lindsey*, 850 F.3d 1009, 1015–16 (9th Cir. 2017), the district court granted the government's

motion in limine denied the defense expert from testifying, concluding his testimony on the question of materiality would be irrelevant.

On appeal, a Panel of the Ninth Circuit, also citing to its decision in *Lindsey*, 850 F.3d 1009, 1015–16, affirmed the lower court, finding that individual lender conduct is not a defense to mail fraud and thus the expert's testimony would have been irrelevant. Appendix.

In so doing, Ninth Circuit Panel completely ignored the United States Supreme Court's decision in *Universal Health Services Inc. v. United States* ex *rel. Escobar*, 136 S.Ct. 1989 (2016). In that case the Supreme Court addressed the same materiality standard, citing to *Neder v. United States,* 527 U.S. 1 (1999), which also held that materiality may be determined by evidence of the "likely behavior of the recipient of the alleged misrepresentations." *Escobar*, 136 S. Ct. at 2002.

Given the plain language of *Escobar*, because victim lenders are recipients of the misstatements, their conduct

specific lender behavior in light of those misstatements is relevant to question of materiality. Therefore, such testimony is admissible, contrary to the Ninth Circuit's holding in *Lindsey* and in this case that it is not.

Petitioner submits that she has presented a substantial question that that Supreme Court must resolve.

BASIS FOR JURISDICTION IN THE LOWER COURTS

Jurisdiction was conferred upon the district court for the Eastern District of California by 18 U.S.C. 3231 and on the Appellate Court by 28 U.S.C. 1291.

STATEMENT OF THE CASE

On October 20, 2011, a federal grand jury returned a multi-count indictment against Palamarchuk, Bondaruk, Zhiry and Kuzmenko. Count One charged conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349; Count Two charged Petitioner and Bondaruk with making false statements to a bank in violation of 18 U.S.C. § 104, Count Five charged petitioner with a violation of 18 U.S.C. § 1957.

Pretrial, the defendants noticed their intent to

call Frank Partnoy as an expert witness on industry lending standards and practices at the end of the mortgage bubble in 2006. The government moved to exclude the evidence and any defense argument related to specific lender conduct as a consequence of any false statements which had been made. The district court agreed, and thus denied petitioner the opportunity to present her expert as a part of her defense.

On July 13, 2015, the jury returned guilty verdicts on all counts.

On October 22, 2015, the district court sentenced petitioner to 70 months imprisonment.

Petitioner filed a timely notice of appeal. On appeal she argued, *inter, alia*, that on the question of whether the misstatements were material, the district court erred by precluding defense evidence relating to individual victim lending conduct, their practices, negligence and, or, their intentional disregard of relevant information.

A Ninth Circuit Court of Appeal's panel, relying on its earlier decision in *United States v. Lindsey*, 850 F.3d 1009, 1015–16 (9th Cir. 2017), affirmed petitioner's conviction, holding specifically that on the question of materiality, evidence of victim lender conduct in the face of alleged misstatements is irrelevant is irrelevant to prove the statements were immaterial. Appendix

STATEMENT OF FACTS

This case involved a series of real estate loan transactions undertaken at the tail end of the mortgage bubble in late 2006. During that time period Wall Street's insatiable demand for profits generated an unquenchable demand for subprime mortgages. In response, retail lenders greedily placed ever more subprime loans. They convinced those without credit and who could not afford a mortgage at all to get one anyway. Having someone to sell their mortgages to, lenders were no longer concerned about whether a borrower could pay them back. Thus, freed of risk, and

in search of profits themselves, retail lenders used deceitful tactics to convince borrowers to take out mortgages that they couldn't afford. The liar loan, and its variants, became the norm. Traditional indicia of credit worthiness had become irrelevant to the lending decision. The only important thing for the originator-lending bank was to get the mortgage signed, resold, and, once relieved of the debt, be able to collect its profit. Because only facially adequate loan documentation was required, the lender was neither induced, motivated, cheated nor deceived – whatever borrower representations were made, whether right, wrong or somewhere in between, were immaterial. They simply did not matter; the lenders were indifferent to the lies.

The transactions in this case took place during the tail end of a veritable feeding frenzy and appellants were indicted for conspiring to commit mail fraud. As part of the scheme it was alleged that appellants conspired to make misrepresentations on loan

applications about income and other matters relevant to traditional lenders, but irrelevant to the originating banks whose only interest was reselling the mortgages to Wall Street.

At trial, the government presented surfeit evidence to prove materiality and acknowledged its burden to prove materiality.

To defend the charges, appellants sought to show that the lending industry at the time was routinely funding mortgages based on applications that contained falsified and unverified information; that whatever misrepresentations may have been made were immaterial, having no capacity whatsoever to influence the ultimate decision maker. They also attempted to cross-examine government witnesses who testified about the "significance"[1] of lender's questions and borrowers related answers.

[1] In a rather disingenuous bit of sophistry the government asked its lender representative witnesses only if a statement, or document was "significant" to its lending decision, never once asking if it was

Appellants' efforts were repulsed, first when the district court ruled that the testimony of Professor Frank Partnoy, an expert on lending industry practices at the time, was irrelevant, and then disallowed and repeatedly limited cross-examination of witnesses who testified in detail about the "significance" of lender questions.

In *Universal Health Services, Inc. v. United States ex rel. Escobar*, --- U.S. ----, 136 S.Ct. 1989 (2016), the Supreme Court held that "materiality look[s] to the effect on the likely *or actual behavior of the recipient of the alleged misrepresentation*." *Id.* at 2002 (citations and quotations omitted) (emphasis added). Nonetheless, the district court and the Ninth Circuit effectively determined that *Escobar* was inapplicable,[2] that it does not truly stand for the

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material. But, later, in argument to the jury, reverted to, "the false statements made in this case, were *material* to the lenders, four different lenders."

[2] The Ninth Circuit declined to even mention *Escobar* in its memorandum decision upholding the district court's decision.

proposition that evidence of a lender victim's actual behavior or conduct is relevant to the determination of whether an alleged misstatement was or was not material to its lending decision. Instead, both the district court and the Ninth Circuit panel relied on *Lindsey*, 850 F.3d 1009, 1015–16, holding that it is not.

REASONS FOR GRANTING THE WRIT

This petition should be granted to clarify the scope of *Universal Health Services Inc. v. United States* ex *rel. Escobar*, 136 S.Ct. 1989 (2016) and *Neder v. United States,* 527 U.S. 1 (1999), which also held that materiality is determined by evidence of the "likely behavior of the recipient of the alleged misrepresentations." *Escobar*, 136 S. Ct. at 2002. Or, conversely whether the Ninth Circuit Court of Appeals is correct that materiality is not determined by looking to the behavior of the recipient of the misrepresentation.

LAW AND ARGUMENT

I

THE DISTRICT COURT ERRED BY EXCLUDING APPELLANTS' TESTIMONY PROFFERED ON THE ISSUE OF MATERIALITY

A. Introduction

Petitioner's principal defense was that whatever misrepresentations there were, were immaterial to the lending industry as a whole and immaterial to the originating lenders. A single reason predominated: Industry-wide, lenders could have cared less about borrower misrepresentations because the general lending standards in the mortgage industry at the time was total indifference and profound apathy in the face of pervasive borrower falsifications.

Petitioner's expert would have explicated how and why industry standards predisposed a system whereby originating lenders were manifestly unconcerned about the information contained on the loan documents and would knowingly loan money to people they knew could not repay loans, and why misrepresentations on loan

documents were palpably not material.

The government argued, both in its moving papers and at the *in limine* motion, and later on appeal, that since petitioner's expert would have testified, *inter alia*, about particular victim lender's specific conduct in this case, the expert's testimony was irrelevant.

The district court agreed, as did the Ninth Circuit Panel.

B. Applicable Law

Basing its decision on *Lindsey*, 850 F.3d 1009, the Ninth Circuit held that a victim's intentional disregard of relevant information is not a defense to wire fraud and thus evidence of such disregard is not admissible as a defense to mortgage fraud. *See, Id.*, at 1016. And it was on this basis, and on this basis alone, the district court denied petitioner the right to present her defense through her expert witness who would have tended to answer the question of why lenders were indifferent to borrower misrepresentations flesh out their specific lender behavior when faced

with obvious misrepresentations.

But *Escobar*, 136 S. Ct. 1989, 2001, has clearly taken the view that materiality may also be evaluated by considering the decision-maker's actual conduct, and thus, evidence directed toward individual lender behavior is equally relevant. Moreover, the mere fact that a decision-maker requests or requires certain information in connection with a claim, and even says that it relies on such information, is not dispositive of materiality. *Escobar*, 136 S. Ct. 1989, 2002.

Instead, the Supreme Court explained, when evaluating materiality, proof can include evidence "that the defendant knows that the government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement. Conversely, if the government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id.*

2003-2004. Accordingly, had the district court followed *Escobar*, rather than *Lindsey*, petitioner would have been able to present her defense. As it is, she was denied her constitutional right to do so.

CONCLUSION

For all the forgoing reasons, this petition for a writ of certiorari should be granted.

DATED: January 24, 2020 Respectfully submitted,

/s/Michael B. Bigelow
Michael B. Bigelow
Attorney for Petitioner