No. 19-7469

IN THE SUPREME COURT OF THE UNITED STATES

OLGA PALAMARCHUK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in excluding certain expert testimony proffered by petitioner regarding the negligence or complicity of the victim lending institution in this mortgage-fraud case, on the ground that the proffered testimony was not relevant to the materiality of petitioner's misstatements.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

United States v. Palamarchuk, No. 11-cr-450 (Oct. 27, 2015)

United States Court of Appeals (9th Cir.):

United States v. Bondaruk, No. 15-10530 (Dec. 9, 2019)

United States v. Kuzmenko, No. 15-10519 (Dec. 9, 2019)

United States v. Palamarchuk, No. 15-10516 (Dec. 9, 2019)

United States v. Zhiry, No. 17-10344 (Dec. 9, 2019)

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OPINION BELOW

The opinion of the court of appeals is not published in the Federal Reporter but is reprinted at 791 Fed. Appx. 658.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 2019.[1] The petition for a writ of certiorari was filed on January 24, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The court of appeals issued an initial opinion (Pet. App. 1-8) on November 8, 2019. On December 9, 2019, the court denied a petition for rehearing and issued an amended opinion. 791 Fed. Appx. at 660.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of conspiring to commit mail fraud, in violation of 18 U.S.C. 1349; making a false statement to a federally insured financial institution, in violation of 18 U.S.C. 1014; and money laundering, in violation of 18 U.S.C. 1957. Judgment 1-2. She was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. 791 Fed. Appx. 658.

1. In 2006 and 2007, petitioner -- a loan officer for Capital Mortgage Lending Incorporated -- participated in a scheme to fraudulently obtain residential mortgage loans, a refinancing loan, and a home equity line of credit. Presentence Investigation Report (PSR) ¶¶ 5-6. The scheme involved two properties in Antelope, California, both of which went into foreclosure; the lenders lost a total of $492,500. PSR ¶¶ 5, 16.

Petitioner recruited her live-in boyfriend, Pyotr Bondaruk, to act as a straw buyer for the first property. PSR ¶¶ 6-8. The loan applications contained false statements regarding Bondaruk's employment, income, and intent to use the property as his primary residence. PSR ¶ 8. For example, the applications falsely stated that Bondaruk earned $14,120 a month in income when, in fact, his car repair business earned only $2560 in all of 2006, and he never made more than $15,000 a year at his other part-time job. C.A.

Supp. E.R. 233, 753, 1073-1074. Petitioner and Bondaruk also submitted documents falsely stating that Bondaruk paid petitioner $1200 per month in rent. PSR ¶ 8. Petitioner provided Bondaruk with $25,000 to place in his checking account to show sufficient funds for the loan. Ibid. And petitioner forged her boss's signature on the loan application, while falsely representing that her boss had interviewed Bondaruk. Ibid. The lender approved two loans totaling $440,000. Ibid. Petitioner received an $8844 commission on the transactions; as part of the scheme, an acquaintance with whom petitioner had conducted prior straw purchases, Peter Kuzmenko, also received $32,378 for landscaping and pool services at the property that he never actually performed. PSR ¶¶ 8-9, 20, 24.

Petitioner and Bondaruk subsequently submitted loan applications for the purchase of a second property, also in Antelope. PSR ¶ 10. The applications again contained false statements about Bondaruk's finances, and petitioner signed the applications as the loan interviewer using her maiden name to avoid detection. Ibid. The lender approved loans totaling $515,000. Ibid. About a month before the sale, petitioner's niece, Vera Zhiry, had recorded a fraudulent lien against the property for a loan that she had never actually provided. PSR ¶¶ 6, 11. Zhiry received a $100,000 payoff on the false lien, and she gave petitioner at least $40,000 of that money. PSR ¶ 11.

Less than two months after closing on the first property, Bondaruk refinanced the loan on that property, making the same false representations as in the original loan applications and failing to disclose his recent purchase of the second property. PSR ¶ 13. Petitioner again forged her boss's signature as the interviewer. Ibid. The lender approved a $465,000 loan, and petitioner received an $18,875 commission. Ibid. Bondaruk later obtained a $91,000 home equity line of credit on the same property, after making false representations about his employment, income, occupancy, and intended use for the loan. PSR ¶ 14. He withdrew and spent the full amount of the credit line. PSR ¶ 15.

2. In October 2011, a grand jury in the Eastern District of California returned an indictment charging petitioner, Bondaruk, Kuzmenko, and Zhiry with conspiring to commit mail fraud, in violation of 18 U.S.C. 1349. C.A. E.R. 649-657. The indictment also charged petitioner with making a false statement to a federally insured financial institution, in violation of 18 U.S.C. 1014, and with money laundering, in violation of 18 U.S.C. 1957. C.A. E.R. 657, 659.

Before trial, the defendants gave notice of their intent to call Frank Partnoy, then a law professor at the University of San Diego, as a putative "expert on the mortgage meltdown." C.A. E.R. 647. Partnoy did not submit an expert report, but the defendants summarized the testimony they expected him to offer as follows:

> 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 institutions) 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.

Id. at 648.

The government moved to exclude Partnoy’s testimony and to exclude evidence offered to show that the victim financial institutions were negligent in approving the fraudulent loans. C.A. Supp. E.R. 1505-1515, 1519-1531. At a pretrial hearing, the district court granted both motions. Id. at 35, 38-40. The court found that evidence of the lenders’ alleged negligence would be “irrelevant,” explaining that “none of the charges * * * will be impacted by the argument that the lenders were negligent or acted in a fraudulent manner.” Id. at 35. The court further explained that “[w]hether the lenders knew or should have known that the defendants’ statements were false is irrelevant to the contention that the false statements were made to a bank.” Ibid. The court excluded the proposed expert testimony on the same basis. See id. at 38 (“[O]n the issue of the lender’s alleged negligence or

complicit behavior, I've already, as I've indicated, said those are irrelevant[.]"). The court also determined that the defendants "have made no showing as to how [the proposed expert] has reliable knowledge of the practices of the lending institutions actually involved in this particular case." Id. at 39.

The case proceeded to trial. Representatives from the defrauded lenders testified about the importance of obtaining accurate information about borrowers' income, employment, assets, liabilities, and intent to occupy a property. C.A. Supp. E.R. 62-66, 281, 384-394. Defense counsel cross-examined those witnesses about the factors that were important to the lending decisions, the steps that the lenders took to verify information on loan applications, and the lenders' economic incentives to approve loans. See, e.g., id. at 119-122, 131-132, 295-297, 404-417. For the mail fraud conspiracy count, the district court instructed the jury that a statement or omission was "material" if it "had a natural tendency to influence or [was] capable of influencing a person to part with money or property." C.A. E.R. 130.

The jury found petitioner guilty on all three counts. Judgment 1-2. The district court sentenced her to 70 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed petitioner's conviction and sentence in an unpublished memorandum disposition, while vacating in part and remanding with respect to codefendant

Bondaruk's sentence. 791 Fed. Appx. at 663. In pertinent part, the court determined that "[t]he district court did not err when it precluded [the defendants] from introducing proffered expert testimony at trial." Id. at 660. The court of appeals explained that, under its precedent, evidence "'of the lending standards generally applied in the mortgage industry' is relevant to the issue of materiality," but that "neither individual victim lender negligence nor an individual victim lender's intentional disregard of relevant information is a defense to mail fraud." Ibid. (quoting United States v. Lindsey, 850 F.3d 1009, 1016 (9th Cir. 2017)). The court determined that the district court "did not err in excluding the expert testimony" because the proposed expert "intended to testify about the conduct and motives of the victim lenders, not about the standards and general practices of the mortgage industry." Ibid.

ARGUMENT

Petitioner contends (Pet. 14-17) that the district court abused its discretion in excluding her proffered expert testimony about the negligence or complicity of the victim lending institutions in this mortgage-fraud case, after finding that the testimony would be irrelevant because the government was not required to prove that the financial institutions actually relied on her false representations. The court of appeals correctly upheld that discretionary evidentiary determination in an unpublished memorandum disposition, and its decision does not

conflict with any decision of this Court. The Court has recently denied a petition for a writ of certiorari in a case that presented similar issues. See Raza v. United States, 138 S. Ct. 2679 (2018) (No. 17-1314). It should do the same here.[2]

1. The federal mail fraud statute prohibits using the mail for the purpose of executing a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341; see also 18 U.S.C. 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."). In Neder v. United States, 527 U.S. 1 (1999), this Court explained that Congress intended to incorporate into the mail fraud statute the common law requirement of materiality. Id. at 20-25. The Court also observed that the Second Restatement of Torts provides that a matter is material if:

> (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

[2] Similar issues are also presented in three pending petitions for writs of certiorari, arising from a single criminal trial before a different judge in the Eastern District of California: Shevtsov v. United States, No. 19-7361 (filed Jan. 16, 2020); Kuzmenko v. United States, No. 19-7368 (filed Jan. 17, 2020); and New v. United States, No. 19-7729 (filed Feb. 18, 2020). In this case, petitioner proffered testimony from the same putative expert witness whose testimony was also excluded in that separate mortgage-fraud trial. See C.A. Supp. E.R. 37-38.

> (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

Id. at 22 n.5 (quoting Restatement (Second) of Torts § 538(2), at 80 (1977)). And the Court made clear that "[t]he common-law requirements of 'justifiable reliance' and 'damages' * * * plainly have no place in the federal fraud statutes." Id. at 24-25.

Consistent with that understanding, the Ninth Circuit explained in United States v. Lindsey, 850 F.3d 1009 (2017), in the context of a mortgage-fraud case, that a "false statement is material if it objectively had a tendency to influence, or was capable of influencing, a lender to approve a loan," even if the false statement did not in fact "'induc[e] any actual reliance.'" Id. at 1015 (citation omitted); see Neder, 527 U.S. at 25. The court further explained 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." Lindsey, 850 F.3d at 1016. The court emphasized, however, that defendants are not "powerless to challenge the materiality of false statements made in connection with securing mortgages," because, "[a]mong other things, defendants can disprove materiality through evidence of the lending standards generally applied in the mortgage industry." Ibid.

The district court in this case correctly precluded petitioner's proposed expert testimony -- which would have addressed the victim lenders' "alleged negligence or complicit behavior" -- as irrelevant evidence of the absence of actual reliance. C.A. Supp. E.R. 38; see Neder, 527 U.S. at 25 ("Under the mail fraud statute, the government does not have to prove actual reliance upon the defendant's misrepresentations.") (quoting United States v. Stewart, 872 F.2d 957, 960 (10th Cir. 1989)) (brackets omitted). The court of appeals likewise correctly explained that petitioner's putative expert "intended to testify about the conduct and motives of the victim lenders, not about the standards and general practices of the mortgage industry," and that evidence of "individual victim lender negligence" or "an individual victim lender's intentional disregard of relevant information" would not be a defense to mail fraud, which does not require proof of actual reliance. 791 Fed. Appx. at 660 (citing Lindsey, 850 F.3d at 1015-1016).

2. Petitioner contends (Pet. 6-7, 15-17) that the decision below conflicts with this Court's decision in Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016), which petitioner views to have established that evidence of the effect of a false statement on the recipient is always admissible on the issue of materiality. But petitioner misinterprets that decision, which does not support petitioner's

proposed evidentiary rule and which does not conflict with the decision below.

In Universal Health Services, the Court addressed materiality under the False Claims Act, 31 U.S.C. 3729 et seq., which prohibits knowingly presenting "false or fraudulent claim[s]" to the government for payment, 31 U.S.C. 3729(a)(1)(A). That prohibition generally incorporates "the common-law meaning of fraud," Universal Health Servs., 136 S. Ct. at 1999, including a materiality requirement. See also 31 U.S.C. 3729(b)(4) (defining "material" as used elsewhere in the False Claims Act to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property"). And this Court observed that the False Claims Act's materiality standard "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 136 S. Ct. at 2002 (brackets and citation omitted).

The Court did not suggest, however, that evidence of the effect of a false statement on the recipient would be admissible to disprove the objective materiality of the statement in a mail-fraud prosecution. To the contrary, the Court noted that, under the common law of torts, a matter is material in either of "two circumstances: (1) 'if a reasonable man would attach importance to it in determining his choice of action in the transaction'; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter

'in determining his choice of action,' even though a reasonable person would not." Universal Health Servs., 136 S. Ct. at 2002-2003 (quoting Restatement (Second) of Torts § 538) (brackets omitted). A similar disjunctive standard exists in contract law. See id. at 2003 (citing Restatement (Second) of Contracts § 162(2) & cmt. c, at 439, 441 (1981)). Universal Health Services thus confirms that materiality is generally a disjunctive standard, requiring proof that the false statement was capable of influencing either a reasonable decisionmaker or the particular person to whom the statement was directed. Accord Neder, 527 U.S. at 22 n.5.

The decision below is consistent with the disjunctive common law standards discussed in Universal Health Services. Cf. Lindsey, 850 F.3d at 1017 (adopting an approach to proffered expert testimony on lender practices designed to be "faithful to" Universal Health Services). Here, the defense indicated that its proposed expert would testify that the particular lending institutions in this case "were not defrauded" because they "encouraged" and "allowed" falsified documents. C.A. E.R. 648. At most, the expert's testimony might have shown that the victim lenders did not actually rely on petitioner's misstatements. But reliance is not an element of mail fraud. Neder, 527 U.S. at 25. And the materiality inquiry asks whether a misrepresentation is "capable of influencing" either a reasonable decisionmaker or the particular victim. C.A. E.R. 130; see Universal Health Servs., 136 S. Ct. at 2002. The expert's proffered testimony that the

victim lenders "encouraged" and "allowed" falsified documents was irrelevant here because it would not have shown that petitioner's misrepresentations were incapable of influencing a reasonable decisionmaker. The court of appeals' decision was therefore correct and does not warrant further review.[3]

3. In any event, this case would be an unsuitable vehicle in which to address the question petitioner seeks to present. The resolution of that question would be academic here because the district court excluded petitioner's proposed expert witness on a second, alternative ground that petitioner does not challenge. In addition to finding the proffered testimony irrelevant, the court found that petitioner had failed to show that the proposed expert had "reliable knowledge of the practices of the lending institutions actually involved in this particular case." C.A. Supp. E.R. 39; see Fed. R. Evid. 702(b) and (c) (providing that, to be admissible, testimony by an expert witness must be "based on sufficient facts or data" and must be "the product of reliable principles and methods"); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993) ("[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.").

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[3] Petitioner does not allege a conflict in the circuits on the question presented. As explained in the government's brief in opposition in Shevtsov, no conflict exists that would warrant this Court's review. See Br. in Opp. at 20-26, Shevtsov, supra (No. 19-7361) (Apr. 24, 2020).

More broadly, any error in excluding the proffered testimony was harmless because the trial record contained overwhelming evidence of the materiality of petitioner's false statements. Representatives from the victim lenders testified that a borrower's representations about the borrower's income, employment, and intent to use the purchased house as a primary residence were important to lending decisions. C.A. Supp. E.R. 62-66, 281, 384-394. Petitioner's employer, whose name petitioner forged on the loan documents, also testified that a borrower's representations about his or her income and primary residence affected both the risk to the lender and the loan terms that the borrower would receive. Id. at 308-310. And the record demonstrated that the $100,000 lien held by petitioner's niece and the $32,378 payment to Kuzmenko from loan proceeds (for services he never provided) were entirely fraudulent, see PSR ¶¶ 6, 8, 11 -- facts that would be material to any reasonable lender.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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