No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GERTI MUHO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, who was pro se in his criminal trial on federal fraud offenses, timely requested issuance of a subpoena for an essential witness, his treating psychiatrist who supported the theory of defense that petitioner believed his actions in handling assets of an investment company were necessary to prevent wrongful misappropriation by the company. The district court denied the request, with no explanation; no other witness attested to the facts for which the psychiatrist's testimony was sought; and the court of appeals affirmed, offering its own view of the need for the witness, stating that petitioner did "not demonstrate[] specific facts or admissible opinions from this witness that show relevancy and necessity." The question presented is:

Because the deprivation of essential, singular witness testimony supporting an indigent defendant's theory of defense violates the right to compulsory process and a fair trial under the Sixth Amendment and the right against unreasonable discrimination based on financial disability in the criminal justice system, may an appellate court affirm denial of a witness subpoena simply by finding reasons that a district court might have relied on where there is no indication that the district court evaluated discretionary questions of evidentiary admissibility in the first instance?

INTERESTED PARTIES

The caption contains the names of all of the parties interested in the proceedings.

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PETITION FOR WRIT OF CERTIORARI

Gerti Muho respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the published decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 18-11248 on October 22, 2020, *United States v. Muho,* reported at 978 F.3d 1212.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (App. 1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Court of Appeals issued its decision on October 22, 2020. App. 1. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the following constitutional and statutory provisions:

U.S. Const. amend. V (due process clause):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. VI (right to jury trial in criminal cases):

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

> of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner was charged in a multi-count superseding indictment with seven counts of bank fraud in violation of 18 U.S.C. §1344, two counts of wire fraud in violation of 18 U.S.C. § 1343, and seven counts of aggravated identity theft in violation of 18 U.S.C. §1028(a)(1). The case arose from numerous financial transactions arising from a complicated business relationship between the petitioner, an attorney with no prior criminal history, and his previous employer, Fletcher Asset Management, during 2013-2016. Petitioner's defense to charges of obtaining Fletcher-invested funds by fraud was that he lacked criminal intent and was instead trying to investigate Fletcher's wrongdoing and recover losses for investors in funds managed by Fletcher.

Before trial, the petitioner underwent a competency examination at the government's request and with the agreement of his defense counsel. After being found competent, the petitioner was allowed to represent himself in pretrial proceedings and at a jury trial, with the assistance of appointed standby counsel.

The petitioner, who was found indigent for costs, moved under Rule 17(b) of the Federal Rules of Criminal Procedure for a waiver of costs and issuance of subpoenas for eight trial witnesses. The request was granted as to six witnesses. However, the district court denied the request as to two additional witnesses without providing any findings or explanation. The latter witnesses consisted of the petitioner's treating psychiatrist (Dr. Eli Shalenberger) during the period of the charged offenses and a

state court judge (Judge James Vaughn of the Delaware Supreme Court) who had presided over an unrecorded telephonic conference in a court case involving investment funds pertinent to the charges against the petitioner.

In requesting the waiver of costs and issuance of a subpoena as to Dr. Shalenberger, the petitioner set forth specific written reasons for the testimony. Petitioner stated that Dr. Shalenberger was his psychiatrist between 2012 and 2015—the period of the charged offenses—and that

> he needs and expects Dr. Shalenberger to testify that Muho's intentions were not to defraud his hedge funds but to save them from misuse and to comply with the law. This will negate that Defendant perpetrated a fraud scheme and Defendant used proceeds of fraud to engage in monetary transactions. Defendant also expects [D]r. Shalenberger to testify as to Defendant's state of mind from his conversations with Defendant related to all counts of the case. Absent [Dr.] Shalenberger's testimony, the Defendant will not be able to prove or show his defense to the jury of the charged counts in this case.

DE:21:2.

At trial, the petitioner presented three witnesses: the petitioner himself; an attorney who testified he did not remember meeting or corresponding with the petitioner; and a federal law enforcement agent, who testified about two meetings initiated by the petitioner in 2013 that did not culminate in petitioner's becoming retained as a confidential informant. Further, the government presented a witness who testified that the petitioner's conduct was both odd and erratic. Following an 11-day jury trial, the petitioner was found guilty on all counts. At sentencing, the district court imposed a 240-month sentence.

On appeal, the petitioner challenged the deprivation of his ability to call Dr. Shalenberger as a witness critical to his defense at trial. The Eleventh Circuit rejected the petitioner's challenges and affirmed his conviction and sentence in a published decision. App. 1 (*United States v. Muho*, 978 F.3d 1212 (11th Cir. 2020)).

The Eleventh Circuit found, regarding the denial of petitioner's request as to Dr. Shalenberger, that the district court had "provided no rationale, and made no factual findings," and further found that it was permissible for a defendant to seek psychiatric testimony regarding, inter alia, his mental state. App. 10. Despite these findings, the Eleventh Circuit held that, based on its independent review of the record, the petitioner had not made the requisite showing as to "specific facts or admissible opinions" from Dr. Shalenberger, and that the deprivation of the witness's testimony was not an error affecting petitioner's substantial rights. App. 11.

REASONS FOR GRANTING THE PETITION

A criminal defendant has a right to a district court's evaluation of a proffer of evidence for admissibility and relevancy, and the violation of that right, depriving an indigent, *pro se* defendant of process needed to present an essential witness to support the theory of defense, violates the Sixth Amendment rights to compulsory process and a fair trial and the Fifth Amendment right not to be subjected to unreasonable discrimination in the criminal justice system because of financial status.

The Eleventh Circuit's decision, rejecting the petitioner's challenge to the district court's unexplained denial of petitioner's timely motion under Federal Rule of Criminal Procedure 17(b) to waive costs and issue a subpoena for witness testimony regarding the petitioner's lack of criminal intent for the charged offenses, was

premised on the imposition of overly-stringent burdens on the indigent, *pro se* defendant with respect to convincing appellate judges, rather than the district court, of the need for the witness and the impact of the precluded testimony on the jury's verdict. The court of appeals, in providing its perception of the witness's bearing on the defense theory, supplanted the district court's role in exercising its discretion within the parameters of Rule 17(b), impairing petitioner's fundamental Fifth and Sixth Amendment rights to compulsory process, a fair trial, and the right against unreasonable discrimination based on financial disability in the criminal justice system.

Rule 17(b), which governs the issuance of witness subpoenas in criminal cases, directs the court to issue a subpoena at government expense for witnesses requested by the defendant 'upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary for an adequate defense.'" *Id.*

It is well-settled that the district court's discretion with respect to ruling on a motion under Fed. R. Crim. P. 17(b) is "considerably narrowed" by the defendant's Fifth and Sixth Amendment rights. *See United States v. Barker*, 553 F.2d 1013, 1019 (6th Cir. 1977) (the right of an indigent criminal defendant to subpoena witnesses rests not only on Rule 17(b), but also on the Sixth Amendment right to compulsory process ... and on the Fifth Amendment right not to be subjected to disabilities by the criminal justice system because of financial status.")(citing *Bandy v. United States*, 296 F.2d 882, 887–88 (8th Cir. 1961); *Taylor v. United States*, 329 F.2d 384, 386 (5th Cir.1964));

See also United States v. Cohen, 888 F.2d 770, 777 (11th Cir. 1989) (trial court's discretion with regard to admission of evidence does not extend to excluding crucial relevant evidence; exclusion of evidence crucial to defense required new trial). Moreover, the government has the burden to refute the propriety of the defendant's request, once the defendant shows facts relevant to his defense. *See United States v. Hegwood*, 562 F.2d 946, 953 (5th Cir. 1977).

As the Court found in *Washington v. Texas*, 388 U.S. 14 (1967), the Sixth Amendment's Compulsory Process guarantee was violated when the defendant was arbitrarily deprived of "testimony [that] would have been relevant and material, and ... vital to the defense." *Id.* at 16. To do so in the case of a *pro se* defendant, as here, also runs afoul of the accepted principal that greater—not less—leeway is to be afforded *pro se* litigants. *See, e.g., McDonald v. Head Criminal Court Supervisor Officer*, 850 F.2d 121, 124 (2d Cir. 1988).

Moreover, the district court's denial, without affording any explanation, of petitioner's request for critical testimony of his treating psychiatrist during the offense period left the petitioner at a grave disadvantage based solely on his financial disability. *See Smith v. Bennett*, 365 U.S. 708, 710–11 (1961) (recognizing abiding principles that '(t)here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,' and consequently that '(t)he imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under

Law.'") (quoting *Griffin v. Illinois*, 352 U.S. 12, 19 (1956); *Burns v. Ohio*, 360 U.S. 252, 258 (1959)).

As the District of Columbia Circuit Court of Appeals has observed, this Court's decision in *Coppedge v. United States*, 369 U.S. 438 (1962), "makes clear the duty of Federal courts is 'to assure to the greatest degree possible' within the framework of the relevant statutes [for appeals] 'equal treatment for every litigant' before the bar of criminal justice, regardless of financial ability." *Greenwell v. United States*, 317 F.2d 108, 110 n.5 (D.C. Cir. 1963) (quoting *Coppedge*, 369 U.S. at 446–47).

In petitioner's case, neither the district court nor the prosecution ever indicated that Dr. Shalenberger's proffered testimony did not show facts that were relevant to the petitioner's defense of lack of fraudulent intent, or offer any other reason to deny his request. Given the circumscribed nature of the trial court's discretion, the Court of Appeals' effort to remedy on appeal the failure to articulate any reason for the district court's ruling and failure to hold the government to its burden violated petitioner's Fifth and Sixth Amendment rights and improperly supplanted the district court's role with its own. The fact that a court of appeals can address in the first instance issues that were presented to the trial court, but as to which a defendant was deprived of a discretionary ruling by the trial court, does not mean that an appellate court should supplant the trial court's role as first-instance adjudicator on matters committed to its discretion. *See Robb v. Norfolk & W. Ry. Co.*, 122 F.3d 354, 361 (7th Cir. 1997) ("In the absence of an actual exercise of discretion by the trial judge, it would be problematic to hold that there has been an abuse of discretion in this case.").

Cf. Hybert v. The Hearst Corp., 900 F.2d 1040, 1054 (7th Cir. 1990) (appellate court must be careful to avoid supplanting its view of the evidence for that of the jury or the trial judge).

The request for the minimal funds necessary for a subpoena as to Dr. Shalenberger—the defendant's psychiatrist—was based on the testimony's relevance to petitioner's defense of lack of criminal intent, in that he never intended to steal or defraud anyone, that he believed his conduct was authorized, and that the drugs he was prescribed and used contributed to his behavior. Dr. Shalenberger was sought also for relevant testimony regarding the petitioner's treatment, diagnosis, medications prescribed to and the effects of the medication on petitioner, who was not a doctor and thus was unable to offer such testimony. The petitioner's mental state was an issue pretrial when he was sent for a competency evaluation based on the government's motion. And it was at issue at trial, as well, where petitioner's behavior and dress were described by a government witness as erratic and odd. Most critically, Dr. Shalenberger's testimony was needed to support Muho's uncorroborated testimony that he lacked the specific, fraudulent intent required for the offenses and instead intended to help other investors preserve and recover their monies from his employer.

The denial of a subpoena for Dr. Shalenberger was reversible error because it would have allowed singular, noncumulative testimony regarding the petitioner's state of mind, specifically that the petitioner appeared to genuinely believe that his corporate employer was engaged in fraudulent wrongdoing which the petitioner was attempting to rectify appropriately. And the testimony of Dr. Shalenberger would have

placed petitioner's behavior in context, including regarding government testimony about the petitioner's odd and erratic behavior, his diagnosis, medications prescribed to and effects of medication on the petitioner.

Moreover, the testimony sought in petitioner's case would not have been cumulative, where petitioner presented testimony by only three witnesses, an attorney (who testified he did not remember meeting or corresponding with Muho); a law enforcement officer (who testified about 2 meetings initiated by Muho in 2013 that did not culminate in Muho becoming retained as a confidential informant), and petitioner himself—none of whom were able to provide the testimony sought from petitioner's treating psychiatrist.

In concluding otherwise and precluding the indigent, *pro se* petitioner from being able to present singular, factual evidence to support his otherwise uncorroborated testimony regarding his lack of criminal intent, the court of appeals displaced the trial court's requisite exercise of discretion with its own, and further jettisoned the petitioner's core rights to compulsory process and the ability to prepare a defense, and against unreasonable discrimination in the criminal justice system on the basis of financial status, meriting certiorari review. *See Washington v. Texas*, 388 U.S. at 16; *Smith v. Bennett*, 365 U.S. at 710–11.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.

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March 2021

APPENDIX

APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11248

D.C. Docket No. 1:16-cr-20390-BB-1

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

GERTI MUHO,

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 22, 2020)

Before MARTIN and NEWSOM, Circuit Judges, and WATKINS,* District Judge.

* Honorable W. Keith Watkins, United States District Judge for the Middle District of Alabama, sitting by designation.

WATKINS, District Judge:

Gerti Muho was convicted for bank fraud, wire fraud, aggravated identity theft, and money laundering. He was sentenced to 264 months of incarceration. Muho appeals his conviction and the sentence imposed by the district court. After careful review, and with the benefit of oral argument, we affirm the district court as to both the conviction and sentence.

I.

After graduating from law school, Gerti Muho began working for Fletcher Asset Management (FAM), an investment firm. FAM had a number of subsidiary and related entities, including RF Services and Soundview Elite, Ltd. Muho's role granted him access to the personal information of current and former employees and interns of the firms.

In April 2013, Muho resigned from his positions at FAM, Soundview Elite, and other entities. He then used a series of fraudulent documents purporting to re-establish his own authority and, in turn, to take control of FAM's entities using Leveraged Hawk, a shell company that he controlled. Among his many misdeeds, he eventually convinced a bank, HSBC-Monaco, that he had legal authority to execute financial transactions on behalf of Soundview Elite (which he did not)—inducing HSBC-Monaco to wire transfer more than $2 million from Soundview Elite's account to Leveraged Hawk's account with another bank.

Muho was first indicted in May 2016. In September 2016, a grand jury returned a 40-count second superseding indictment charging him with bank fraud, in violation of 18 U.S.C. § 1344 (Counts 1–17); wire fraud, in violation of 18 U.S.C. § 1343 (Counts 18–19); aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1) (Counts 20–37); and money laundering, in violation of 18 U.S.C. § 1957 (Counts 38–40).

Muho's case involved a number of trial and sentencing rulings that are relevant here. First, Muho was represented by a rotating cast of attorneys. While represented by his third attorney, David Harris, he moved for leave to proceed *pro se* with Harris as standby counsel. After a hearing, Muho's request was granted. Second, Muho, proceeding *in forma pauperis*, moved the court to waive costs and issue subpoenas for eight witnesses under Federal Rule of Criminal Procedure 17(b). As relevant to this appeal, the court granted the motion as to all but two witnesses; as to those two, the motion was denied without findings or explanation.

After an eleven-day trial and less than three hours of jury deliberation, Muho was convicted on all charges. He was sentenced to 264 months' imprisonment: 240 months as to Counts 1–19 and 120 months as to counts 38–40, to be served concurrently; 24 months as to Counts 20–37, to be served concurrently with each other and consecutively to the remaining counts; and five years of supervised release. In calculating Muho's sentence, the court applied a two-level

enhancement under U.S.S.G. § 2B1.1(b)(16)(A), which applies if "the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense."

On appeal, Muho raises four issues:

(1) Whether the district court erred in not reinstating counsel for Muho despite his valid invocation of his right to self-representation;

(2) Whether the district court abused its discretion in denying, in part, Muho's Fed. R. Crim. P. 17(b) motion;

(3) Whether the district court erred in applying a two-level sentencing enhancement for deriving more than $1,000,000 from a financial institution where Muho fraudulently induced a bank to transfer funds from another customer's account; and

(4) Whether the district court imposed a sentence that was substantively unreasonable.

II.

A. Failure to Appoint Counsel

Muho argues that the district court erred by allowing him to proceed *pro se*—that is, by not *sua sponte* reinstating counsel for Muho—after he invoked his right to self-representation.

Muho cycled through a number of attorneys before moving for leave to proceed *pro se* with his then-attorney, David Harris, as standby counsel, in January 2017. The government responded by requesting a *Faretta* hearing.[1] There, the court informed Muho that he lacked a constitutional right to standby counsel. Muho reiterated his desire to push forward, confirming that he understood the risks, believed himself capable, and had no diagnoses of mental illness. The court found that Muho had voluntarily, knowingly, and intelligently waived his right to counsel and was competent to proceed *pro se*. Muho did. Although he periodically appeared to reconsider, Muho reaffirmed (and the court recognized, after correctly questioning Muho to confirm) his desire to represent himself on numerous occasions.

On appeal, Muho does not contest that he validly waived his right to counsel. Rather, he argues that he "was deprived of his right to a fair trial when he was allowed to continue to represent himself, even after he vacillated about self-representation . . . ." Muho is wrong.

1. *Faretta* urged that a defendant be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). Our Circuit has understood this language "to mean that ideally a trial court should hold a hearing to advise a criminal defendant on the dangers of proceeding *pro se* and make an explicit finding that he has chosen to represent himself with adequate knowledge of the possible consequences." *Nelson v. Alabama*, 292 F.3d 1291, 1295 (11th Cir. 2002). These hearings are often referred to as "*Faretta* hearings."

The Sixth Amendment to the United States Constitution guarantees familiar rights to a criminal defendant: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." But "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants *to the accused personally* the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975) (emphasis added). Accordingly, a criminal defendant has a "constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." *Id.* at 807.

Faretta protects an individual's right to self-representation despite the possible downsides. "It is the defendant . . . who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–351 (1970) (Brennan, J., concurring)). *Faretta* and subsequent caselaw make clear that, while a court *may* terminate a defendant's self-representation, that action is discretionary. *See, e.g.*, *id.* at 834 n.46 ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."). On the other hand, this Court has explicitly recognized that "a trial court can commit reversible constitutional error . . . by denying a proper assertion of the right to represent

oneself, and thereby violating *Faretta*." *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990).

Put simply, the trial court's failure to override *sua sponte* the defendant's waiver of his right to counsel—where, as here, the waiver's validity was clear, uncontested on appeal, and repeatedly reaffirmed after signs of uncertainty—is due to be affirmed.[2] To find otherwise would contradict a "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Faretta*, 422 U.S. at 817. Muho's arguments to the contrary are unpersuasive. He is not entitled to relief on this issue.

B. Denial of Subpoenas After Rule 17(b) Motion

Muho also argues that the district court abused its discretion in denying, in part, his motion under Federal Rule of Criminal Procedure 17(b). Proceeding *in forma pauperis*, Muho asked the court to waive costs and issue subpoenas for eight witnesses under Rule 17(b). In his motion, Muho explained the relevance of two

2. Typically, review of a waiver of right to counsel would be *de novo*. *See, e.g.*, *United States v. Garey*, 540 F.3d 1253, 1268 (11th Cir. 2008) (noting that whether waiver of counsel was knowing and voluntary is "a mixed question of law and fact which this Court reviews *de novo*"). Here, however, Muho did not raise the issue below, which would ordinarily trigger plain error review. *See, e.g.*, *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005). We have not resolved the appropriate standard in such a context: "No published case in this Circuit explicitly addresses the question, though the mine run of cases apply *de novo* review without discussing whether a defendant formally objected at trial." *United States v. Stanley*, 739 F.3d 633, 644 (11th Cir. 2014). We need not resolve this issue here; under either standard, the district court is due to be affirmed.

of these witnesses—Dr. Eli Shalenberger and Justice James Vaughn of the Delaware Supreme Court—as follows:

> Defendant's third witness is Eli Shalenberger, Defendant's psychiatrist between 2012 and 2015. Defendant needs and expects Mr. Shalenberger to testify that Defendant's intentions were not to defraud his hedge funds but to save them from misuse and to comply with the law. This will negate that Defendant perpetrated a fraud scheme and that Defendant used proceeds of fraud to engage in monetary transactions. Defendant also expects Mr. Shalenberger to testify as to Defendant's state of mind from his conversations with the Defendant relating to all counts of the case. Absent Mr. Shalenberger's testimony, Defendant will not be able to prove or show his defense to the jury of the charged counts in this case.
>
> Defendant's fourth witness is Justice Vaughn of the Delaware Supreme Court. Defendant needs and expects Justice Vaughn to testify about the contents of an unrecorded telephone conference on a case arising from the dispute of control of Defendant's hedge funds that Defendant needs to show and prove [to] the jury his intention not to defraud his hedge funds, engage in a fraud scheme, or engage in monetary transactions from criminal funds, and that will establish and support Defendant's defense regarding his intentions and motives for all charged counts of the case. Without Justice Vaughn, Defendant will not be able to show or prove to the jury that Defendant was the victim set up by actors of said conference in their attempt to wrest away Defendant's control over his hedge funds and that Defendant lacked criminal intent for all the charged counts of the case.

The court granted Muho's motion for all witnesses except these two—as to whom the motion was denied without explanation.

This court reviews the denial of a Rule 17(b) motion for abuse of discretion. *See United States v. Rinchack*, 820 F.2d 1557, 1566 (11th Cir. 1987) ("The grant or denial of a Rule 17(b) motion is committed to the discretion of the district court

and is subject to reversal on appeal only upon a showing of abuse of that discretion."). "A district court abuses its discretion if it fails to apply the proper legal standard or to follow proper procedures in making the determination, or makes findings of fact that are clearly erroneous." *United States v. Izquierdo*, 448 F.3d 1269, 1276 (11th Cir. 2006) (internal quotation marks and citation omitted). If the evidentiary ruling was in error, the harmless error standard applies. *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005). That is, a decision constitutes *reversible* error only if it "ha[s] a 'substantial influence' on the outcome of a case or leave[s] 'grave doubt' as to whether [it] affected the outcome of a case." *United States v. Frazier*, 387 F.3d 1244, 1266 n.20 (11th Cir. 2004) (en banc) (alterations added).

Rule 17(b) allows indigent defendants to subpoena a witness at the government's expense whose presence is a "necessity" to an "adequate defense." But the Rule places the burden on the defendant: "[A] defendant making a Rule 17(b) request bears the burden of articulating specific facts that show the relevancy and necessity of the requested witness's testimony." *Rinchack*, 820 F.2d at 1566. Courts considering a Rule 17(b) request may also consider the materiality, competency, and timeliness of the request. *See id.* "The appellate courts have upheld the refusal of district courts to issue a Rule 17(b) subpoena where the request was untimely, the testimony sought was cumulative, or the defendant failed

to make a satisfactory showing of indigency or necessity." *Id.*; *see also United States v. Link*, 921 F.2d 1523, 1528 (11th Cir. 1991) (summarizing the valid considerations of courts considering a request made under Rule 17(b)).

Muho correctly points out that the district court provided no rationale, and made no factual findings, when it denied the two requests. Findings would have been helpful. But even without such findings, this Court can affirm based on its own review of the record if it finds that the rejection was proper. *See, e.g.*, *United States v. Gill*, 864 F.3d 1279, 1280 (11th Cir. 2017) ("[W]e can affirm the district court's judgment on any ground supported by the record—even if that ground was not considered or advanced in the district court.").

Upon an independent review of the record, the trial court did not err in denying the Justice Vaughn request. Muho's proffer described testimony that involved an unrecorded phone call between unidentified persons about unspecified facts. It further asserted that the phone call would support certain conclusions regarding Muho's intent. But Muho's proffer failed to indicate what *facts* supported the conclusions, and it did not indicate why or how the evidence would be relevant or admissible over hearsay or other objections. These assertions fell short of meeting Muho's burden to articulate "*specific facts* that show the relevancy and necessity of the requested witness's testimony." *Rinchack*, 820 F.2d at 1566 (emphasis added).

Turning to Dr. Shalenberger, Muho stated that this witness would testify that Muho's "intentions were not to defraud his hedge funds" and about his "state of mind . . . relating to all counts of the case"—a possible violation of Federal Rule of Evidence 704(b). Although Rule 704(b) forbids expert testimony on the *ultimate* issue in a case, a defendant may seek testimony from a psychiatrist regarding his diagnosis, the particulars of a mental disease or defect, and his opinion as to a defendant's mental state. *See United States v. Manley*, 893 F.2d 1221, 1223 (11th Cir. 1990).

Again, Muho has not made the requisite showing; he has not demonstrated specific facts or admissible opinions from this witness that show relevancy and necessity. Where a defendant does not meet his required burden, we have upheld denials even when it is alleged that the court failed to make a relevant inquiry. *See, e.g.*, *Rinchack*, 820 F.2d at 1568 ("Although Rinchack argues that the district court erred in not inquiring into what the two men might be expected to testify, the law is crystal clear that the burden of showing necessity and relevance is on the defendant."). The trial court did not abuse its discretion in denying the Shalenberger subpoena.

In any event, any purported error was harmless. Muho was convicted quickly and under a great weight of evidence. After a trial lasting eleven days, the jury deliberated for less than three hours before convicting Muho on all counts.

Further, as he concedes, Muho was able to present the lack-of-intent defense allegedly supported by the two witnesses. And, finally, nothing in the relevant proffer or in Muho's appellate briefing indicates that the testimony, if allowed and admissible, would have substantially improved his case or his chances of a different verdict. Given these facts, "we do not harbor a grave doubt that the jury would have changed its verdict," *Henderson*, 409 F.3d at 1300, if these two witnesses had testified. We find no error that "affect[ed] a substantial right" of Muho. *Frazier*, 387 F.3d at 1266 n.20 (alterations added).

C. Application of Sentencing Enhancement

Muho argues that the district court wrongly applied a two-level enhancement in calculating his sentence. Again—although in a case of first impression—he is incorrect.

The United States Sentencing Guidelines provide a two-level enhancement when "the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense." U.S.S.G. § 2B1.1(b)(16)(A) (2016 ed.).[3] "Gross receipts from the offense" is defined as "all property . . . which is obtained directly or indirectly as a result of [the] offense." *Id.* § 2B1.1 cmt. n.12(B) (2016 ed.); U.S.S.G. § 2B1.1 cmt. n.13(B) (2018 ed.). We review *de*

3. This enhancement is currently codified at U.S.S.G. § 2B1.1(b)(17)(A). Below, for the sake of clarity, the enhancement is referred to as the § 2B1.1(b)(16)(A) enhancement.

novo whether this enhancement applies. *United States v. Rodriguez*, 732 F.3d 1299, 1305 (11th Cir. 2013) (noting that this Court "reviews *de novo* the interpretation and application of the Guidelines").

HSBC-Monaco's status as a financial institution is uncontested, but this Circuit has not explicitly interpreted what it means to "derive[]" receipts from a financial institution in this context. It is no small project. Section 2B1.1 of the Guidelines applies to a broad range of criminal conduct including larceny, embezzlement, and other forms of theft; offenses involving stolen property and property damage or destruction; fraud and deceit; forgery; and offenses involving altered or counterfeit instruments. In turn, these broad categories encompass bank fraud, college scholarship fraud, Ponzi schemes, health care fraud, and a host of other wrongs. Even when limited to property[4] taken from financial institutions, the range of entities is vast.[5] Crafting a standard that applies universally is all but impossible.

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4. We use the term "property" to refer to "gross receipts" as defined in the Guidelines. U.S.S.G. § 2B1.1 cmt. n.12(B) (2016 ed.); U.S.S.G. § 2B1.1 cmt. n.13(B) (2018 ed.).

5. The relevant Guideline defines "financial institution" as "any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. 'Union or employee pension fund' and 'any health, medical, or hospital insurance association,' primarily include large pension funds that serve many persons (*e.g.*, pension funds of large national and

But we are not dealing with the economic universe here. Our factual starting point is a specific spot on the financial map: financial institutions that exercise control over the property of others. Muho argues that the government had to prove that HSBC-Monaco owned, invested, or otherwise had unrestrained discretion to alienate its depositor's funds in order for the enhancement to apply. He asserts that Soundview Elite's status as depositor renders HSBC-Monaco's control over the funds irrelevant. The government counters that, by tricking the bank into transferring Soundview's funds to Muho's account at another bank, Muho stole from a bank account over which he had no authority and over which the bank exercised control.

We hold today that, to trigger the § 2B1.1(b)(16)(A) enhancement, at least in a case involving property held by a financial institution for a depositor, the financial institution (1) must be the *source* of the property, which we interpret as having property rights in the property, and (2) must have been *victimized* by the offense conduct. These two requirements follow straightforwardly from the Guideline's text—that the defendant's gross receipts be (1) "derived . . . from" a financial institution (2) "as a result of the offense." Because of the broad range of conduct to which § 2B1.1 applies, this standard may not be a perfect fit for all

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international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (*e.g.*, medical or hospitalization insurance) to large numbers of persons." U.S.S.G. § 2B1.1 cmt. n.1.

possible scenarios under this Guideline. However, it fits typical banking practices involving funds held by banks for depositors. We will discuss the elements of this standard in turn.

The words "derived . . . from" must be given their plain and ordinary meaning. *United States v. Tham*, 118 F.3d 1501, 1506 (11th Cir. 1997). To "derive" means "[t]o receive, as from a source . . . ; to obtain . . . by transmission." *Webster's New International Dictionary* (2d ed. 1934). Thus, "derived . . . from" calls for identification of the *specific* source of the property. *See United States v. Stinson*, 734 F.3d 180, 184 (3d Cir. 2013) (first citing *Black's Law Dictionary* 444 (6th ed. 1990); and then citing *Webster's Ninth New Collegiate Dictionary* 342 (1986)). "Source" means that the financial institution, before the offense conduct, possesses and controls the property to be filched: the "from" in "derived from." In shorthand, the financial institution "holds" the property. To clarify the source requirement and its application here, some elementary background on banks—and their relationship to the property they hold—is in order. We all use banks in our daily lives, but what exactly does a bank do? As Merriam-Webster defines it, a bank is "an establishment for the custody, loan, exchange, or issue of money, for the extension of credit, and for facilitating the transmission of funds." *Bank*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/bank (last

visited Oct. 22, 2020). Typical banking involves third-party financial arrangements between a bank and its customers—usually depositors or borrowers.

In facilitating those transactions, the bank either takes a non-exclusive property interest in another's (the depositor's) property or holds the property with contractual instructions in the nature of a bailment. Either arrangement gives the bank possession of and a measure of control over the property. *See Shaw v. United States*, 137 S. Ct. 462, 466 (2016). It may be property held in an ordinary deposit account, in trust, or in a safe deposit box or other storage arrangement (say, valuable art), or it may be property that has been foreclosed upon or repossessed and that is awaiting disposition. Thus, money deposited in a bank by a third-party depositor is *property* necessarily involving *property rights*.

Shaw is instructive here because it rejects the argument that Muho now makes—namely, that full ownership is required. *Shaw* involved a prosecution under 18 U.S.C. § 1344 for defrauding a financial institution. Section 1344 makes it unlawful for anyone to "knowingly execute[] . . . a scheme . . . to obtain any of the moneys . . . owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344(2). Shaw wrongfully took money from the deposit account of another depositor at the bank by means of deception of the bank, much the same as Muho's conduct here. Shaw argued that the statute does not cover

schemes to deprive a bank of customer deposits; it only covers the taking of the bank's own property. The Supreme Court disagreed. "The basic flaw in this argument lies in the fact that the bank, too, had *property rights* in Hsu's [the other depositor's] bank account." *Shaw*, 137 S. Ct. at 466 (emphasis added) (alterations added). The Court likened such arrangements to a bailment:

> [A]s bailee, the bank can assert the right to possess the deposited funds against all the world but for the bailor . . . . This right, too, is a property right. . . . Thus, Shaw's scheme to cheat Hsu was also a scheme to deprive the bank of certain bank property rights.
>
> Hence, for purposes of the bank fraud statute, a scheme fraudulently to *obtain* funds from a bank depositor's account normally is also a scheme fraudulently to *obtain* from a "financial institution," at least where, as here, the defendant knew that the bank held the deposits, *the funds obtained came from* the deposit account, and the defendant misled the bank *in order to obtain those funds*.

Id. (emphasis added). We see no difference, in the context of a bank holding deposited funds for a third party, in "obtaining" funds (statute) and "deriving" funds (guideline) from a financial institution. In defining "gross receipts," the Sentencing Commission said as much: "all property . . . which is *obtained* directly or indirectly as a result of [the] offense." § 2B1.1 cmt. n.13(B) (2018 ed.) (emphasis added). In both cases, the source of the funds is the bank.

Importantly, the financial institution as a "source" need not have full ownership of the property. Our perspective recognizes the routine practices of many financial institutions, like banks, which exercise varying degrees of

dominion or control over property that is technically owned by others. Had the Sentencing Commission intended for this enhancement to apply solely to property "owned by" a financial institution, it would likely have employed the terms "owned by" or "belonging to" rather than "derived . . . from." *Cf. Loughrin v. United States*, 573 U.S. 351, 366 n.9 (2014) ("[T]he broad language in § 1344(2) describing the property at issue—'property owned by or under the custody or control of' a bank—appears calculated to avoid entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud.") (citation omitted).

Muho relies on the Third Circuit's decision in *Stinson*. In that case, which did not involve banking at all, but rather investment companies as financial institutions, the Third Circuit held that "[a] financial institution is a source of a defendant's gross receipts if it owns the funds," and it defined ownership as "exercis[ing] dominion and control over the funds and ha[ving] unrestrained discretion to alienate the funds." 734 F.3d at 186. Muho's suggestion—that ownership of the property determines from whom it was "derived"—is inconsistent with the plain language of the Guidelines and with modern banking practices.

The *Stinson* Court, despite its definition of "source," did not resolve the issue consistently with its own definition. There, the fraudster, Stinson, used fictitious marketing materials to induce two legitimate investment firms,

Brentwood and TWM, to market his fraudulent enterprise to investors. Brentwood and TWM were financial institutions, which formed the basis for the guideline application. The key distinction in *Stinson* for our purposes was made by the Court itself. On the record before it, the Court could not say whether the investment firms only advised their clients to invest directly with Stinson, or whether the investment firms "*retained control over the assets of certain clients and invested . . . on their behalf.*" *Id.* at 182 (emphasis added). Stinson argued "the money flowed from individual investors, not financial institutions like Brentwood and TWM." *Id.* at 183. In a telling conclusion, the Court admitted: "[W]e are unable to conclude definitively that the enhancement does not apply because the record is unclear as to whether Brentwood or TWM *invested any money on behalf of their clients. The record as developed on remand may indeed support application of the enhancement.*" *Id.* at 187 (emphasis added).

Thus, *Stinson* did not hold that the financial institution had to be the *sole* owner of the funds obtained by fraud, and it remanded the case for the trial court to resolve the source of some of the funds. If the financial institution controlled or possessed investor funds with the "unrestrained discretion" to invest them on behalf of the investor, *id.* at 186, *Stinson* suggests that the enhancement would apply even in spite of a potential finding on remand that the financial institution

did not actually own the funds in question.[6] Accordingly, *Stinson* does not carry the freight of Muho's argument.

Finally, to establish the financial institution as the source of the derived funds, the sentencing court must find that the relevant property flowed directly or indirectly from the possession or control of the financial institution to the defendant. *See generally United States v. Van Alstyne*, 584 F.3d 803, 819 (9th Cir. 2009) ("Under this language, the only effect on a financial institution that counts is money flowing from a financial institution into the defendant's coffers."). It clearly did so here: HSBC-Monaco transferred $2 million from Soundview Elite's HSBC-Monaco bank account to Leveraged Hawk's Citibank account—as a result of Muho's trickery.

Which brings us logically to the second prong: Because the enhancement applies only if the defendant's derivation of gross receipts from a financial institution is "as a result of the offense," the financial institution must be—as HSBC-Monaco was—victimized by the offense conduct. This element is easily met when the financial institution's own property has been "derived" by a thief or fraudster, such as in larceny or in an "inside" job, like embezzlement, loan fraud,

6. There may be a reason to define "source" differently in the investment realm as opposed to banking, but *Stinson* did not address banking and banks—and we do not address investment houses—as financial institutions.

or theft of bank property by an employee. And it is equally true here: Muho used fraudulent documents to convince the bank that he had control over the account of another, thereby inducing the bank to wire the funds of another to Muho's account without even looking at the third base coach to see if it should swing or not. The bank swung away and made contact. Muho caught the funds and made out of the stadium gates like a bat out of Boston.[7]

This play separates the facts of our case from those in *United States v. Huggins*, 844 F.3d 118 (2d Cir. 2016), a case in which *investors* were duped by a fraudster to deposit funds *into the fraudster's account* from which the fraudster, predictably and legally, withdrew them. The Second Circuit recognized that, though the funds were withdrawn from the bank, the defendant derived property from the investors, not the bank. In a fit of unintended understatement, the Court wrote that "[a]pplying the enhancement to all cases where a defendant merely withdraws money from his own bank account at a financial institution cuts too broadly . . . ." *Id*. at 120–21. Our holding today is consistent with *Huggins*. The financial institution must be a target of the offense conduct.

The Guideline's history supports such a reading. Prior to its amendment, this Guideline enhancement called for a four-level enhancement "[i]f the offense . . . *affected* a financial institution and the defendant derived more than

7. We do not intend to implicate the Red Sox in this fraud.

$1,000,000 in gross receipts from the offense." U.S.S.G. § 2B1.1(b)(6)(B) (2000 ed.) (emphasis added). As the Ninth Circuit pointed out, "under this [previous] language any impact on a financial institution would do." *Van Alstyne*, 584 F.3d at 819. In contrast, the modern Guideline "makes equally clear that the enhancement only applies if gross receipts in excess of $1 million are derived *from* a financial institution." *Id*. (emphasis added). The new Guideline is thus narrower than its predecessor. As the Third Circuit recognized, "mere tangential effects on financial institutions will not support application of the enhancement." *Stinson*, 734 F.3d at 186. "Deriving" gross receipts from a financial institution demands more than being "affected." While a financial institution may be "affected" if it faces heightened exposure to risk or serves as a conduit for transfers of property, property is only "derived" from a financial institution if sufficient indicia of source and victimization are present.[8]

8. District courts are instructed to apply this narrower two-level enhancement *or* to apply a four-level enhancement "[i]f . . . the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees," whichever is *greater*. U.S.S.G. § 2B1.1(b)(16)(B) (2016 ed.); U.S.S.G. § 2B1.1(b)(17)(B) (2018 ed.). One rationale for the enhancement, illustrated by its bifurcation into two- and four-level applications, is that deriving more than $1 million from a financial institution has greater potential spillover effects than deriving more than $1 million from Mr. or Ms. Private Citizen. Taking that much money from a financial institution impacts the financial system because, *e.g.*, it could trigger an FDIC audit or payout, it could endanger the deposits or investments of many innocent people, and it could prompt layoffs or stock selloffs. In a small enough financial institution or a big enough heist, such conduct could jeopardize the institution's solvency, shake public or community confidence in the financial system, and deter individuals from depositing or investing their money.

These factors—source and victimization—are cousins. They both overlap and operate independently to define the scope of the enhancement's application. The source prong requires an intentional, close examination and finding of from whence the property is derived, and our definition clarifies that a defendant may "derive" property of which the financial institution is not the sole owner. The victimization prong acts to cabin the meaning of "source." It ensures that the enhancement does not apply when the defendant derived property that he or she had some lawful right of ownership, possession, or control over, as in *Huggins*. In other words, the offender cannot be the owner of the property, nor have a right to control the property for the enhancement to apply. When it is the offender's own funds that are being held by the bank, he cannot victimize the bank because he can do whatever he wants with his own money.

Nor does the enhancement apply when the bank holds the property, but is not the victim of the heist. An example would be if, as stated above, Muho convinced Soundview Elite to direct HSBC-Monaco to wire Soundview funds from its account into Muho's account. Or a nefarious nephew might unduly influence a rich aunt to go into her safe deposit box and give him cash and jewels in excess of $1 million. In both examples, the enhancement would not apply, but the property was held by a bank which was not the victim.

Furthermore, our holding does not implicate pass-through banking conduct, like ordinary checking transactions and wire transfers.[9] An ordinary wire transfer is simply an electronic check, an instant transfer of funds rather than a multistep transfer of a piece of physical paper representing funds the bank holds for a depositor. An ordinary check takes days to clear in customary banking practices; a wire transfer "clears" almost instantly. But it is the same transaction: Funds pass *from* one bank to another, not *through* a bank. The sending bank possesses the funds initially; the recipient bank possesses them ultimately. In no way would the guideline apply to either ordinary wire transfers or checking transactions, not because of the source requirement, but because of the victimization requirement.

In many cases involving banks, the victimization prong may end up doing most of the work. Muho snookered the system; he tricked the bank with forged documents, inducing the bank to initiate the wire transfer. As it happened, the

9. A wire transfer is a "transfer of funds done electronically across a network of banks . . . around the world." Julia Kagan, What Is a Wire Transfer?, *Investopedia* (May 29, 2020), https://www.investopedia.com/terms/w/wiretransfer.asp (last visited Oct. 22, 2020). "No physical money is transferred between banks or financial institutions when conducting a wire transfer [nor does a check transfer physical money]." *Id.* (brackets added). "Instead, information is passed between banking institutions about the recipient, the bank receiving account number, and the amount transferred." *Id.* "The sending bank sends a message to the recipient's bank with payment instructions through a secure system . . . . The recipient's bank receives all the necessary information from the initiating bank and deposits its own reserve funds into the correct account." *Id.* "The two banking institutions then settle the payment on the back end (after the money has already been deposited) [same as a check]." *Id.* (brackets added).

bank was both the source of the funds and the victim of the offense, and the guideline enhancement was triggered.

To sum up, the Guideline was correctly applied. First, HSBC-Monaco, not Muho, was a source of the derived property. Second, control over the property transferred directly from HSBC-Monaco to Muho. Third, the bank was not just a conduit for a transfer of property that resulted from criminal conduct directed elsewhere; rather, the bank was a victim of Muho's fraud. For purposes of this sentencing enhancement, we hold that Muho derived the property from HSBC-Monaco. The sentencing court did not err in applying the two-level enhancement.

D. Substantive Reasonableness of Sentence

Finally, Muho argues that his sentence was substantively unreasonable. We review a claim that a sentence is substantively unreasonable under "a deferential abuse of discretion standard." *United States v. Early*, 686 F.3d 1219, 1221 (11th Cir. 2012).

In considering the reasonableness of a sentence, the Eleventh Circuit looks to the 18 U.S.C. § 3553(a) factors, "tak[ing] into account the totality of the circumstances." *Gall v. United States*, 552 U.S. 38, 51 (2007). A district court "abuses its considerable discretion" only when it "(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in

considering the proper factors." *United States v. Rosales-Bruno*, 789 F.3d 1249, 1256 (11th Cir. 2015) (quoting *United States v. Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc)). In this context, Muho must show that his sentence "lies outside the range of reasonable sentences dictated by the facts of the case." *Irey*, 612 F.3d at 1190 (internal quotation marks and citation omitted). Perhaps unsurprisingly, sentences are rarely overturned. *See, e.g.*, *id.* at 1191.

Muho's sentence was not substantively unreasonable. Though the Guidelines are not themselves dispositive, sentences that fall within the Guidelines range or that are below the statutory maximum are generally reasonable. *See, e.g.*, *United States v. Hunt*, 941 F.3d 1259, 1264 (11th Cir. 2019) ("We have said that if the sentence imposed is below the statutory maximum . . . that is a factor indicating that the sentence is reasonable."). Muho received a small *downward* variance and his sentence was far below the applicable statutory maximum. Moreover, Muho concedes that the district court considered the relevant factors and "determined that a slight variance was warranted."

Accordingly, having reviewed the substantive reasonableness of Muho's sentence, we find that the district court did not abuse its discretion.

III.

Muho's conviction and sentence are AFFIRMED.

UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
GERTI MUHO

JUDGMENT IN A CRIMINAL CASE

Case Number: **16-20390-CR-BLOOM-001(s)(s)**
USM Number: **89343-053**

Counsel For Defendant: **Thomas William Risavy, Esq.**
Counsel For The United States: **Sean Thomas McLaughlin, AUSA**
Court Reporter: **Yvette Hernandez**

The defendant was found guilty at trial by jury verdict on counts 1 through 40 of the second superseding indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1344	Bank Fraud	5/17/2016	1-17
18 U.S.C. §1343	Wire fraud affecting a financial institution	5/17/2016	18
18 U.S.C. § 1343	Wire fraud	5/17/2016	19
18 U.S.C. § 1028A(a)(1),(b)(2)	Aggravated identity theft	5/17/2016	20-37
18 U.S.C. § 1957(a),(b)(1)	Money laundering	5/17/2016	38
18 U.S.C. § 1957(a), (b)(1)	Money laundering	5/17/2016	39
18 U.S.C. § 1957(a), (b)(1)	Money laundering	5/17/2016	40

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

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

Date of Imposition of Sentence: **3/9/2018**

Beth Bloom
United States District Judge

Date: 3/12/2018

DEFENDANT: **GERTI MUHO**
CASE NUMBER: **16-20390-CR-BLOOM-001(s)(s)**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **264 months**. **This sentence consist of 240 months as to each of Counts 1 through 18; 240 months as to Count 19; 120 months as to each of Counts 38 through 40, to be served concurrently with each other, and 24 months as to each of Counts 20 through 37, to be served concurrently with each other and consecutively to Counts 1 through 19, 38 through 40.**

The court makes the following recommendations to the Bureau of Prisons: That the defendant be designated to a facility in New York or as close to New York as possible.

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

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **GERTI MUHO**
CASE NUMBER: **16-20390-CR-BLOOM-001(s)(s)**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Five (5) years as to each of Counts 1 through 18, Three (3) years as to each of Counts 19, 38 through 40, and One (1) year as to each of Counts 20 through 37, all such terms to run concurrently.**

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 a 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, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, 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 the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents 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 at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
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 of 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; and
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.

DEFENDANT: **GERTI MUHO**
CASE NUMBER: **16-20390-CR-BLOOM-001(s)(s)**

SPECIAL CONDITIONS OF SUPERVISION

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Related Concern Restriction - The defendant shall not own, operate, act as a consultant, be employed in, or participate in any manner, in any related concern during the period of supervision.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Unpaid Restitution, Fines, or Special Assessments - If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: **GERTI MUHO**
CASE NUMBER: **16-20390-CR-BLOOM-001(s)(s)**

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	Total $4,000.00 ($100.00 as to each of counts 1 through 40)	$0.00	$1,733,198.46

The defendant must make restitution (including community restitution) to the attached list of 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
TRAVIS VIOLA C/O R. O'NEILL, ESQ., SHUTTS & BOWEN 200 SOUTH BISCAYNE BOULEVARD, SUITE 4100 MIAMI, FL 33131 UNITED STATES AMOUNT: $176,474.89	$176,474.89	$176,474.89	100%
SALLIE MAE BANK P.O. BOX 3350 WILLMINGTON, DE 19804 UNITED STATES AMOUNT: $15,000.00	$15,000.00	$15,000.00	100%
WELLS FARGO BANK 420 MONTGOMERY STREET SAN FRANCISCO, CA 94163 UNITED STATES AMOUNT: $26,852.04	$26,852.04	$26,852.04	100%
BANK OF AMERICA P.O. BOX 15047 WILMINGTON, DE 19850-5047 UNITED STATS AMOUNT: $565.00	$565.00	$565.00	100%
PNC BANK 500 FIRST AVENUE PITTSBURG, PA 15219 UNITED STATES AMOUNT: $10,746.14	$10,746.14	$10,746.14	100%

SOUNDVIEW ELITE C/O CORRINE BALL, ESQ., JONES DAY 250 VESEY STREET NEW YORK CITY, NY 10281 UNITED STATES AMOUNT$1,491,132.93	$1,491,132.93	$1,491,132.93	100%
AMERICAN EXPRESS 18850 N 56 STREET PHOENIX, AZ 85054 UNITED STATES AMOUNT: $2,667.47	$2,667.47	$2,667.47	100%
CAPITAL ONE C/O CORY WADDY P.O. BOX 85582 RICHMOND, VA 23260 UNITED STATES AMOUNT: $4,950.00	$4,950.00	$4,950.00	100%
BARCLAYS BANK C/O JANET BRANCH, BARCLAYS BANK OF DELAWARE 700 PRIDE CROSSING ROOM113 NEWARD, DE 19713 UNITED STATES AMOUNT: $1,352.86	$1,352.86	$1,352.86	100%
AMSCOT FINANCIAL C/O JESSICA WHEELER 600 N. WESTSHORE BLVD. SUITE 1200 TAMPA, FL 33609 UNITED STATES AMOUNT: $1,552.00	$1,552.00	$1,552.00	100%
SUNTRUST BANK C/O LEGALDEPARTMENT 303 PEACHTREE STREET, N.E. ATLANTA, GA 30308-3201 UNITED STATES AMOUNT: $1,905.13	$1,905.13	$1,905.13	100%

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of $1,733,198.46. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* 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.**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **GERTI MUHO**
CASE NUMBER: **16-20390-CR-BLOOM-001(s)(s)**

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of $4,000.00 due immediately.

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.

This assessment/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Government shall file a preliminary order of forfeiture within 3 days.

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