No. 20-7953

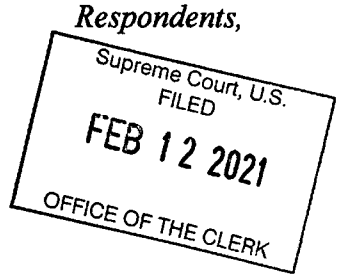
IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

UNITED STATES,

Respondents,



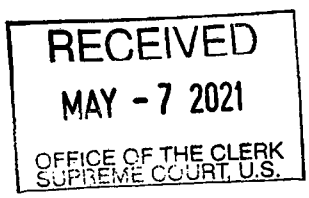
v.

ALENA ALEYKINA,

Petitioner

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

PETITION FOR A WRIT OF CERTIORARI



Alena Aleykina 76433097
Dublin FCI Satellite Camp
5675 8th Street - Camp Parks
Dublin, California 94568
Petitioner Pro Se

QUESTIONS PRESENTED

2. Was it fair to affirm 18 U.S.C. 1519 charge where the integrity of juridical process was harmed by the prosecutor who:

   a. Submitted doctored indictment to change its meaning.

   b. Falsified government expert Jack's testimony as to issues of destruction.

   c. Fabricated government expert Larson's testimony as to issues of destruction.

   d. Actively concealed his possession of multiple copies of allegedly destroyed files.

   e. Proceeded with full knowledge that the evidence lacked criminal intent.

   f. Misrepresented government's notice of charges to affirm on new untried unindicted theory.

   g. Remaining evidence was insufficient to convict on all counts, all in violation of the Fifth and Sixth amendments.

3. Does emptying a computer recycle bin after the IRS obtained copies of the computer constitute a destruction/obstruction under 18 U.S.C. 1519?

4. Do materiality or knowledge of federal investigation need to be shown in 18 U.S.C. 1519 prosecution?

5. When the IRS held that a birth of a child invalidated a state-issued legal separation judgment, thus rendering tax-payer's tax return fraudulent, were taxpayer's reproductive and the Fifth Amendment rights violated?

6. Does the IRS have jurisdiction to judge validity of a divorce/legal separation for a purpose of criminal conviction?

7. Do Article IV Section 1 and Substantive Due process preclude IRS and district court jurisdiction to judge or convict on theory of "sham legal separation" when:

   a. Substantive due process right to marriage and divorce precludes federal government from examining validity of legal separation.

   b. Art. IV Sec. 1 of U.S. Constitution jurisdictionally precludes federal review of state legal separation judgment.

c. Indictment was defective as lacking specificity in notice of "false legal separation" accusation.

d. Prosecutor concealed and actively misstated facts and law.

8. Does trial introduction of compelled uncounseled statement under the premise that "the Fifth Amendment does not protect one from making a false statement" violate the Fifth and Sixth Amendments?

9. Was conviction on element of criminal intent unreliable and fundamentally unfair, in violation of fifth and sixth amendments, when prosecutor:

a. Introduced illegally obtained statements by fabricating admissibility law.

b. Implied guilt from Alena's silence, in violation of self-incrimination clause.

c. Substituted intent element with intent from uncharged crimes

d. Materially misstated knowledge element in closing

e. Provided jury instructions that relieved government from its burden of proof of intent (on count 1 – 6).

f. Conclusory indictment failed to provide fair notice and opportunity to prepare defense.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Alena Aleykina ("Alena") respectfully prays that a writ of certiorari issued to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix C to the petition and is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is unpublished.

JURISDICTION

The jurisdiction is invoked under 28 U. S. C. § 1254. The date on which the United States Court of Appeals decided my case was 09/24/2020. A timely petition for rehearing was denied by the United States Court of Appeals on 11/18/2020, and a copy of the order denying rehearing appears at Appendix C. This petition is timely as it is mailed by 02/16/2021 which is within 90 days of the order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 26 U.S.C. 7703(a)(2) "an individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married."
2. Art. IV Sec.1 and 28 U.S.C. 1738 state "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."
3. Amendment 5: "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 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."
4. Amendment 6: "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."
5. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992).
6. "The petitioners are entitled to respect for their private life," which include "sexual conduct." *Lawrence v. Texas*, 539 U.S. 558 (2003).

STATEMENT OF THE CASE

1. Alena obtained a legal separation judgment from state of California. Alena followed IRS law 26 U.S.C. 7703(a)(2) and filed a tax return as a head of household. IRS agent made ultimate determination that the legal separation was invalid, added separated spouses' income to Alena's tax return, disallowed rental losses (no longer available due to the added income), disallowed head of household status, and successfully argued for criminal conviction under 26 U.S.C. 7206(1). Alena objected to the invalidation of legal separation at trial and appeal. District court overruled. Appellate court affirmed by holding IRS have the authority to determine that the legal separation was obtained "for improper purpose," and if there was an error, it was harmless.

2. After Alena requested an attorney, armed police compelled Alena to make statements regarding issues not under investigation. Government introduced and repeated the compelled statement on the premise that the statements were false and "the Fifth Amendment does not protect someone from making a false statement," all to paint Alena as a liar. Alena objected at trial and appeal (Dkt. 81), both courts overruled the objection without addressing it.

3. After IRS obtained a back-up and "direct imaging copies" of Alena's laptop, Alena placed "some files" in a computer recycle bin and emptied the bin. Government did not disclose to the jury the government's possession of "direct imaging copies." At trial Government argued that the back-up copies were irrelevant to 18 U.S.C. 1519 charge. FOR APPELATE COURT GOV-T PRESENTED DOCTORED INDICTMENT TO AFFIRM ON THEORY OF DESTRUCTION FROM LAPTOP AND NOT THE SERVERS. GOV-T MATERIALLY MISSTATED TESTIMONIES.

4. Government expert Jack testified the files and the laptop recycle bin were <u>not</u> destroyed because nothing was done to them after recycle bin was emptied. Government expert Larson testified that when she attempted to view "some files" shown as deleted in the morning (before Alena was notified of the investigation), there were file she could not "read." Government argued it does not need to show relevance or materiality of those files to convict. Appellate court affirmed on the theory of destruction of "some files" and on a new theory (not presented to the jury) – the theory of alteration.

5. At sentencing prosecutor alleged various stale/uncharged conduct, and district court enhanced Alena's sentence from the guideline level of 10 – 16 months to 87 months. The Ninth Circuit, unlike the First Circuit, held that it is the statute of conviction, not the guideline, that sets the maximum percentage enhancement for Fifth, Sixth Amendments and *Apprendi* purposes. Alena raised this issue on appeal (Dkt. 81). The court overruled.
(Exh. E 88-90)

REASONS FOR GRANTING THE PETITION

ISSUES RAISED ARE THOSE OF PUBLIC CONCERN, JURISDICTION AND FUNDAMENTAL FAIRNESS.

6. If the issues are unaddressed, then IRS is free to convict any adult by arbitrary redefining his/her marital status. IRS will pick and choose only the evidence boosting IRS's position, notwithstanding individual's substantive due process right to be free from government intrusion in matters of family living arrangements, marriage, or reproductive rights (*See* 576 U.S. 644 (2015)).

7. Should an individual choose to have a second child with the same father as that of the first child (instead of from a fertility clinic) – IRS charges it as a high crime. Per IRS, having a child invalidates a legal separation, notwithstanding lack of any law supporting IRS's position. It is notable, if one did file as a married (and not as a head of household), IRS would still convict him/her by saying that he/she violated 26 U.S.C. 7703(a)(2) and there was no substance to that marriage, as there were no joint bank accounts/ vacation/ friends.

8. Currently anyone can be convicted and sentenced to 20 years in penitentiary since government is not required to show neither the materiality, nor your knowledge of federal investigation in 18 U.S.C. 1519 prosecution. All that government needs -- is a tip to open an investigation. An IRS agent, for example, may suspect that your marriage "has no substance" and you are defrauding the government by filing as "married." Now when investigation is open unknown to you, you routinely use your computer and routinely delete "some files." Government will even make copies of all files in your computer and will argue that copies in government possession are irrelevant to 18 U.S.C. 1519. Next, government will take your computer, will see that "some files" were deleted (by you or a computer process) and off to penitentiary you go.

9. It does not matter how irrelevant "some files" were to government investigation. "Materiality would not be an element of §1519" *U.S. v. Powell*, 680 F.3d 350 (4th Cir. 2012). "Materiality is not an express element of 1519." *U.S. v. Moyer*, 674 F.3d 192 (2012).

10. It also does not matter that you had no idea of government investigation - courts hold "18 U.S.C. 1519 does not impose a nexus requirement." *U.S. v. Gray*, 642 F.3d 371 (2011). Lower court hold *Andersen*, 544 U.S. 696 (2005) or *Marinello*, 138 S.Ct 1101 (2018) do not apply to 18 U.S.C. 1519.

11. After armed agents showed up to interrogate you, and you request an attorney, they will continue to interrogate you for a couple more hours. That is because prosecution had invented a

loophole around the Fifth and Sixth Amendments. Government introduces statement at trial by calling them "false statements are excluded from the Fifth and Sixth Amendments protection," and disregard *Michigan v. Tucker*, 417 U.S. 433 (1974).

12. The real trial begins at sentencing. While the First Circuit held "it is the guideline, not the statute of conviction that sets relevant maximum sentence" for sentence enhancement (976 F.3d 63), the Ninth Circuit rules it is the statute of conviction (20 years for §1519) that sets the maximum (593 F.3d at 1017). Thus, U.S. Court of Appeal has so far departed from the accepted and usual course of judicial proceeding as to call for exercise of this Court supervisory power.

I. IT WAS FUNDAMENTALLY UNFAIR TO AFFIRM 18 U.S.C. 1519 CHARGE WHERE THE INTEGRITY OF JURIDICAL PROCESS WAS HARMED BY THE PROSECUTOR WHO:

1. SUBMITTED DOCTORED INDICTMENT TO CHANGE ITS MEANING
2. FALSIFIED GOVERNMENT EXPERT JACK'S TESTIMONY AS TO ISSUES OF DESTRUCTION
3. FABRICATED GOVERNMENT EXPERT LARSON'S TESTIMONY AS TO ISSUES OF DESTRUCTION
4. ACTIVELY CONCEALED HIS POSSESSION OF MULTIPLE COPIES OF ALLEGEDLY DESTROYED FILES.
5. PROCEEDED WITH FULL KNOWLEDGE THAT THE EVIDENCE LACKED CRIMINAL INTENT
6. MISREPRESENTED GOVERNMENT'S NOTICE OF CHARGES TO AFFIRM ON NEW UNTRIED UNINDICTED THEORY
7. REMAINING EVIDENCE WAS INSUFFICIENT TO CONVICT ON ALL COUNTS, ALL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

BACKGROUND

13. As part of employment, Alena was issued a laptop computer for emails, word processing, and such. Alena regularly backed-up the laptop to the employer's server. "We routinely back up" testified Alena's direct supervisor SSA Howard.

14. In summer 2012, Howard referred Alena for TIGTA/IRS criminal investigation alleging "suspicious tax return" (RT 301-302). On December 27, 2012 during covert investigation, government made a "direct imaging" copy of Alena's laptop (Doc. 116, p. 32; E-5). Four days before notifying Alena of the investigation, on April 11, 2013 government ordered Alena to back up her laptop which she did (RT 312, 446). The backup was then backed up to central office and not accessible to modifications by Alena. (RT 454, RT 1027). (Exh. E-71)

15. On April 15, 2013, Alena requested a sick leave to care for her sick 3-year-old child (RT 327). Howard refused the leave and instead sent five criminal agents. Two of the agents attempted to

interview Alena, while her sick child laid motionless with fever. Alena requested an attorney. The two agents left and documented the request in their memo (Gov. Exh. 1009, E-18), just to be immediately replaced with three other agents. who were "waiting outside" (RT 154)(E-40)

16. The three agents entered the residence under the pretense of delivering a "Temporary Restricted Duty letter" ("TRD") (RT 152, A51). One of the agents, SSA Delaney, testified that all they told Alena was what in TRD letter:

17. "SAC Martinez explained to the defendant what being placed on TRD would mean to her. He basically read the letter to her." (RT 155/ 7-11). The TRD letter to Alena did not mention her laptop or prohibited her use of the laptop. (A 51). A's direct supervisor SAA Howard was not present at TRD letter delivery. (RT 152-154).

18. March 17, 2014 (11 months later) SSA Howard emailed to Alena's criminal case agent SA C. Martin. SSA Howard directed SA Martin to "consider recommending potential charges for AA" of "fraud and related activities in connection with computers." (Doc. 57, p.2). Even though Howard was never a computer specialist (RT 286-287), and the government servers were not even accessed by Alena (RT 239-241, RT 253-254, A 38-40), Howard directed SA Martin to "articulate... that the servers were accessed to delete/ alter/ remove information" and that she [Aleykina] was informed of her termination to that access." (Doc. 57, p. 2). (Exh E-4)

19. Under oath, Howard concealed his involvement: "It wasn't my investigation" (RT 328/14) "The Seattle field office conducted the IRS portion of this investigation." (RT 333/4). "I did not exercise any authority of the investigation." (Doc. 56-1, p.3).

20. On October 20, 2016 prosecutors obtained indictment against Alena. Count 9, 18 U.S.C. 1519 stated that "on or about April 15, 2013... Alena Aleykina... knowingly altered, destroyed, covered up, and falsified at least one record, document, or tangible object; that record, document, or tangible object being stored on government issued computer **AND** government servers; with intend to impede, obstruct, and influence the investigation." (Doc. 7, p. 8). (Exh E-1)

21. Central to the trial and appeal of 18-1519 charge was whether Alena in fact destroyed a document located on [both] Alena's computer **AND** servers with intent to obstruct federal investigation within the meaning of the statute.

22. On 08/28/2019 prosecutor filed objection to Alena's appeal of 18-1519 conviction (Dkt. No. 40). To obtain a favorable ruling, prosecutor made a series of calculated misstatements and omissions.

1. Prosecutors submitted doctored indictment to change its meaning.

23. The prosecutor submitted doctored indictment by replacing word "**and**" with "**or**". That word replacement gave the indictment an opposite meaning, changing it:

- From alleged deletion of backed up file[1] (see "document stored on [both] computer **and** government servers", Doc. 7, p. 8)(E·1)
- To alleged deletion of some different, not backed up but a local document on laptop (see "document stored on [either] computer **or** government servers", Dkt. No 40, at 26)(E·3). "See *Connecticut*, 482 F.3d 1091 (9th Cir. 2007) (finding fraud on the court where party photocopied records in a way to support misleading date calculation.)" 2020 U.S. Dist. Lexis 25240.

24. On the unaltered version prosecutor could not prove 18-1519 violation:

25. The Ninth Circuit held: "In order to secure a conviction [18 U.S.C. §1519], the Government was required to prove that [defendant] actually destroyed or concealed 'electronic records and documents.'" *U.S. v. Katakis*, 800 F.3d 1017 (9th Cir. 2015). "Destroy – to put out of existence." Merriam-Webster dictionary.

26. When a document remains on government severs, it is not destroyed (nor it is altered, concealed, etc.)[2] See RT 245: "Q: "Bert" was not deleted, correct? Jack: I think there was a copy on the server."[3]

27. Government expert Jack testified there was NO evidence of either accessing the government servers by Alena, nor of document destruction (or alteration, concealment, etc.) (RT 240-241).[4] Un-accessed files could not be destroyed (or altered, concealed etc.).[2] (E·71)(E42;49)

28. Destruction from servers was integral part of the indictment that could not be proven.

29. Prosecutor made calculated alteration to the indictment so that he could trick the court into affirming on his new theory of destruction/alteration from laptop computer instead. Prosecutor proceeded with full understanding of the impropriety involved.

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[1] The alteration had also deprived Alena of notice of charges and right not to be tried on unindicted charges, all in violation of Fifth and Sixth amendments.

[2] On April 11, 2013 government ordered Alena to back up her laptop which she did (RT 312, 446). The backup was then backed up to central office and not accessible to modifications by Alena. (RT 454, RT 1027).

[3] "There were personal photos, personal files [in Bert.zip]." (RT 242).(E·42)

[4] On direct exam expert Jack told the jury that a computer program "windows explorer or similar program was started up, and it reached out and touched all these different folders, some on the server." (RT 216). On cross-exam Jack said "No, no, I am saying that the program [not Alena] would have, whatever it was, went out there" (RT 240) in an attempt to read "ini" files on government server. (RT 240-241).

2. Prosecutor falsified government expert Jack's testimony as to issues of destruction.

30. The prosecutor falsified testimony of government expert jack by misrepresenting laptop files as destroyed when Jack said they were not.

31. Unaltered testimony of expert Jack completely discredited prosecutor's case. Jack testified the files on the laptop could neither be destroyed by "Disk defragmenter" program, nor by copying "Loheit" file. See RT 223: "Would Disk Defragmenter on this computer have helped eliminate already deleted files? Jack: No... this was a solid state drive, and Disk Defragmenter was... deactivated." See RT 248: "Jack: There was no defrag that actually occurred." (Ehx E 43,44)(E 50)

32. Jack testified that because emptying recycle bin was the last action taken, the files had not been destroyed. Jack testified "Loheit" file was copied at 4:54 (See RT 228, Gov. Exh. 260B, pg. 19, line 726) which is before the recycle bin was emptied at 5:32 (See RT 232-233; Gov. Exh. 260B, p 23). (E·51) Files are not destroyable when they are in the recycle bin. (RT 234) (Ehx E·45, 46, 47)

33. When prosecutor asked "If you delete to the recycle bin, is the file at this point in a stage where the computer would write over it if you copied Loheit a million times?" Jack answered: "No. Because it is still in the recycle bin. It's still available to recover." (RT 234)(E·48).

34. Prosecutor clarified that "Had the order been different, and the recycle bin were cleared, then Loheit copied 141 times" "it could have overwritten some files" (RT 234). But the order had NOT been different and this line of questioning was misconduct. Questions must not assume facts not in evidence.*

35. In altered indictment, the order of emptying recycle bin was determinative of whether files were destroyed, and prosecutor misrepresented that order:[5]

36. Contrary to trial evidence, prosecutor misrepresented the recycle bin was emptied first, not last. "She placed files in the computer recycle bin and then emptied it... She copied the same file again and again... to overwrite deleted files. And she tried running Disk Defragmenter." (Dkt. No. 40, p. 28)(E·93) "Aleykina destroyed these files when she deleted them and took the other steps described above." (Dkt. No. 40, p. 31)(E·96). "And Aleykina concealed files on the computer by moving them to the recycle bin, emptying the bin, and taking the steps described above." (Dkt. No. 40, p. 32).(E·97)

37. Prosecutor presented this material misstatement with full understanding that emptying of the recycle bin was the last action, not first. (RT 232-233) (E·46-47). For this reason [testified Jack] the files could not be destroyed (RT 234) (E·48).

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[5] In unaltered indictment this falsification would not indicate Alena's guilt from destruction as copies of files were still located on government servers.

* "Experts may be asked hypothetical questions.. but such questions must not require the expert to assume facts that are not in evidence" Stinson, 647 F3d 1196 9c, 2011.

38. At district court prosecutor said, "The defendant's use of disk defragmenter and trying to copy "Loheit" 200,141 times, but she did successfully delete from the laptop many, many, many, many files." (RT. 875-876). (E·66)

39. Prosecutor made this statement with full understanding that disk defragmenter was not run. (ER 223, 248) and the files were not actually destroyed (RT 234) (E 43,44,50),(E48)

40. Without misstatements of Jack's testimony, "Government in this case presented no theory at all how [files] were destroyed. Instead, government invited the jury to do what *Nevils* (598 F.3d at 1167) forbids: engage in mere speculation on critical elements of proof." *U.S. v. Katakis*, 800 F.3d 1017 (9th Cir. 2015). "Misstating the evidence from trial is a particularly prejudicial form of misconduct, because it distorts the information the jury is to rely on in reaching a verdict" 762 F3d 933, 9c, cts 477 us 168, 181-2, 1986

41. As a result of these misrepresentations, prosecutor made trial and appellate courts unaware participants of his improprieties, resulting in denial of motion for acquittal and affirmance of conviction.

3. Prosecutor fabricated government expert Larson's testimony as to issues of destruction.

42. The prosecutor fabricated testimony of government expert Larson and used it as confirming destruction of "some files", when Larson did not make such testimony.

43. After Jack testified that the files in the recycle bin were not destroyed, Larson made passing comment: "There's dc1 through – up through 359 listed as showing that files were deleted on 4-15. So, I use FTK. FTK was able to identify that those files were deleted, and I attempted to view them. All of the rest of the dc sequential number files were either – they were unreadable. They just looked like random characteristics. They came up blank." (RT 443-444). (Exh. E 54-56)

Larson said she could not view DC 359 (RT 443-444), but also said she did recover it. (RT 391-393). (E 53) Larson did not tell who, or what, or how deleted those DC 1 - 359 files. Larson did not testify if the files were ever not blank or that it was Aleykina and not computer process or network administrator who deleted those files. "Arguments made in passing and not supported by citations to the record or to the case authority are generally deemed waived" GRAT 610 F3d 1148, 1166, 9c, 2020

44. Larson presented no evidence to support her comment, even if she intended to testify to destruction. If she made an argument, it was waived as unsupported by record.

45. Prosecutor appeared to refer to government exhibit 304 as supportive of Larson's misstated testimony (RT 442). But there is nothing in exhibit 304 about destruction (or alteration). Exhibit 304 is merely summarizing sending and receiving emails. (E13)

46. Prosecutor's 'expert' notice did not say Larson or anyone else would testify about destruction, alteration, or concealment of "many files" that "government [allegedly] never recovered." (E 20-22)

47. Prosecutor repeatedly misstated Larson's (and Jack's) testimony by representing Larson's statement of not being able to view some unidentified files (RT 443-444) as "never recovered." See Dkt. No. 40, p. 29 "Many files that Aleykina deleted were never recovered in readable form, despite government efforts." See. Dkt. No.40, p. 35.: "Aleykina destroyed, altered, and concealed dozens of others [files] – many of which the government never recovered in a readable format." (E-94, 99)

48. In fact, Larson said she did not investigate files beyond Bert.zip file: "All of the files that we – I was asked to review came from DC395.zip.[6] (RT 391). (E53)

49. Larson said she recovered DC359.zip file, and it was same as Bert.zip file in backed up copy of the government server. (RT391-393). (E53)

50. At trial prosecutor aggressively misstated the testimonies of both Larson and Jack:

> Prosecutor: "The court heard from SA Larson, some of the things that were recovered had been rendered unusable or unreadable or corrupt after having been deleted." (RT 875). "But it is also important to know that most files were deleted from the recycle bin were not recoverable.... The government was never able to recover those documents the defendant successfully and completely eradicated from her computer." (RT 1027). (E66, 71)
>
> "And the truth is that SA Larson testified, the defendant was successful in some respects with these files that were never recoverable from her computer." (RT 1027 – 1028). "The other files that were never – that they were never able to retrieve from her computer... The government does not know what was in those, because they were destroyed, because the defendant obstructed justice." (RT 1087).[7] (E71)

51. As the result of these prosecutorial misrepresentations, trial court denied motion to acquit, and the circuit court affirmed saying "she deleted some files." (Dkt.Entry100-1). "Misstating evidence from trial is a particularly prejudicial form of misconduct" 762 F3d 933, 9c.

4. Prosecutor actively concealed his possession of multiple copies of allegedly destroyed files.

52. From Summer 2012 until Apri 15, 2012, government agents had full possession and access to Alena's laptop. Government made "direct imaging" copy of the laptop on December 27, 2012 (Doc.

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[6] Larson: "DC395.zip was originally 'Bert.zip' file, before it was placed into recycle bin, when Aleykina backed up her computer. Bert.zip was also located on government backup servers. Recovered Bert.zip and Bert.zip located on the backup were identical (RT 445-447).

[7] "Government lawyer... made factual assertion he well knew were untrue. This is misconduct... The government sweeps under the rug the most troublesome part of his statement to the jury. *U.S. v. Kojayan*, 8 F.3d 1315 (9th Cir. 1992).

116, p.32; E.-5), the had full access to the laptop over the network, they had scheduled and unscheduled backups of the laptop, including that on April 11, 2012. (RT 312, 446).

53. But for the appellate court, prosecutor presented dead silence about the government backups and "direct imaging" copies. This was not a mere omission.

54. The prosecutor affirmatively misrepresented absence of any copies: "It therefore makes no difference that one of the incriminating files Aleykina deleted from her IRS laptop – Bert.zip – also happened to be found on an IRS server... That it turned up on IRS server is mere happenstance." (Dkt. No. 40, p. 34; E 99). "Aleykina permanently destroyed some [unidentified] files that government never managed to recover." (Dkt. No. 40, p. 30) (E. 95). "The government does not know what was in those, because they were destroyed, because the defendant obstructed justice." (RT 1087). "the Bert.zip file happened to be backed up on an IRS Server (Dkt Entry 40, p 29) (E 94).

55. "*Brady* imposes a duty on prosecutors to learn of material exculpatory and impeachment evidence in the possession of state agents, and to disclose it to the defense." *Browning v. Baker*, 871 F.3d 942 (9th Cir. 2017). Had the prosecution admitted they already had the complete image of Alena's laptop, prosecutors would not be able to argue "actual destruction or concealment;" one cannot destroy or conceal something that government already has.

56. Prosecutor's malicious concealment constitutes fraud on the court. See *Pumphrey*, 62 F.3d 1128 (9th Cir. 1995) (finding fraud on the court where Thompson officials had known of the evidence unfavorable to their case, but represented at trial they were not aware of any such evidence).

5. Prosecutor proceeded with full knowledge that the evidence lacked criminal intent.

57. The prosecutor proceeded with full knowledge government evidence was devoid of criminal intent.

58. Since Alena did not attempt to delete the laptop back-up on government server, she lacked "intent." Government expert testified: "User [Aleykina]... backed up her laptop on 4-11." (RT 446). "Bert.zip was located in that back up," "every user has access to their back up server," "[Aleykina] could remove the back up from the server." (RT 449).

59. With his own mouth, the prosecutor effectively conceded that Alena did not act "knowingly" within the meaning of 18 U.S.C. §1519. "[18 U.S.C. §] 1519 requires that the defendant act knowingly. A defendant is said to act knowingly if he is aware that the result is practically certain to follow from his conduct." *U.S. v. Bailiey*, 444 U.S 394, 404 (S.Ct. 1980), *U.S. v. Katakis*, 800 F.3d 1017 (9th Cir. 2015).

60. If anything, Alena knew that emptying recycle bin would not "put out of existence" all the copies of the record, as prosecutor explained:

"Now, there was some talk about the server and whether she went on the server to access the backups. Well, she knew there was no point in accessing the backups because the backup is backed up for a backup of the backup of a backup. You heard of all the backups. So she could go on there and delete, but that wouldn't have done anything." (E71)

(RT 1027)

61. Accordingly, a reasonable jury would not infer from the evidence alone neither intent to destruct, nor actual destruction of a record "stored on government-issued computer and government servers." The fact that the jury returned a guilty verdict on 18 U.S.C. §1519 indicates the jury necessarily and improperly considered allegations of other crimes/acts and prosecutor's misstatements as substantive evidence against Alena. "Practical and human limitations of the jury system cannot be ignored." *Bruton v. U.S.*, 391 U.S. 123 (1968).

6. Prosecutor misrepresented government's notice of charges to affirm on new untried unindicted theory.

62. On its face Count 9 of the indictment was defective, as multiplitious, as it charged different, contradictory crimes in the same count. In their opposition to Bill of Particulars prosecutors narrowed the offense down to "destruction": "Count 9 specifies that Aleykina destroyed evidence from a government issued computer and government servers." (Doc. 28, p.8). (E.5) In closing prosecutor directed the jury to convict for destruction: "Count nine, obstruction of justice for destruction of evidence on April 15, 2013" (RT 1021) "That is deleting the files off the computer." (RT 1021). (E69)

63. If convicted for destruction of records not located on government servers, the Fifth Amendment guarantee against prosecution without indictment was violated.

Indictment for Count 9 was for "record... being stored on a government issued computer **and** government servers." (Doc. 7, p. 8). (E.1) The indictment was not for a record on a computer "or" government server. To the extent the conviction is for a record located on a laptop only, the conviction may not stand: "Refusing to revers on such a situation would impermissibly allow conviction on a charge never considered by the grand jury." (*Dubo*, 186 F.3d at 1178-80, citing 361 U.S. at 219).

64. When defense moved for Rule 29 acquittal on Count 9, prosecution alleged two theories on how Alena actually deleted the files on her laptop: 1) disk defragmenter, and 2) overwriting the file by copying the file named "Loheit." Prosecution: "The defendant's use of disk defragmenter and trying to copy "Loheit" 200,141 times, but she did successfully delete from the laptop many, many, many, many files." (RT. 875-876). (E66)

65. Prosecution presented no theory of document destruction from government server.

66. Government waived any other theory/argument by failing to present it at Rule 29 hearing. "Government waived this theory by failing to present it to the district court as part of its opposition to rule 29 motion." *U.S. v. Katakis*, 800 F.3d 1017, n 3 (9th Cir. 2015). "The government waived this argument by failing to present it to the district court." *U.S. v. Taylor*, 670 Fed. Appx. 638 (9th Cir. 2016).

67. If convicted or affirmed for alteration, the Fifth and Sixth Amendments right to notice of charges and trial by jury was violated.

68. "Guilt or punishment cannot, of course, be premised on uncharged crimes." *Comstock*, 786 F.3d 701 (9th Cir. 2015). See *McCormic v. U.S.*, 500 U.S. 257, 270 (1991) (Noting that the Supreme Court "has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions an on a different theory that was ever presented to a jury.")(f.34)

69. The appellate court believed it was hearing a legitimate adversarial dispute, when, in fact the proceeding was a charade fraud with doctored indictment, misstated and concealed evidence, and malicious motives.[8] "The IRS [and government] had an opportunity to present its case fairly and property. Instead, its lawyers intentionally defrauded [appellate] court... The [petitioner] should not be forced to endure another trial and the IRS [and government] should be sanctioned for this extreme conduct." *Dixon v. Comm.*, 2003 U.S. App. Lexis 4831 (9th Cir.)

II. ART. IV SEC. 1 AND SUBSTANTIVE DUE PROCESS PRECLUDE IRS AND DISTRICT COURT JURISDICTION TO JUDGE OR CONVICT ON THEORY OF "SHAM LEGAL SEPARATION" BECAUSE:

1. SUBSTANTIVE DUE PROCESS RIGHT TO MARRIAGE AND DIVORCE PRECLUDES FEDERAL GOVERNMENT FROM EXAMINING VALIDITY OF LEGAL SEPARATION
2. ART. IV SEC. 1 OF U.S. CONSTITUTION JURISDICTIONALLY PRECLUDES FEDERAL REVIEW OF STATE LEGAL SEPARATION JUDGMENT.
3. INDICTMENT WAS DEFECTIVE AS LACKING SPECIFICITY IN NOTICE OF "FALSE LEGAL SEPARATION" ACCUSATION
4. PROSECUTOR CONCEALED AND ACTIVELY MISSTATED FACTS AND LAW.

[8] "A long trail of small misrepresentations, none of which constitutes fraud on the court in isolation, could theoretically paint a picture of intentional, material deception when viewed together." *Sierra Pac.*, 862 F.3d 1157 (9th Cir. 2017)

1. Substantive due process right to marriage and divorce precludes federal government from examining validity of legal separation.

70. Legal Standard: "Our precedents "have respected the private realm of family life which the state cannot enter."" *Planned Parenthood,* 505 U. S. 833, 851 (1992), citing *Prince,* 321 U. S. 158, 166 (1944). "An individual freedom of personal choice in matters of marriage and family life is central among the protected liberties guaranteed by the Due Process clause." Akron, 462 U.S. 416 (1983).

71. In 2018 Prosecution convicted Alena on Counts 1-6 of 26 U.S.C. §7206(1) filing of false tax returns in 2009, 2010, 2011. Roughly 90% of "criminal tax loss" was generated from prosecutors' theory of "false legal separation." As soon as they proclaimed the legal separation invalid and fraudulent, prosecutors were able to disallow Alena's head of household status (since "married people may not claim head of household" (RT 731) and disallow Alena's rental losses. (RT 799)(RT 747)(E-60)

> Prosecutor: The defendant went out and got this sham separation, this fraudulent separation, and then she and her husband claimed this rental real estate loss. (RT 1048)

72. Through its Revenue Agent, prosecutor testified:

> Prosecutor: And it is your testimony then, based on your opinion, that in 2010 the defendant and her husband, Richard Hartzell, continued to live at the same address, notwithstanding the legal separation order? (RT 735).
>
> Revenue Agent: The records support that there is no separation that occurred. (RT 739) (E 59)

73. Prosecutor basically argued Alena filed for legal separation on November 10, 2009 solely to criminally claim rental losses from property Alena somehow predicted she would purchase next year 2010. Revenue Agent testified that total tax loss from disallowed items on 2009, 2010, 2011 tax returns was $7,000 in 2009, and $8,700 in 2011. (RT 769) Prosecution showed no loss in 2011 since Alena only claimed $25,000 of the $31,979 rental loss. (RT 792) It is notable the "disallowed rental loss" would not be an actual loss because IRS "disallowed" rental losses do not disappear but "carry over".

74. The law is "An individual legally separated from his spouse under a decree of divorce or separate maintenance shall not be considered as married." 26 U.S.C. 7703(a)(2). And the state family law is controlling: "State law should be used to determine marital status for federal tax purposes." *Lee v. Comm.*, 550 F.2d 1201 (9th Cir. 1977), "Under the Internal Revenue Code a federal court is bound (Exh 30-31)

by state law rather than federal law when attempting to construe marital status. *Boyter v. Commissioner*, 668 F.2d 1382, 1385 (4th Cir. 1981).[9]

75. IRS neither has the competency, nor legal basis to determine the "validity" of divorce/ legal separation. "Our precedents have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158 (1944). "An individual's freedom of personal choice in matters of marriage and family life is central among liberties guaranteed by the due process." *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983).

76. Government put Alena in a position where her tax return is false both ways. If she files as "married", she would violate 26 U.S.C. §7703(a)(2). If she does not file as "married", she violates prosecution's claim of "invalid legal separation." "A criminal proceeding is an inappropriate vehicle for pioneering interpretations of tax law." *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979)

2. Art. IV Sec. 1 of U.S. Constitution jurisdictionally precludes federal review of state legal separation judgment.

77. In a similar case, where U.S. government obtained criminal conviction based on allegations of invalid divorce decree, U.S. Supreme court reversed, stating: "Article 4 §1 and the act of May 26, 1970 require that 'not some but full' faith and credit be given judgment of a State Court." *Williams v. North Carolina*, 317 U.S. 287, 294 (S. Ct. 1942)

78. Federal Court was without jurisdiction to try the legality of California State issue legal separation judgment. The Ninth Circuit District Court held, "Even if as [plaintiff] contend, the Separation Decree was entered in error, this court is not a court of appeal on that issue. The Separation Decree is entitled to receive "full faith and credit" in the bankruptcy court. U.S. Constitution Article IV, Section 1." *Ford v. Deitz (in Re Deitz),* Case No. 08-13589B7 (2013).

79. The theory of false legal separation was invalid per Article 4, Section 1 of the U.S. Constitution and *Cheever v. Wilson*, 76 U.S. 108 (S. Ct. 1980). "Where a general verdict of guilty was rendered in a criminal case and one of the theories on which the case was tried and submitted is based on a ground which is invalid under Federal Constitution, the judgment can not be sustained." *Stromberg v. California*, 51 S. Ct. 532 (1931). "Error was structural because it enabled the jury to deliver a general verdict that potentially rested on different theories of guilt, at least one of which was constitutionally invalid." *Id.*

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[9] "Although under state law foreign divorce decree was of a doubtful validity, where neither state court nor foreign court which issued decree declared it invalid, it would be recognized for tax purposes." Estate of Felt v. Commissioner, Docket Nos. 6961-78; 7079-78., 1987 Tax Ct. Memo LEXIS 461 (T.C. Sep. 16, 1987). "The last thing federal courts needed was to be dragged into domestic-relations disputes." *Liu v. Mund*, 686 F.3d 418, 419 (7th Cir. 2012).

80. "If a judgement is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the U.S." *Cheever v. Wilson*, 76 U.S. 108 (S. Ct. 1980). U.S. Supreme court held in *Christmas v. Russell*, 72 U.S. 290 (1866), that conclusiveness of a state court judgment cannot be challenged in a federal court on the basis that the prior [state] judgment was procured by fraud.

81. "A federal court lacks jurisdiction to review final determination of state courts, as well as claims 'inextricably intertwined' with state court judgment." *Dist. of Columbia Ct of Appeals v. Feldman*, 460 U.S. 462 (1983).[10]

82. Submission of validity of California state-issued legal separation order to Federal jury was substantive due process violation that affected the whole trial and sentencing. "It is a fundamental right of every citizen of... the United States, to be tried by the tribunals of justice of that sovereign power whose criminal code he has transgressed; and the complement of this rule or axiom is, immunity or exemption from trial or punishment for that offence by any other government or sovereignty." *Ex parte Bridges*, 4 F. Cas. 98, 103 (1875). "It is very well settled that penal laws have no extraterritorial force... Nor will the courts of one state enforce the statutory penalty of another state." *Crebbin v. Deloney*, 70 Ark. 493, 69 S.W. 312 (1902).

83. Because Alena was exempt from trial in Federal court regarding the validity of California state-issued legal separation, reversal is required. "Subject matter limitation on federal jurisdiction must be policed by courts on their own initiative even at highest level." *Ruhrgas AG v. Marathon Oil*, 526 U.S. 574 (1999). "Because subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived." *U.S. v. Cotton*, 535 U.S. 625 (2002).

84. Defense continuously objected to government's disregard to California judgment and introduction of theory of invalid legal separation pre-trial (Doc. 98) and during trial (RT 712 continuing objection).

85. Theory of invalid legal separation. "It has been long settled that when a case is submitted to the jury on an alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside." *Lara v. Ryan*, 455 F.3d 1080 (9th Cir. 2006). "In the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled

[10] "Where the district court must hold that the state court was wrong in order to find in favor of the plaintiff, the issues presented to both courts are inextricably intertwined." *Doe Associates v. Napolitano*, 252 F. 3d 1026 (9th Cir. 2001). "Per 28 U.S.C. §1257, federal review of state court judgments (except habeas corpus) may be obtained only in the U.S. Supreme Court." *Smith v. Krieger*, 389 Fed. Appx 789 (10th Cir. 2009). "There is simply no principle of law or equity which sanctions the rejection by a Federal Court of the salutary principle of res judicata." *Edmondson v. City of Martinez*, 17 F.App'x 678 (9th Cir., 2001).

to "automatic reversal" regardless of the error's actual effect on the outcome." *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017), citing *Neder v. U.S.*, 527 U.S. 1, 7 (S.Ct. 1999).[11]

3. Indictment was defective as lacking specificity in notice of "false legal separation" accusation.

86. The Sixth Amendment guarantees "the right... to be informed of the nature and cause of the accusation." The indictment stated the nature of the accusation was "false tax returns" on counts 1-6. The indictment did not notify directly that the falsity of tax return was caused by "legal separation which government considered false". "Charge must be made directly, and not inferentially or by the way of recital." *United States v. Hess*, 8 S. Ct. 571 (1888).

87. The prosecution also assumed Alena had a legal duty to remain married yet failed to cite any law to support such a position. "The function of an indictment by a federal grand jury is to correlate claimed wrongful conduct of the accused with the prohibitions set forth by Congress in its enactment of the criminal laws of the United States." *United States v. Root*, 366 F.2d 377, 378 (9th Cir. 1966). When "conviction and punishment are for an act that the law does not make criminal, there can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333 (1974).

88. There is no indication the theory of "false legal separation" was even presented to a grand jury per the Fifth Amendment requirement. In both its plea offers (Doc. 116, p 25) and objection to bill of particulars (Doc 28, p3) prosecution claimed "The problem for Aleykina was that unlike partnership losses, trust losses do not carry through to the beneficiary's individual return." (Doc 28, p.3/17). But prosecution's position was contrary to 26 U.S.C. §6001, which states that "grantor/living trusts" are disregarded for tax purposes. (RT 893-896). Prosecution brought up its theory of "false legal separation" only mid-trial, claiming Alena was really still married, and "married people can only deduct rental losses if they file joint return." (RT 1103/7-10).

89. Therefore, Alena's conviction requires reversal because her indictment fails to ensure that she was prosecuted only on the basis of the facts presented to the grand jury. Failing to enforce this requirement would allow a court to guess as to what was in the minds of the grand jury at the time they returned the indictment. Refusing to reverse in such a situation would impermissibly allow conviction on a charge never considered by the grand jury. (Dubo, 186 F3d at 1178-80, ctg 361 us at 219)

[11] "Due process... is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land." *Bond v. U.S.*, 131 S. Ct. 2355, 2365 (S.Ct. 2011). "If law is invalid as applied to the criminal defendant's conduct, the defendant is entitled to go free... A conviction under a law is not merely erroneous, but illegal and void and cannot be legal cause of imprisonment." *Bond v. U.S.*, 131 S. Ct. 2355, 2365 (S.Ct. 2011).

4. Prosecutor concealed and actively misstated facts and law.

90. Prosecutor not only omitted 26 U.S.C. 7703(a)(2), *Lee v. C.I.R.*, 550 F.2d 1201 (9th Cir. 1977), and substantive due process law described above in 1-3. He actively misrepresented these laws.

91. Prosecutor presented as criminal the acts that are legal.

92. Prosecutor testified that legal separation was "fraudulent" because Alena and Hartzell shared health insurance and because some people thought Alena and Hartzell were married. But per California law, legally separated people are still married, they may not marry others, and may be on each other's health insurance. And private sexual conduct*, if any, is outside of government's jurisdiction under substantive due process. "Present address" is confidential under Family Code 3429", there is no requirement to announce it in the public record, see Cal Form FL-105/GC120.

93. Prosecutor fragrantly misstated California law.

94. "Arguments of counsel which misstate the law are subject to objections and corrections by the court." *Boyde v. California*, 494 U.S. 370, 384 (S.Ct. 1990).

95. Prosecutor, the expert at law, deceived district court when he testified:

> 'Legally separated' means 'actual, in other words, physical separation (RT 860 (E·64)), but defendant and her husband, Richard Hartzell, continued to live at the same address, notwithstanding legal separation order. (RT 735).

96. Prosecutor was well aware that "there was second residence" (RT 153). Prosecutor himself introduced Aleykina's lease at other property (RT 581, Government Exhibit 191A).

97. More importantly, Alena's residence was not relevant:

> "Nothing in California Family Code §2310(a) requires more than a pleading, that irreconcilable differences have caused the irremediable breakdown of the marriage, to obtain a separation Decree in the state of California Unlike a petition for dissolution, a petition for legal separation does not even require six months residency. There is no requirement that the spouses make a showing of actual separation before they can obtain a judgment of legal separation."
>
> *Ford v. Deitz* (in Re Deitz) Case No. 08-13589B7 (2013) (Exh E·32)

98. "One of the bedrock principles of our democracy, implicit in any concept of ordered liberty is that State may not use false evidence to obtain criminal conviction." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Deliberate deception of a judge and jury is "inconsistent with rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)." *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2004).

* Sexual activity is protected by Substantive Due Process see 10F3d1363 Yepes, 9c, 1997, stg 405 us 438, 453; 431 us 678, 687; 357 us 116, 129-130. (E·33)

99. Prosecutor misstated facts.

100. At closing, prosecutor misstated witness testimony when he argued, "As you heard from the defendant's husband himself, they were not separated. He did not even know about the legal separation judgment." (RT 1019). When in fact, Richard Hartzell testified, "I got something [regarding legal separation]... something showed up in my mailbox. You know, I was pretty upset about it." (RT 974). Richard Hartzell had also acknowledged signing service of process (Government Exhibit 107, bates 61). "It does look like my signature." (RT 978). Court records also show "Request to enter default mailed to the respondent [Richard Hartzell] on December 17, 2009. (Excerpts of Records, 286).

III. CONVICTION ON ELEMENT OF CRIMINAL INTENT WAS UNRELIABLE AND FUNDAMENTALLY UNFAIR, IN VIOLATION OF FIFTH AND SIXTH AMENDMENTS, BECAUSE PROSECUTOR:

1. INTRODUCED ILLEGALLY OBTAINED STATEMENTS BY FABRICATING ADMISSIBILITY LAW
2. IMPLIED GUILT FROM ALENA'S SILENCE, IN VIOLATION OF SELF-INCRIMINATION CLAUSE
3. SUBSTITUTED INTENT ELEMENT WITH INTENT FROM UNCHARGED CRIMES
4. MATERIALLY MISSTATED KNOWLEDGE ELEMENT IN CLOSING
5. PROVIDED JURY INSTRUCTIONS THAT RELIEVED GOVERNMENT FROM ITS BURDEN OF PROOF OF INTENT (ON COUNT 1 – 6)
6. CONCLUSORY INDICTMENT FAILED TO PROVIDE FAIR NOTICE AND OPPORTUNITY TO PREPARE DEFENSE
7. REMAINING EVIDENCE IS INSUFFICIENT TO PROVE WILLFUL CRIMINAL INTENT.

1. Prosecutor introduced illegally obtained statements by fabricating admissibility law.

101. Prosecutor directed the jury to use "all the other evidence" to find intent. The jury instructions said: "You may consider... all the other evidence in dividing whether the defendant acted knowingly." (RT 1101).

102. "The other evidence" of intent that prosecutors introduced over objections (Doc. 60-64, RT 157, 294 -295) and relied on at trial was the compelled statements extracted from Alena on July 19, 2012 and April 15, 2013 by visibly armed IRS Special Agents acting as Alena's employer. April 15, 2013 statement was compelled by IRS after Alena had already requested an attorney. (Gov. Exh. 1009), all in violation of *Escobedo v. Illinois*, 378 U.S. 478 (1964), as described in District Court Doc

#116, p. 19. Prosecutors did not dispute the involuntariness of the statements at trial and may not start disputing now. See *U.S. v. Flores*, 942 F.2d 556, 558 (9th. Cir. 1991).

103. The law is that "Any criminal trial use against a defendant of his involuntary confession or statement is a denial of due process of law even though there is ample evidence aside from the confession to support his conviction." *Mincey v. Arizona*, 437 U.S. 385, 398 (1975); and "Statute prohibits the prosecutorial authorities from using the compelled testimony in any respect and it provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." *Pillsburg v. Conboy*, 459 U.S. 248 (1983).

104. Nevertheless, prosecutor offered unlawful basis for admitting compelled testimonies.

> "[Government] submitting it as a false statement. And she [Alena] does not get any protection because it was a false statement. So, I'm not sure I need a hearing since the case seems to be pretty clear to me that the Fifth Amendment doesn't protect someone from making a false statement." (RT 295). (E-52)

105. When forbidding any use of a compelled testimony, *Kastigar* addresses "use," not "truth." (*United States v. N.*, 910 F.2d 843, 861 (1990)). Even if the "truthfulness" was the focus of the Fifth Amendment inquiry, the record does not disclose the basis for "truthfulness" determination. "Court has made clear that the truth or falsity of a statement is not the determining factor in the decision whether or not to exclude it. Thus, the state which has obtained a coerced or involuntary statement cannot argue for its admissibility on the ground that the evidence demonstrate its truthfulness." *Michigan v. Tucker*, 417 U.S. 433, 466 (1975), citing *Denno*, 378 U.S. 368, 376 (1964).

106. Similarly, it was illegal to admit Alena's July 19, 2012 and Apr 15, 2013 statement basing admissibility on the grounds of "falsity." The admission of the compelled statements was not harmless since prosecutor capitalized on it at his opening and closing statements to argue criminal intent:

> On April 15, 2013, when fellow agents of IRS Criminal Investigation Division came to seize her government-issued laptop... she lied about where the laptop was... and she used that time, having lied about where the computer was, because it was actually in her home, to delete hundreds of files in an effort to destroy evidence of her criminal wrongdoing. (RT 121)
>
> On July 19, 2012, the defendant's supervisor at the IRS asked her to explain what happened with this audit... so she provided the following letter... so you will hear that this letter, which she submitted to her IRS supervisor, is false. (RT 127-128).

The improperly admitted evidence targeted main and disputed issue in the case - Alena's credibility. per US v Jimenez, 214 F3d 1095, 1099, 9c, 2000 such admission was not harmless.

2. Prosecutor implied guilt from Alena's silence, in violation of self-incrimination clause, *and right to an attorney.*

107. On April 15, 2013 several visibly armed special agents interrogated Alena for two hours after she requested an attorney (Doc. 116, 19). And when Alena attempted to exercise her Fifth Amendment Right to remain silent, prosecutor implied Alena's guilt from her silence. *He introduced the inadmissible hearsay, and violated Alena's Sixth Am-t right to an attorney:*

> "You heard Special Agent Delaney describe how Special Agent in Charge Martinez confronted the defendant and asked her, Well, what about these emails you sent this morning. And you heard how the defendant reacted to that. She poured herself -- she didn't answer. She poured herself a glass of water. She slowly drank that glass of water, while the three IRS agents were waiting for an answer. When she was done slowly drinking that glass of water, she put it down and filled the cup again. And she took a long sip of water, drinking the second glass of water. I submit to you, she was trying to figure out what she was going to tell them. And when she had finished taking those long drinks of water, she decides she was going to lie. She told the investigators that the computer was at her mother's house, sending them to a goose chase that would keep them occupied about an hour and a half." (RT 1023). *(E-90)*

108. "Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* (380 U.S. at 615) holds that the privilege against [5th Amendment] compulsory self-incrimination is violated." *U.S. v. Robinson*, 485 U.S. 25 (6th Cir. 1988). "Whether the government argues that a defendant remained silent or described the defendant's state of silence, the practical effect is the same – the defendant's right to remain silent is used against him at trial. *U.S. v. Velarde-Gomez*, 296 F.3d 1023. The privilege against self-incrimination prevents the government's use at trial of evidence of a defendant's silence – not merely the silence itself, but the circumstances of that silence as well." *U.S. v. Bushyhead*, 270 F.3d 905 (9th Cir. 2001).

109. In addition to being inadmissible, the alleged intent from year 2012 and 2013 statements was too remote in time and space to be used as substitution of intent for years 2009 – 2011 charged:

110. The error is structural because the effects of the prosecutor's use of compelled and uncounselled statements are simply too hard to measure. "In the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to "automatic reversal" regardless of the error's actual effect on the outcome." *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

111. Alternatively, the error created a substantial likelihood of affecting the jury verdict and requires reversal per *Mincey*, 437 U.S. 385 and *Chapman*, 386 U.S. C. 18.

3. Prosecutor substituted intent element with intent from uncharged crimes.

112. Over pre-trial and trial objections (Doc. 60-64, Rt. 294-295, RT 575, RT 776 (side bar)), prosecution used allegations of uncharged crimes – First Time Home Buyer (FTHB) credit claim (RT 1059) and T. A. 2010 tax return (RT 1060) as proof of Alena's willfulness on counts 1 – 6. Prosecutor specifically directed jury to use "other acts" and acts of other people as evidence of intent:

> Prosecutor: "Now there are two other short chapters that tell you the defendant knew exactly what she was doing. The first one pertains to the amended 2009 tax return that she filed claiming the First Time Home Buyer credit for 522 A Street." [uncharged conduct] (RT 1057).
>
> Prosecutor: "Now, there is another chapter that shows you the defendant knew exactly what she was doing, and that is the 2010 tax return for T.A." (RT 1060).

113. But "[e]vidence tending to show intent to commit other [uncharged] crimes may be circumstantial evidence of intent to commit the charged crime, but it is not a substitute for it." *U.S. v. Hernandez*, 859 F.3d 817 (9th Cir. 2016). The "other crime / bad act" evidence should not have been admitted per Rule 403 and 404 as being of slight probative value and based on insufficient evidence.

114. The "other crime/ bad act" evidence was based on misstated IRS law and evidence. Prosecutor presented First Time Home Buyer Credit claim as fraudulent by coaching a witness to say "Aleykina did not live there." IRS itself held that "It was not necessary that taxpayer occupy house as principal residence during tax year" to be entitled to first-time home buyer credit. Prospective analysis is required under IRC 36, asking whether taxpayer will occupy house as principal residence." *Woods v. Commissioner*, 137 T.C. 159 (2011).

115. At trial Revenue Agent said T.A. received Earned Income Credit of $3,050 (RT 777). Revenue Agent did not say $3,050 was the maximum. According to 26 U.S.C. 32(a)(2) maximum Earned Income Credit is $8,890. Prosecutor misstated this law and testified to facts not in evidence:

> Prosecutor: "If these wages weren't actually paid, why would she [T.A.] report them on her tax return?... She obtained – filed a fraudulent tax – obtained a fraudulent tax refund by claiming the Earned Income Tax Credit... If you make around what T.A. reported, you get the maximum. (RT 1052)."

4. Prosecutor materially misstated knowledge element in closing.

116. Through its closing arguments and jury instructions prosecution told the jury that government does not need to prove Alena violated tax law knowingly. In particular, prosecutor told the jury that having good reason to know is equivalent to knowing that law:

Prosecutor: If she did not know them [tax rules] off the top of her head, she knew where to find the answer, she knew where to look. She knew how to find this out. (RT 1041).

If there is something she is unsure about, that she wants to check out, she has every resource at her disposal. (RT 1040).

117. The law regarding knowledge is: "Having "good reason to know" one is violating the law is not tantamount to knowing it." Even if the court's statement accurately conveyed the willfulness standard to the jury, a correct statement of the law given during trial does not cure an incorrect one delivered immediately prior to deliberations. See *Seltzer v. Chesley,* 512 F.2d 1030, 1035 (9th Cir. 1975). Erroneous instructions can be cured by the trial judge only by expressly correcting them and by directing the members of the jury to expunge the erroneous statements from their minds." *U.S. v. Liu*, 731 F.3d 982 (9th Cir. 2013) (vacated).

118. Prosecutor misstated the disputed element.[12] "See *Castillo,* 868 F.3d at 840 (finding prejudice where the erroneously stated element was the central contested element in the case). Mens rea was contested." *United States v. Rodriguez*, 880 F.3d 1151 (9th Cir. 2018).

119. Alena objected pro se to district and appellate courts. (Doc. 116 ; Dkt. Entry 81). (Dkt Entry 101)(ER 80-89)

5. Prosecutor provided jury instructions that relieved government from its burden of proof of intent (on count 1 – 6).

120. The court amplified that misstatement by instructing the jury that ignorance of the law is no excuse:

"The government is not required to prove that the defendant knew that her acts or omissions were unlawful." (RT 1101/7); and that the jury may use all other evidence as proof of intent:

"You may consider... all the other evidence in deciding whether the defendant acted knowingly." (RT 1101/8).

121. This instruction from the district court relieved government from proving intent element on Counts 1-6. The law is that "[t]he trial court, when instructing that specific intent is required, may not instruct that ignorance of the law is no excuse, because ignorance of the law goes to the heart of the defendant's denial of specific intent." *U.S. v. Buford*, 889 F.2d 1406 (1989). "Willfully for purposes of

[12] See *Deck v. Jenkins*, 814 F.3d 954, 986 (9th Cir. 2016) (holding that the "prosecutor's misstatements regarding an element of the crime amounts to constitutional trial error," if the misstatements were central to the case and were not corrected by the trial court's instruction).

the statute criminalizing preparation of false tax returns means a 'voluntary intentional violation of known legal duty." *U.S. v. Arditti*, 955 F.2d 331 (1992).

122. In tax case, government's burden is to prove defendant knew specific legal duty (see *Cheek v. U.S.*, 498 U.S. 192, 201 (1991)), not just that "she knows about taxes." (RT 1056).

123. "A structural defect mandating automatic reversal occurs when the government has been relieved of its burden to prove the elements of the crime charged beyond a reasonable doubt." *U.S. v. Trevino*, 394 F.3d 771 (9th Cir. 2004). "Jury instruction that relate to the burden of proof or element of proof in a criminal case quite obviously relate to the accuracy of conviction. A misdescription of the burden of proof... violated all of the jury's finding." *In Re Winship*, 397 U.S. 358, 372 (1970).[13]

6. Conclusory indictment failed to provide fair notice and opportunity to prepare defense. The indictment failed to state a claim*, see pg 25.

124. The improper urging of intent was also spilled over from other misstated evidence described in sections I-IV. Here, the combination of the improperly introduced compelled statements, improper inferences from defendant's silence, "other crimes" allegations, misstated instructions on element of intent for Counts 1 – 6 and overly broad jury instruction for intent on Count 8-9 (RT 1101) raises substantial likelihood that defendant was convicted for intent in the compelled statements and "other crimes" rather than those with which she was charged. This substantial likelihood requires reversal under the Due Process Clause and the right against self-incrimination of the Fifth Amendment.

7. Remaining evidence is insufficient to prove willful criminal intent.

125. Government told the jury Alena knew of all tax code because Alena was employed at IRS. Alena's job did not involve tax return preparations or audits,(see Exh E-23). "If a government officer does not act within his scope of employment or under color of state law, then that government officer acts as a private citizen." *Van Ort*, 92 F.3d 831, 835 (9th Cir. 1996).

126. The only training Alena's job mentor could talk about was: "Building entry with fire from role players, fire range training, interviews, mobile surveillance." (Doc 129-2). Alena's supervisor SSA Howard testified that he did not know of any cases that involved dependents or head of household determination that Alena worked on (RT 320), and "FLETC isn't about learning how to analyze or evaluate 1040 forms." (RT 337, L 1-3).

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[13] "See *Castillo*, 868 F.3d at 840 (finding prejudice where the erroneously stated element was the central contested element in the case). Mens rea was contested." *United States v. Rodriguez*, 880 F.3d 1151 (9th Cir. 2018). "When trial court gave contradictory instructions, the jury cannot be presumed to have chosen the correct one." *Sanden*, 994 F.2d 1417.

* "the charge must be made directly, and not inferentially, or by way of recital.. For this, facts are to be stated, not the conclusions of law alone.. A crime is made up of act and intent." Hess 124 us 483, 487

127. Government presented no evidence on Alena's training on treatment of scholarships and tuition waivers in calculating support test for dependents. "Instead, the government invited the jury to do what *Nevils* [598 F3d at 11671 forbids: engage in mere speculation on critical elements of proof." *U.S. v. Katakis*, 800 F.3d 1017 (9th Cir. 2015).

128. It is also a telling evidence, that government did not (or could not) qualify Alena's ex co-worker, IRS-CI case agent Christian Martin to be government tax expert. Instead, government employed IRS Revenue Agent "regularly assigned to assist criminal investigations." (RT 672), Van House. RA Van House was "in large part... examining books and records to essentially put together an individual's Form 1040... determining income, deductions, dependency deductions, filing status." (RT 674).

129. After all inadmissible evidence is disregarded and Revenue Agent's testimony is stricken as unreliable, the remaining evidence of alleged guilt is insufficient because "in order to make out a "willful violation" of section 7206 the government must prove defendants acted with specific intent to defraud the government in the enforcement of its tax laws. This means that the government must prove not only that the defendant's conduct affected tax revenue, but that tax fraud was an objective." *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir. 1990), *Ingram v. U.S.*, 360 U.S. 672, 680 (1959) (violator's objective must include evasion of federal taxes); *U.S. v. Murdock*, 290 U.S. 389, 397-99 (1933) (more is needed than acting intentionally and without legal justification; "bad faith or evil intent" must be shown).

CUMULATIVE EFFECT OF ERRORS

130. Legal Standard: "Multiple errors, even if harmless individually, may entitle a petitioner to habeas relief if their cumulative effect prejudiced the defendant." *Ceja v. Stewart*, 97 F.3d 1246 (9th Cir. 1996). "An error that was not objected to at trial, and may not have amounted to plain error, should be considered in the cumulative error analysis." *U.S. v. Wallace*, 848 F.2d 1464 (9th Cir. 1988)

REQUEST TO REMAND TO A DIFFERENT JUDGE.

131. Please reassign this case to a different (a female) judge. "Reassignment (to a different judge) is also necessary to preserve the appearance of fairness and justice, as the record indicates district judge's opinion would remain unchanged." *U.S. v. Kwon Woo Sung*, Case No. 17-10435 (9th Cir. 2018). For details, see Appendix B.

Respectfully submitted,

Date: 2/7/21

A. Aleykina

Alena Aleykina