APPENDIX A - ISSUES RAISED BUT NOT ADDRESSED *

IV. 18 U.S.C. §641 CONVICTION ON ALLEGED $4,000 THEFT WITH A SEVEN YEAR SENTENCE WAS TIME BARRED AND IN VIOLATION OF 18 U.S.C. 3282(A), DUE PROCESS AND EQUAL PROTECTION (COUNT 8).

A. July 28, 2016 indictment was late to charge allegedly false July 15, 2011 application for $4,000 tuition reimbursement. Record is developed to show ineffective assistance of counsel.

1. Count 8 is barred by statute of limitation.

132. Legal Standards: "Due Process Clause (5th, 8th Amendments) protects against prejudicial pre-accusation delay... The applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." *US v. Marion*, 404 U.S. 307 (1971). "When a defendant presses a limitation defense, the government then bears the burden of establishing compliance with the statutes of limitation." *Musacchio v. United States*, 577 U.S. ___ (2016).

133. Factual Background: As her employer, IRS ordered Alena to take English classes to improve her English (A 20-22). Alena paid for the classes. (A 25-26). Upon completion, SSA Howard wrote "you [Alena] did better in English communication." (This email is unavailable in prison but Alena emailed it to her defense attorney before trial.)

134. On July 15, 2011, Alena submitted application for tuition reimbursement. (A 23-24).

135. On July 28, 2016, prosecutor indicted Alena for 18 U.S.C. 641 – theft of government property. (Doc#1). The indictment was returned over 5 years from the moment the alleged crime occurred, in violation of 18 U.S.C. 3282(a).

136. Prosecution based Count 8 (18 U.S.C. §641) on allegedly false application for $4,000 reimbursement from IRS TAP (Tuition Assistance Program). Prosecution claimed Alena violated 18 U.S.C. §641 "by fraudulently causing the IRS... to issue IRS tuition assistance reimbursement." Government filed indictment on July 28, 2017 (Doc. #1), over five years from "fraudulently causing the IRS..." Prosecutor argued to the jury: "Count 8, First element...she made a request for reimbursement from the IRS" (RT 1030). "This document was faxed," "and the date is July 15, 2011." (RT 430/24).

137. Prosecution is precluded from arguing any new theories. "The government waived this argument by failing to present it to the district court." *U.S. v. Taylor*, 670 F.App'x 638 (9th Cir. 2016).

138. Argument: The prosecution for 18 U.S.C. §641 was outside of the statute of limitations (18 U.S.C. §3282(a)), and district court lacked jurisdiction. "The crucial date for statute of limitations purposes is not the

* Raised in 9th circuit DktEntry 81; 101. (Exh E 80-89)

date of receipt, but the date upon which the government obtains jurisdiction. Statute of limitations begins to run when statement was faxed to the government." *U.S. v. Grenier*, 513 F.3d 632 (6th Cir. 2008). "The statute of limitations for prosecuting an offense runs from the moment the offense is completed.... Completion occurs at the moment the defendant's (not government's) conduct satisfies every element of the offense." *Toussier v. U.S.*, 397 U.S. 112 (S. Ct. 1970). "When doubt exists about the statute of limitations in a criminal case, the limitations period should be construed in favor of the defendant." *U.S. v. Marion*, 404 U.S. 307 (1971). "It is well settled that criminal limitations statutes are to be liberally interpreted in favor of repose." *Toussier v. U.S.*, 397 U.S. 112 (S. Ct. 1970). Therefore, "when a general verdict may be based on a legally inadequate ground, such as because of statutory time bar, the verdict should be set aside." *Yates v. U.S.*, 354 U.S. 298 (S.Ct. 1957).

139. The statute of limitations issue should be preserved because it was government who confused the issue by misstating the date on the face of the indictment. While the prosecutor knew the indictment was two weeks late, they misstated the date by one month to make the indictment appear timely. "Defendant's objection to admission of evidence was sufficient to preserve claim for appeal because it was government that confused issue by suggesting inappropriate basis for admitting evidence." *U.S. v. McGee*, 408 F.3d 966, 981 (7th Cir. 2005).

2. Trial and Appellate counsels were ineffective for failure to assert Due Process right against Stale Charges of 18 U.S.C. 641

140. Record was developed for the appellate court to decide issue of ineffective assistance of counsel. On March 26, 2018, Alena filed motion notifying the court that her counsel ignores statute of limitations. (Doc. 114, p.3, l. 27). This is not a case where "former defense counsel has had no opportunity to explain his actions" *U.S. v. Laughlin*, 933 F.2d 786, 789 (9th Cir. 1991). Defense counsel was questioned by district court on 03/27/2018:

> Court: Was there a statute of limitations issue that you didn't research, or you believe you should have brought a motion on a statute of limitations issue?
>
> Defense Counsel (Mr. Warriner): I believe I researched that I determined there was not a statute of limitations. I looked at the time when the statute of limitations commences running, and I determined that there was not a violation.
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> (*Transcript of In Camera proceedings* dated 03/27/18, p 10-11).

141. Defense counsel testified he researched but did not find a statute of limitations problem.

142. "When a petitioner shows that counsel's actions actually resulted from inattention or neglect rather than reasoned judgment, the petitioner has rebutted the presumption of strategy." *Marcum v. Luebbers*, 509 F.3d 489, 502 (8th Cir. 2007). "Where the ineffective assistance issue is properly raised and litigated in district

court, this (appellate) court does have the evidence necessary." *U.S. v. Jeronimo*, 398 F.3d 1149 (9th Cir. 2005). "The panel concluded that the district court should dismiss one of the counts on remand because counsel was ineffective by failing to raise an obvious statute of limitations defense." *U.S. v. Liu*, 731 F.3d 982 (9th Cir. 2013).

143. Counsel's failure to assert rights against stale charges resulted in prejudice. "No apparent or plausible tactical decision could explain counsel's failure to move for dismissal, potentially with prejudice, of an untimely charge." "An erroneous conviction may be prejudicial even if the error did not immediately lead to additional jail time... the collateral effects of conviction, independent of the sentence, are many and varied." *U.S. v. Palomba*, 31 F.3d 1456 (9th Cir. 1994).

144. This court, therefore, should order dismissal, with prejudice, of Count 8.

B. Indictment defective as lacking specificity of $4,000 "theft through payback" accusation.

145. 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 as "theft of $4,000." The indictment did not directly notify that the theft was caused by "payback of the $4,000" to defendant.

146. Prosecution presented at trial: "Well, because she [J.R.] withdraw the cash on October 20th of 2011, I submit to you that she gave it right back to [Aleykina] because there had been no English classes. This was just fraud." (RT 1038).

147. There is no indication the theory of $4,000 tuition "pay back" was even presented to a grand jury as required by the Fifth Amendment.

148. In both its plea offer (Doc 116, p. 28) and objections to bill of particulars (Doc 28 p5) govememnt claimed only that "On two occasions Aleykina submitted the exact same checks [#205, #206] to her employer in an effort to be reimbursed for fictitious childcare payments and educational expenses." But prosecution's position was not supported by evidence, and for that reason prosecution invented new "pay back" theory.

149. 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, citg 361 us at 219)

C. Government failed to prove element of payment of $4,000 by IRS.

150. In open court prosecution failed to present a witness of the payment or record of $4,000 payment of the tuition reimbursement to Alena.

D. Prosecutor made a trail of material misrepresentations to improperly influence the court.

151. On 18-641 (Count 8) prosecution did not present any direct evidence of guilt but argued Alena's application for tuition reimbursement was 'fraudulent'. Thus, The central issues were if the instructor J.R. had qualifications, whether Alena paid $4,000 for tuition, and whether classes were actually taught.

152. First, prosecutor misrepresented J.R.'s qualifications. At the time of teaching Alena, J.R. had a Doctorate degree from University of Nebraska and a Bachelor's degree in English. As part of the investigation, prosecution obtained all educational documents from University of Nebraska that related to J. R. Among the documents the prosecution received was "credential evaluation report" from World Education Services, New York ("WES", International Credential Evaluation), confirming that Julia R. has "Bachelor's degree in foreign language and literature (English) and the teaching thereof." (Exh E24-25). WES-evaluated degrees are accepted by all U.S. entities, including he University of Nebraska.

153. Prosecutor presented no evidence that IRS TAP requires teachers to be "accredited by state of California," or that state of California provides accreditation, or what "accreditation" is.* Prosecutor argued J.R. was not authorized to teach because she was not "accredited." Prosecutor:

> Q. Are you accredited by the State of California to teach in the State of California? (RT 927)
>
> Q. My question for you, Miss Richter, is were you accredited to teach in the State of California? (RT 927).
>
> Q. So it wasn't accredited? It wasn't authorized to offer classes, is that correct? (RT 928).

154. When prosecutors "question assumes fact not in evidence" (*U.S. v. Sanchez*, 176 F.3d 1214 (1999)) the question is not harmless to the defendant right to a fair trial because it suggests to the jury Alena's application would be based on violation of (non-existing law of) accreditation. It is also misconduct for prosecutor to testify falsely as unsworn witness. "Government lawyer... made factual assertion he well knew were untrue. This is... misconduct." *U.S. v. Kojayan*, 8 F.3d 1316 (9th Cir. 1993).

155. J. R.'s doctorate degree entitles her to teach anywhere, including Universities, without any additional "accreditation", certification, etc.[14] Prosecution concealed J. R.'s credentials and presented her to jury as "not educational person" (RT 882, L. 11). Thus, prosecution created false impressions of J. R.'s lack of educational qualifications and teaching qualifications. Creation of false impression of fact amounts to fraud on the court. *Hamric*, 386 F.2d 390, 394 (1967).

156. Second, it is also misconduct for prosecutor to introduce inadmissible immunized testimony through cross-examination. "In *Sanchez* [176 F 3d 1214, 1221-22] we concluded that the prosecutor was guilty of

[14] https://www2.ed.gov/about/offices/list/ous/international/usnei/us/professional.doc

* J.R. was not an expert on "accreditations"

misconduct in presenting otherwise inadmissible evidence through artful cross-examination." *U.S. v. Cabrera*, 201 F.3d 1243 (9th Cir. 2000).[15] "Clearly, if a witness had invoked his 5th Amendment privilege, the government could have no testimony available with which it might impeach his subsequent sworn statements. See *U.S. v. Frumento*, 552 F.2d 534, 542 (1977)." *U.S. v. Apfelbaum*, 584 F.2d 1264 (3rd Cir. 1978).[16]

157. Prosecutor introduced prior immunized testimony:

> Prosecutor: Do you remember on previous occasion testifying that you were accredited in the State of California as a teacher? (RT 928)
>
> Prosecutor reading: 'Are you accredited in the State of California? Answer: I am.' That was false, wasn't it? (RT 928)

158. The misconduct was not harmless because prosecutor capitalized on it in closing. Prosecutor: "You heard she [Richter] lied to the grand jury about being an accredited teacher in California... because immunity protects her." (RT 1036). J.R. was not an expert on accreditation. Moreover, "A witness may not be impeached by contradiction as to collateral or irrelevant matters, elicited on cross-examination (*U.S. v. Lambert*, 463 F.2d 552 (7th Cir. 1972). A matter is collateral if the impeaching fact could not have been introduced into evidence for any purpose other than contradiction." *U.S. v. Jarrett*, 705 F.2nd 198 (7th Cir. 1983).

159. Third, it was a misconduct to impeach witness with an inadmissible memorandum of interview. Through cross-examination of J.R. prosecutor introduced inadmissible memorandum of interview which is misconduct per *U.S. v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999).[17] The memorandum was not admissible: "Only those statements which could properly be called witness' own words should be made available... for purposes of impeachment." *Palermo v. U.S.*, 360 U.S. 343, 352 (S.Ct. 1959). "Memorandum of interview was

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[15] "It is improper under the guise of artful cross-examination to tell the jury the substance of inadmissible evidence. While prosecutors are not required to describe sinners as saints, they are required to establish the state of sin by admissible evidence unaided by aspersions that rests on inadmissible evidence, hunch or spite." *U.S. v. Sanchez*, 176 F.3d 1241 (9th Cir. 1999).

[16] "Permitting the government unrestricted use of any immunized statements whenever it supposes them to be false would necessarily vitiate the protection afforded by a grant of immunity and would effectively abrogate the immunity agreement. Until such time as the immunized statements are incorporated into a false swearing indictment as the Corpus delicti of the indictment, the statements are unavailable for use by the government at trial." U.S. v. Apfelbaum, 584 F.2d 1264 (3rd Cir. 1978). "Due Process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes." Boyd v. U.S., 116 U.S. 616 (1886). "To protect the voluntariness of a waiver of 5th Amendment rights, where a plea, confession, or admission is based on a promise of a plea bargain or immunity, the government must keep its promise." U.S. v. Weiss, 599 F.2d 730, 737 (5th Cir. 1979).

[17] Prosecutor: Do you remember being interviewed on March 13, 2017, by members of defense team? (RT 952)
Prosecutor: But that's not what you told the person who interviewed you, right? (RT 954/15)

Prosecutor: Did you or did you not say that you also created the grade sheet? (RT 956) Are you denying it? (RT 956). Did you make a transcript for her with the grades? (RT 958).
The court: You've asked about it three times... she said she did not. (RT 958).
Prosecutor: You told the defense team that you created the grade sheet for her, right? (959).

not within the definition of the term 'statement' as contained in the [Jencks] Act." Id. "As a general rule, a third party's characterization of a witness's statement is not attributable to the witness for impeachment purposes." *United States v. Tones*, 759 Fed. Appx. 579, 585 (9th Cir. 2018).

160. Fourth, it was a misconduct to impeach witness with false evidence. It is more shocking misconduct to use FALSE inadmissible evidence. There is no "4330 Watt, Number 250, Sacramento, a criminal investigator..." in any of tuition receipts from CPDST. (See Gov. Exh. 80), (Gov Exh 81) (E 6-11) (RT 957) (E67)

161. Through their talking questions prosecutor mislead the court into believing J.R. testified falsely when she said she did not create a document with "4330 watt, number 250.." The fact was the impeachment evidence did not come from CPDST_school and was plainly false. Compare to gov. Exh 80-81. (E 6-11)

162. "Due Process protects defendants against the knowing use of any false evidence by the state, whether it be by document, testimony, or any other form of admissible evidence. It is well settled that the presentation of false evidence violates due process." *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2004).[19]

163. Because J.R.' credibility "was therefore an important issue in the case" and the inadmissible, improperly admitted and false impeachment evidence directly undermined that credibility, the "error" was not harmless, but reversible. See *Giglio*, 405 U.S. 150, 154-4 (1972). Prosecutor capitalized on the "errors" in closing: Prosecutor: "On the stand, she told you she assigned grades... Previously she said she had not assigned the grades and never seen the transcript... lies, lies, lies." (RT 1035); "The defendant not only used her sister to perpetrate this fraud against the IRS. Her sister was then called as a witness and lied on the stand under oath to all of you to cover for her sister... The story kept changing. She couldn't keep track of it. That's the challenge with lies." (RT 1035).

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[18] Prosecutor proceeded to "impeach" J.R. yet again with inadmissible evidence:

> Prosecutor: Now, isn't it true that when you were interviewed before at the prior proceeding, where you had immunity and were under oath, you said you did not create the document.
> J.R.: I did not... the grades one?
> Prosecutor: Either one. (RT 956)

> Prosecutor: And do you remember saying that you did not remember ever seeing it?... isn't it a fact that you previously testified that you had never seen any of those documents? (RT 956)...I'm on page 65 of the grand jury...
> Question: And this document shows that Alena Aleykina -- 4330 Watt, Number 250, Sacramento, a criminal investigator, took intermediate high grammar...
> Answer: Um-hum. I don't remember creating this.
> Question: You don't remember creating that document?
> Answer: No.
> Prosecutor: So was that false when you testified before the grand jury? (RT 958)

[19] "In *Napue* [360 U.S. 265] the court found due process violation where the prosecutor's responsibility to ensure a fair trial is concerned there is no difference between false substantive evidence and false impeachment evidence. The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. In addition [court] found that the constitutional infirmity was not eliminated because other impeachment evidence had been introduced against this witness." *U.S. v. Kaplan*, 470 F. 2d 100 (7th Cir. 1972).

164. Fifth, prosecutor misstated GAAP, J.R.'s testimony, and bank records to create a false impression of J.R.'s returning $4,000 to Alena.

165. Prosecutor told the jury that on July 18, 2011 and August 30, 2011 J.R. failed to report $4,000 for June 1 – September 30, 2011 tutoring contract as income. Moreover, prosecutor impermissibly assumed facts not in evidence. There was no expert testimony saying J.R.'s teaching contract was earned before completion – before September 30, 2011. On the contrary, "Under GAAP (Generally Accepted Accounting Principles) revenue must be earned before it can be recognized... Revenue is recognized upon the completion of contract requirements." *Provenz v. Miller*, 102 F.3d 1478 (9th Cir. 1996). The $4,000 gross income could not be legally recognized either on July 18, 2011 or on August 30, 2011. "A long-term contract will not be 'considered completed' until final completion and acceptance have occurred." The circuit courts of appeals interpreted the phrase 'finally competed and accepted' literally, requiring absolute completion. *Ball v. Commissioner*, 964 F.2d 890 (9th Cir. 1992).

166. Prosecutor attacked J.R. in front of the jury:

> You deposited those [$4,000 tuition] checks on July 11, 2011 (RT 934).
>
> In terms of your income 'reported $1,110' (RT 936) on July 18, 2011 application to Fair Oaks Apartments (RT 936), and $1,080 in application dated August 30, 2011 to Greenbriar Apartments. (RT 940-941).

167. It is curious that prosecutor investigated J.R.'s tax returns but did not ask more important question – "whether J.R. reported the $4,000 income on her 2011 income tax return." Prosecutor did not ask the question because prosecutor knew J.R. did report it, and the inquiry would be exculpatory.

168. "Government lawyer... made factual assertion he well knew were untrue. This is... misconduct." *U.S. v. Kojayan*, 8 F.3d 1316 (9th Cir. 1993). In closing prosecutor capitalized on his false factual assertion and misstated J.R.'s testimony. At closing prosecutor said: "She also said she lied to the Greenbriar Apartments when they asked her on August 30, 2011 what her income was and she said $1,080." (RT 1037), when in fact J.R. did not "say she lied."

169. Prosecutor created false impression of facts to argue that J.R. gave $4,000 back to Alena. Trial and bank record show that J.R. did not have $4,000 in cash deposit box at the time of alleged July and August rental applications, because J.R. did not withdraw the $4,000 until October 20, 2011 (RT 881). (RT804) (E-63) Prosecutor confidently told the jury: "If her [J.R.] story was true, that she took the cash and stuck it in a safety deposit box, that would be an asset. Yet she never reported that $4,000 in cash on any of these [July 18, 2011 and August 30, 2011 rental application] forms." (RT 1037) "Government lawyer... made factual assertion he well knew were untrue. This is... misconduct." *U.S. v. Kojayan*, 8 F.3d 1316 (9th Cir. 1993).

170. Sixth, prosecution introduced an uncertified, undated, unsigned exhibit 80 and misstated trial evidence to create an impression of false tuition assistance application.

171. Disputed fact of 18-641 charge was whether Alena in fact took English classes from J.R. Through Reinhart, government introduced an uncertified, unsigned, undated exhibit 82 purportedly representing Alena's application for tuition assistance.[20] Prosecution affirmatively mislead the court and jury by a) omitting the date from Alena's application; b) eliciting misleading testimony from Reinhart.

172. a) Even if exhibit 82 was based on a true application, exhibit 82 was altered by removing/ omitting its date. If the exhibit 82 was an electronic application (as government said), there could be no way for the application to be undated. 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). The date of the electronic signature on government exhibit 81 showed the tuition assistance application was approved on April 22, 2011. It means the application was filed before at least April 22, 2011.

173. b) The questionable exhibit 82 did not state a "class location", but listed contact address of tuition provider as 10852 Ambassador Dr. Prosecutor, without foundation, forced Renhart to guess class location: Prosecutor: "And where does this application say those classes are taking place?" TAP Representative: "Well, I would say at 10852 Ambassador Drive." (RT 462)[21]

174. Neither Alena, nor J.R. ever stated class location as 10852 Ambassador Dr.

175. Prosecutor benefitted from the prosecutor-elicited misleading Reinhart's testimony and omitted application date to create a false impression of fact that the 10852 Ambassador Dr. was occupied by Eric Gropp at the time of pre-April 22, 2011 application. But Eric Gropp neither looked at or rented the 10852 Ambassador Dr. until over 6 months after Alena's application for tuition assistance.[22]

176. The omitted application date and the misleading testimony regarding English "class location" were central to the issue of guild, and undermined judicial process.

177. Thus, the error was not harmless. Prosecutor capitalized on its misstatements at closing: "There were no English classes taking place there. There was no school there. It was just him [E. Gropp], his kids and dog." (RT 1032). "A long trail of small misrepresentations, none of which constitutes fraud on the court in isolation,

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[20] It was improper to admit gov. exh. 80 because Reinhart was neither a custodian of record, nor was she an eyewitness to the gov. exh. 80 creation.

[21] "*Napue* [360 U.S. 264 (1959)] forbids the knowing presentation of false evidence by the state in criminal trial, whether through direct presentation or through covert subornation of perjury... That the witness is unaware of the falsehood of the testimony makes it more dangerous, not less so." *Hayes v. Brown,* 399 F.3d 972 (9th Cir. 2002).

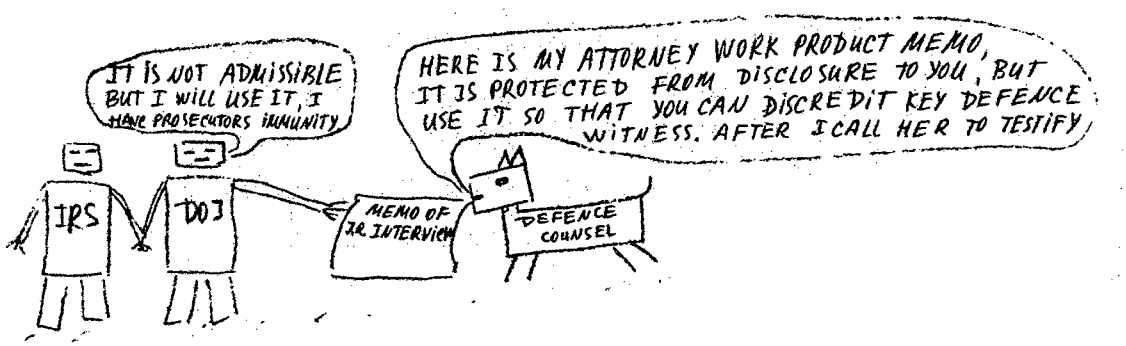
[22] Eric Gropp testified he looked at Ambassador Drive three months later, on July 25, 2011, and rented it on August 1, 2011 (RT 498).

could theoretically paint a picture of intentional, material deception when viewed together." *Sierra Pacific,* 862 F.3d 1157 (9th Cir. 2017)

178. It is prosecutor's burden to show harmlessness, and they cannot show that burden. "In cases… involving 'prosecutorial misconduct and, more importantly… a corruption of the truth-seeking function of trial process' supreme court applies 'stricter' standard of materiality under which a 'conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2001). "A state, as the beneficiary of an identifiable error, must be able to affirmatively show that it was harmless. See O'Neal v. McAninch, 513 U.S. 432 (1995)." *Fisher v. Roe*, 263 F.3d 906 (9th Cir. 2001). "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." 328 U.S., at 764-765, (emphasis added)." *O'Neal v. McAninch*, 513 U.S. 432 (1995)

E. Counsel violated the integrity of adversary process when he provided his privileged work product to prosecutor and failed to object to introduction of false, misleading, and inadmissible evidence, in violation of the Sixth amendment.

179. Before calling defense key witness J.R., defense counsel provided prosecutors with memorandum of interview of J.R. (RT 883). This memo was written by defense counsel investigator. J.R. had never seen the memo: "Who wrote this?" (RT 953) "I do not even use the word 'portal'" (RT 953). Prosecutor used that memorandum to impeach J.R.'s credibility: "But that is not what you told the person who interviewed you, right?" (RT 954) and called J.R. a liar at the closing argument. (RT 1035).



180. There can be no reasonable strategy here.

181. "There is no question that litigants need not produce materials covered by the attorney-client privilege or documents that constitute attorney work product, including those prepared by party's agents and consultants.

See, e.g., *Hickman*, 329 U.S. at 510-511 (work product materials are protected); *Nobles*, 422 U.S. at 238 (work product encompasses materials prepared by attorney's investigators)." *Rojas v. F.A.A.*, 927 F.3d 1046 (9th Cir. 2018).

182. "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.... It is therefore necessary that the doctrine protects material prepared by agents for the attorney. The concern reflected in the work-product doctrine do not disappear once trial has begun." *U.S. v. Nobles*, 422 U.S. 225, 238 (9th Cir. 1975).

183. By providing his work product to prosecution, defense counsel failed to keep integrity of adversary process: "The purpose of the work product privilege is to protect the integrity of adversary process." U.S. v. Christensen, 801 F.3d 970 (9th Cir., 2013). "Memorandum of interview was not within the definition of the term 'statement' as contained in the [Jenkins] Act." *Palermo v. U.S.*, 360 U.S. 343 (1959).

184. The prejudice, thus, is presumed under U.S. v Chronic. "Prejudice is presumed if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Garza v. Idaho*, 139 S.Ct. 738 (2019) (citing Chronic, 466 U.S. 649, 695). "The Sixth Amendment to the U.S. Constitution guarantees the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668 (S.Ct. 1984). "A single, serious error may support a claim of ineffective assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

185. Counsel improperly failed to introduce J.R.'s English teacher credentials that were easily available from University of Nebraska and from WES (credential evaluation company).

186. "Because [witness] took the stand, it was critical to have any available objective physical and forensic evidence to support his version. See, e.g., *Hart v. Gomez,* 174 F.3d 1067, 1070 (9th Cir. 1999) (when attorney failed to investigate, "the jury was left to decide without benefit of supporting or corroborative evidence," the credibility of trial testimony. Reversed)." *Bennett v. Cate*, 407 F.App'x 2013 (9th Cir. 2010). "Where the defense strategy is to win a credibility contest, the importance of corroborating the accused's testimony with physical evidence is paramount." *Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009).

187. In addition, defense counsel entirely failed to object to multiple introduction of inadmissible evidence. Neither prior immunized testimony, nor memorandum of J.R.'s interview was admissible for impeachment. "The Fifth amendment prevents the Government from using immunized testimony either directly or indirectly. Government is required to prove "that all of the evidence it proposes to use was derived from legitimate independent source." Moreover, "hearing must make specific findings on the independent nature of this proposed allegedly tainted evidence." *U.S. v. Tallia*, 1991 U.S. Dist. DC Lexis 6654.

188. Counsel also failed to object to questions outside of direct examination of J.R. Issues of California teacher accreditation and employment at "International Tutoring" were irrelevant and collateral.

189. Counsel's ineffectiveness of Count 8 (theft count) negatively affected all other counts. Theft, one of the 10 prohibited sins, would be particularly disturbing to the jury. "Prejudice can arise even more readily than in average case when there is misjoinder of a crime that would be particularly disturbing to the average juror." *U.S. v Jawara*, Case No. 05-30266 (9th Cir. 2006).

V. OMISSION OF NET WORTH METHOD JURY INSTRUCTIONS IS PLAIN REVERSIBLE ERROR (COUNTS 1 – 6).

A. Net Worth method of proof was never approved for non-unreported income cases and Revenue Agent was never qualified as expert in net worth.

190. Indirect method of proof (Net Worth) was central to government's theory of guilt on Counts 1-8. Prosecutor did not have a direct evidence of proof. Thus, they employed indirect method of proof by "creating" (RT 685) Alena's "financial picture." Prosecutors used (or pretended to use) the Net Worth method to argue that even though "the money did go out of the account" (RT 656), Alena did not spend them on dependents or childcare, thus making Alena's tax returns (Count 1-6) and $4,000 tuition payment (Count 8) false.

> Prosecutor: At issue in this case are the defendant's 2009, 2010, 2011 tax returns. She claims to have spent money taking care of her household. She claims to have spent money on childcare. In order to track down all of these expenses, in order to rebut these expenses, the government needs to be able to put in a full financial picture of the defendant. (RT 652).
>
> Prosecutor: Because the money goes out of the account. You know, it's... I can't just have the expert testify to something that isn't true, that there was no money going out of the account. The money did go out of the account. (RT 656).

191. Revenue Agent testified he had a special method to determine Alena's income and expenses: "I created summary spread sheet of all of the deposits and withdrawals going in and out of each and every one of the bank accounts... to determine what the correct level of amount of income was for each of these individuals and expenditures for each of the years." (RT 685). While admitting that he does not know everything about Alena's finances: "Because the financial records give a good picture, so I might not – it is very true, I do not know the defendant or her family personally, so I do not know everything" (RT 846), Revenue Agent declared, "based on growth in her assets,... there was not a whole lot of cash being spent" and defendant "did not have significant expenses." (RT 886).

192. But "[t]he net worth method is not a system of accounting. It is merely indirect evidence of income." *Baumgardner v. Commissioner*, 251 F.2d 311, 321 (9th Cir. 1957) and the Supreme Court approved the net worth method to estimate unreported taxable income through circumstantial evidence in *Holland v. U.S.*, 348

U.S. 121 (1954). Prosecution presented no legal bases to adopt the net worth method for non-unreported income cases.

193. Even if the net worth method was permitted to be used in this case, Revenue Agent was not qualified to conduct Net Worth testimony. He was never qualified or presented peer-reviewed evidence of his expertise in forensic accounting or the net worth method.

194. The complete lack of record establishing opening/closing net worth is just a telling example of Revenue Agent's lack of qualification. For this reason, Revenue Agent's testimony should be stricken in its entirety. "In proving the elements of the crime of tax evasion by the "net worth" method, the government is required to... accurately establish the defendant's opening net worth and [closing] net worth." *United States v. Gomez-Soto*, 723 F.2d 649, 651 (9th Cir. 1984). "The establishment of an accurate opening net worth is crucial under the net worth and expenditures method of proof for "the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset." *United States v. Hamilton*, 620 F.2d 712, 713 (9th Cir. 1980).

B. Prosecution failed to explain assumptions and inferences of Net Worth method of proof in violation of U.S. v. Hall, 650 F. 2d 994, 998 (9th Cir. 1981).

195. Prosecutors not only failed to explain the assumptions and inferences in government's application of the net worth method, but also, they told the jury there was no assumptions:

> Well, I would remind you that the revenue agent, like all the other witnesses, took the stand and took an oath to testify truthfully and accurately. His testimony to you was supported by all the bank records that he identified should you want to go and examine them in the jury room. (RT 1084-1085).

196. Alena raised the issue of Net Worth jury instruction in her Motion for New Trial (Doc 116, p. 7). "There is no indication that the prosecution's evidence had any comment on the underlying assumptions and existing inferences of the method. This does not comport with the Supreme Court's mandate in Holland." *United States v. Hall*, 650 F.2d 994, 998 (9th Cir. 1981).

197. Convictions have been reversed where the trial court failed to give full explanatory instructions on the net worth method. "[T]he complete lack of any instruction on the nature of the [net worth] method and its concomitant assumptions and inferences affects a substantial right of the accused and constitutes plain error... and required a reversal despite the lack of objection by the defendant to such omission." *U.S. v. Tolbert*, 367 F.2d 778, 781 (7th Cir. 1966). See also *United States v. O'Connor*, 237 F.2d 466, 472-73 (2d Cir. 1956), *United States v. Hall*, 650 F.2d 994, 999 (9th Cir. 1981). "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation." *Holland*, 129. Furthermore, "the prosecution may pick and

choose from the taxpayer's statement, relying on the favorable portion and throwing aside that which does not bolster its position." *Id.*

198. "Although the net worth may have been used for corroboration, the results of the net worth analysis were thoroughly presented to the jury by the Government expert. We cannot speculate on the role which the Government net worth analysis played in the minds of the jury, but it may have been substantial." *U.S. v. Hall*, 650 F. 2d 994, 998 (9th Cir.) "Comprehensive explanatory instructions must be given when the bank deposit method of proof is used, just as is required by Holland for the net worth method." *Id.*

199. "Because the omission of these explanatory instructions goes to the very basis of the jury's ability to evaluate the evidence, we conclude that a finding of plain error is warranted. Accord, *U.S. v. Tolbert*, 367 F.2d at 781. See *O'Connor*, 237 F.2d at 471-72." *Hall*, 998 (9th Cir. 1981).

C. Omission of disclosures and instructions is not harmless because plain error is not harmless per se and/or Revenue Agent summaries created a false impression of facts.

200. "'Plain' error is automatically prejudicial for Strickland purposes. Error is plain if it affects substantial rights, aka "have substantial and injurious effect or influence in determining the verdict." *Rusnak*, 981 F.3d 996, 1002 (9th Cir. 2000).

201. Revenue Agent misused those summaries in two ways: a) to present government's speculations as real bank transactions indicative of guilt, and b) to present speculative estimates of money needed for support of household to tell Alena "did not provide" that much support. "Prejudice is at its apex when the district court erroneously admits evidence that is critical to the proponent's case." *Estate of Barabin*, 740 F.3d 457 (2014). [23]

1. To declare Alena's dependent N.A. as false, Revenue Agent presented false bank record summary overstating N.A.'s income by over $30,000 (over $20,000 in 2009, and over $10,000 in 2010).

202. Revenue Agent mislead the jury that he possessed actual bank records of N.A. receiving and spending $20,458 in 2009, when there was no such deposit or expenditure. (The amount spent by a dependent is important "for determination" of 50% of his support). That is the reason Revenue Agent summary does not

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[23] Pre-trial, defense moved for bill of particulars alleging insufficiency of indictment. (Doc. 27). Prosecution objected, arguing that government had already exceeded its discovery obligations by providing full discovery (Doc. 28), and court denied bill of particulars. Defendant then moved for pre-trial inspection of government summaries (Doc. 60-64), prosecution objected, and court denied it. It was the court's duty to exercise its gatekeeper function. The court abused its discretion when it admitted, over objections, unverified, previously undisclosed summaries: " The following precautionary measures should be taken when summary charts are used: 1) The trial court, out of the presence of the jury, should carefully examine the summary charts to determine that everything contained in them is supported by the proof; 2) Trial court should not admit the charts as evidence or allow their use by the jury during deliberations." *U.S. v. Soulard*, 730 F.2d 1292 (9th Cir. 1983).
Prosecution reiterated the importance of the summaries: "I mean, the numbers are the case." (RT 656). "The failure to make an explicit reliability finding [i]s error, even where the district court's ruling suggests an implicit finding of reliability." *United States v. McLeod*, 755 F. App'x 670 (9th Cir. 2019).

point to any particular bank statement or date. Through leading questions prosecutor mislead the jury that N.A. received $28,296 and spent $27,472 which demonstrated in government bank record based exhibit 405: "And the basis of those bank records, were you able to create a summary of [N.A.] support for 2009?" (RT 696-697). Revenue Agent explained: "I created a summary based on defendant's bank records, a summary of support for her sister for 2009, yes... [405] on exhibit list." (RT 697) and "$20,458... is the funding [N.A.] received from...University of Nebraska." (RT 699).

203. Exhibit 405, supposedly based on bank records showed to the jury that N.A. "received $28,296 in 2009... and spent $27,472." (RT 700 – 701). "Based on [Revenue Agent] analysis of these bank accounts... [Aleykina] would have to have paid over $13,700 approximately of her support in 2009 in order to claim dependent. So, Revenue Agent opinion was that "Aleykina was not entitled [to claim dependent]" (RT 701).[24]

204. As Revenue Agent correctly admitted, "Persons own funds are not support unless they are actually spent on support." (RT 829). The problem for prosecution is N.A. neither received the $20,458 into her bank account, nor spent them from her account. Prosecution presented similar misleading testimony regarding year 2010 deposits and expenses.

2. To invalidate bank records showing childcare payments, Revenue Agent mislead the court that he possessed the actual bank records of T.A. paying wages back to Alena, when he really had no such records. [25]

205. Revenue Agent's testimony was not in fact supported by bank records, as both Revenue Agent and prosecutor assures. "There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Deveraux*

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[24] Moreover, 26 U.S.C. 152 states: "Amounts received as scholarship shall not be taken into account in determining whether such individual received more than half of his support from the taxpayer, and "[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)

[25] Prosecutor: Now, did you further examine what happened to the money that was paid to T.A?
Rev. Agent: Yes, I did.
Prosecutor: And did you summarize those findings in a chart?
Rev. Agent: Yes.
Prosecutor: That's government exhibit 416.
Prosecutor: Can you explain to the jury what you discovered about the payments to T.A.?
Rev. Agent: Yes, this shows the money that came into Pelican Enterprise Trust on the left, the checks written to Tetyana, and then there were three amounts – or three payments that went back to defendant. (RT 773)

Rev. Agent: These are the wages checks that went to T.A. [deposited] into Wells Fargo Account 7117.
Prosecutor: What happened with the money that was in that Wells Fargo bank account?
Rev. Agent: Again, what happened to it was it was withdrawn and payments to the defendant. (RT 775).

v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001). Neither government exhibit 416, nor bank records show "payments back" to Alena of the babysitting wages.[26]

3. To declare Alena's household status as "false", Revenue Agent misstated IRS own definition and guidelines on what a "household" is.

206. Revenue Agent assumed (and communicated his assumptions through government summaries) that Alena's household expense should be total expense of maintaining R. H.'s house (RT 1043). But IRS rule is that "It would be an elevation of form over substance to say only one household existed simply because only one building was involved and certain areas were used in common." *Estate of Fleming v. Commissioner*, Docket No. 3503-72., 1974 Tax Ct. Memo LEXIS 183 (T.C. May 29, 1974)

207. Total expenses of maintaining a shared dwelling are irrelevant for two separate households. "Taxpayer only needs to show that he contributed over one-half the household expenses jointly contributed by said taxpayer and his children." (IRS Memorandum SCA 1998-041, Doc. 127, p. 5-7).

4. Revenue Agent declared rental losses "false" not because losses did not occur, but by telling the court a non-existing law allegedly requiring one to be a "head of household" to claim legitimate losses.

208. When testifying about rental losses qualifications, Revenue Agent relied on his summaries. He testified Alena "was not entitled to claim rental loss because she [as Revenue Agent determined] was not a head of household: After telling the jury "Aleykina would not be entitled to... head of household filing status," Revenue Agent claimed she could not claim rental losses (count 2, 3) on her 2010, 2011 forms 1040.[27]

209. There is simply no law (and revenue agent presented none) that requires one to be a "head of household" in order to be able to deduct rental losses.

210. "It may be asked what harm is done, after all, by disregarding the admonitions of Holland, putting everything int a chart showing increased net worth and having the Special Agent testify that it was prepared under his supervision and is right. There is still opportunity for cross examination and for witnesses for the defense. What is wrong, in addition to its being contrary to the law laid down by the Supreme Court, is that

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[26] Bank record exhibit is available from government.

[27] Prosecutor: And when it says 'rental losses allowed', what is this numbered, negative $16,603?
Rev. Agent: That's assuming head of household filing status the rental losses claimed and allowed would have been $16,603
Prosecutor: But it is your opinion she was not entitled to head of household filing status, correct?
Rev. Agent: Correct.
Prosecutor: So, she was not entitled to this loss, is that correct?
Rev. Agent: That is correct.
Prosecutor: That what it would have been if she were entitled to head of household filing status?
Rev. Agent: Correct. (RT 749)

such a process is outrageously unfair. *Lenske v. United States*, 383 F.2d 20, 24 (9th Cir. 1967). "What has happened to [the defendant] is that the Government has not assumed the burden of proving, beyond a reasonable doubt, that he is guilty. It has assumed only the burden, with its unlimited resources and time, of preparing a mass of documentary evidence and charts incomprehensible to a layman, all prepared by the Government itself, and saying to the taxpayer, "Your task is to prove that all of what is contained in the charts is false, not merely that it is 96% false, but that it is all false. You do not have the time nor the resources that the Government had, but that is your misfortune. *Lenske v. United States*, 383 F.2d 20, 24 (9th Cir. 1967) (reversed).

211. Revenue Agent did not even want to take responsibility for his testimony. Revenue Agent testified that his role in this case was "to calculate the tax due and owing based on what the government (not Revenue Agent) believes are items on the return that are false." (RT 675/24-25). Revenue Agent's testimony was so unreliable, it should be stricken in its entirety. "Where expert testimony has been erroneously admitted, appellate court begins with a presumption of prejudice." *United States v. Sarkissian*, 755 F. App'x 613 (9th Cir. 2018).

VI. 26 U.S.C. §7206(1) CONVICTION ON ALLEGED $3,400 UNDERPAYMENT WITH FOUR YEAR SENTENCE IS BASED ON INSUFFICIENT EVIDENCE (COUNT 6).

A. Indictment defective as insufficient in notice of "$9,750 wage pay back" or notice of alleged $2,000 in income understatement accusations.

212. The Sixth Amendment guarantees "the right to be informed of the nature and cause of the accusation." While the indictment stated tax nature of the accusations, it did not directly allege that the falsity of 2010 Form 1041 was caused by "wage payback" theory or by $2,000 understatement in income. Neither government's plea offer (Doc. 116 p 25-26), nor opposition to Bill of Particulars (Doc 28) ever mentioned these two theories. Therefore, there is no indication the "wage payback" and $2,000 in income was presented to the grand jury, as required by the Fifth Amendment.

213. 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.

B. 3,400 in underpayment for childcare is not supported by sufficient evidence. Rule 29 motion should be granted.

214. Count 6 of superseding indictment stated Alena willfully subscribed to 2010 Form 1041 Tax Return for Pelican Enterprises Trust (PET) which she did not believe to be true and current because Alena 1) reported $18,171 in wages while she knew PET paid less in wages and 2) claimed negative income of $16,071 while she knew she was not entitled to claim $16,071 in negative income.

1. He that is unjust in the least is unjust also in much. Luke 16:10.

215. Revenue Agent testified the income for PET was $10,021 (RT 784) and wage expense was $2,100 (RT 784). Revenue Agent did not dispute approximately $600 paid to California EDD in employment tax (Government Exhibits 84-89). Sentencing guideline on underreported income is 30%. If one accepts Revenue Agent's testimony for the sake of argument, tax would be $2,190. (10,021 – 2,100 – 600) x 30% = 2,190. Even when tax due is calculated on assumptions most favorable to prosecution, it would not be $3,400 as Revenue Agent claimed (RT 758), and is over 30% overstatement in government favor.

2. Substitution of $8,000 in income with $10,021 was not supported by sufficient evidence.

216. Prosecution presented government exhibits 93 and 96 as a "proof" of understated income. In particular, Revenue Agent claimed R.H. paid $5,021 to PET (RT 752) according to the third-party handwritten receipt - Exhibit 96. Prosecution failed to present direct testimony from R.H. of alleged $5,021 payment R.H. was on government witness list and was available. "Because [the witness's] out-of-court statements . . . do not fall within an exception to the hearsay rule, they are inadmissible, regardless of Rule 106." *United States v. Sine*, 493 F.3d 1021, 1037 (9th Cir. 2007). "The Sixth Amendment Confrontation Clause requires that in order to introduce relevant statements at trial, state prosecutors either produce the declarants of those statements as witnesses at trial or demonstrate their unavailability." *Bains v. Cambra*, 204 F.3d 964, 973 (9th Cir. 2000). It is also notable R.H. requested $3,000 (and not $5,021) in payment to PET (Gov. Exh. 96). The remaining $2,021 out of $5000 appeared to be paid to "Greenhaven" childcare.

3. Substitution of $8,421 in wages with $0.00 was not supported by sufficient evidence.

217. Revenue agent testified $8,421 was not paid to Anna A. because there was no payment of $8,421 from PET bank account (RT 755-756). (At the same time Revenue agent argued there was $10,021 in income to PET even though there was no $10,021 in deposit to PET bank account. There is no GAAP that would allow such inconsistent approach).

218. Revenue agent's testimony did not prove lack of $8,421 in wage payment beyond a reasonable doubt. Revenue agent was not a witness to the event, and his testimony violated Confrontation Clause. "Where the crime involves no tangible corpus delicti (like tax) ... all elements of the offense must be established by

independent evidence or corroborated admissions." *Smith v. U.S.*, 348 U.S. 147, 156 (S.Ct. 1954). Despite Revenue Agent's testimony that $8,421 was not reported anywhere else (RT 756), government exhibits 84 – 89 show employment wages reported and taxes paid.

4. Substitution of $9,750 in wages with $2,100 was not supported by evidence.

219. Revenue Agent testified that he prepared government exhibit 401L "based on [his] examination of the bank account for PET" (RT 770), and exhibit 401L is "a summary of the PET bank account." (RT 771). Revenue Agent presented theory of wage "pay back" and mislead jury that prosecution possesses actual records of that wage pay back, when in fact he had no such bank record.

Prosecutor: Now, did you further examine what happened to the money that was paid to T.A?

Rev. Agent: Yes I did.

Prosecutor: And did you summarize those findings in a chart?

Rev. Agent: Yes.

Prosecutor: That's government exhibit 416

Prosecutor: Can you explain to the jury what you discovered about the payments to T.A.?

Rev. Agent: Yes this shows the money that came into Pelican Enterprise Trust on the left, the checks written to Tetyana, and then there were three amounts – or three payments that went back to defendant. (RT 773)

Neither Rev. Agents testimony, no his summaries were supported by actual bank records. IRS R.A. created false impression of facts.

Rev. Agent: These are the wages checks that went to T.A. [deposited] into Wells Fargo Account 7117.

Prosecutor: What happened with the money that was in that Wells Fargo bank account?

Rev. Agent: Again, what happened to it was it was withdrawn and payments to the defendant. (RT 775).

220. Revenue Agent concluded that actual wages paid were $2,100 and not $9,750 (RT 771, 784). Prosecutor argued at closing that the fact that T.A. received $3,050 in Earned Income Credit (EIC) as a result of filing her 2010 Form 1010 was the proof of $9,750 wage falsity. Prosecutor did not dispute that childcare services for child under one year old were provided, nor the prosecutor presented an alternative childcare provider. Prosecution presented theory that T.A. decided to return her earnings and to live on $2,100 for the year due to some odd reason. If the prosecution theory were to be accepted, anyone who ever paid to a future EIC recipient would be making a false tax return and heading for penitentiary.

5. Prosecution failed to prove all elements of count 6 in general and elements of materiality in particular.

221. Gov. Exh 401L show Pelican Trust made no income, and had "0.00" balance before the year end. Alena contributed $6,057 to the trust, Alena had no income from this trust. Thus, there was no tax due on $0.00 income. (Exh E-14)

"Following *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), we have instructed that the settled meaning of intent to defraud requires a showing of materiality. *Watkins*, 278 F.3d at 965. We "must presume that Congress intended to incorporate materiality unless the statute otherwise dictates." *United States v. Smith*, 714 Fed. Appx. 701, 704-705 (9th Cir. 2017). Materiality must be demonstrated by the government (*U.S. v. Oren*, 893 F.2d 1057, 1063 (9th Cir. 1990), *U.S. v. Talkington*, 589 F.2d 415, 416 (9th Cir. 1978)), and must be submitted to the jury (*U.S. v. Gaudin*, 515 U.S. 506 (S. Ct. 1995). "Even if any failure to report income is material in most circumstances, it is not necessarily material in all circumstances, since the materiality of an underreporting of income necessarily depends on the facts of each case." *United States v. Uchimura*, 125 F.3d 1282, 1285-1286 (9th Cir. 1996).

222. Instead, prosecution took determination of materiality away from the jury when it directed that all is material unless it is a typo.

VII. 7 YEARS 3 MONTHS SENTENCE IS DISPROPORTIONATE AND UNCONSTITUTIONALLY BASED ON ALLEGATIONS OF UNPROVEN, STALE, UNINDICTED, UNTRIED CONDUCT, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS.

A. Guideline ranges were inflated from the start.

223. "Failure to accurately state the correct Guideline range... derails the sentencing proceeding before it even begins." *U.S. v. Vargem*, 747 F.3d 724 (9th Cir. 2014). The sentencing guideline ranges were overstated. Base offense level for 18-1519 (Count 9) is level 14 (2 J.1.2), 16-21 months. The court added 2 levels for "obstruction" when guideline specifically precludes such enhancement (2 J 1.2. application note 2), see *U.S. v. Vastardis*, 2020 U.S. Dist. Lexis 68748.

224. The court further enhanced Count 9 by alleged "tax loss" when there is nothing in USSG allowing such an enhancement to 18-1519. On the contrary, the double jeopardy clause mandates that once the 18-1519 (count 9) is used to enhance other count by 2 points, count 9 has to be dropped altogether. "Obstructive conduct... is [to be] taken into account only once: as a 2 level adjustment to the base offense level for the identifying offense, or as the offense level provided for the obstruction offense itself, whichever is greater, USSG 3G1.1 cmt 7." *Fries*, 781 F.3d 1137 (9th Cir. 2014).

225. When sentencing Alena, judge alone increased her offense level from 6-14 level to 20-21 level, and almost tripled Alena's sentence:

Counts of Conviction	Jury Found Base offense level[28]	Base sentencing range	Judge enhanced offense level	Judge enhanced sentence of confinement	Judge found offense level increase	Time of increase from jury found base sentence
Count 1-6	6 (2T 1.1)	0-6 months	20	36 months	+14	12 (36/3 months)
Count 8	6 (2B 1.1)	0-6 months	22	51 months	+16	17 (51/3 monhts)
Count 9	14 (2J 1.2(a))	15-21 months	22	51 months	+8	2.7 (51/19 months)

226. Count 1-6 base offense level is 6 (0 – 6 months) because the question of tax loss amount was not found by the jury. Jury was instructed to convict upon finding of any of the allegations in the tax charges on counts 1-6. "We have no instruction here to show that the jury was required to find the amount of loss, and I agree *Parker* [5 F.3d 1322] prevent us from relying on the judgment of conviction." *Li,* 389 F.3d 892 (9th Cir. 2004).

227. Per *Booker*, base offense level is also the maximum guideline level:

- "Based solely on the facts admitted as part of Quintero's guilty plea... the maximum sentence he would have been eligible to receive was not the 5 years statutory maximum, but 1-3 months, the standard range calculated for that offense. See *Blakely*, 542 U.S. at 303-4." *Quintero*, 891 F.3d 1197 (9th Cir. 2018).
- "*U.S. v. Booker* [543 U.S. 220] did not give 'unfettered discretion to impose any sentence that Congress made applicable to the offence." *U.S. v. Garcia*, 202 F.Supp.3d 1109 (9th Cir. 2016). "Federal sentencing scheme aims to achieve uniformity by ensuring that the sentencing decisions are anchored by the Guidelines." *Peugh v. U.S.*, 133 S.Ct. 2072, 2083 (2013).
- "The fact that the U.S. sentencing guidelines manual has become discretionary following *Booker*, does not alter the analysis for sentencing enhancements." *U.S. v. Ameline*, 409 F.3d 1073 (9th Cir. 2005).
- "the Guidelines - not the defendants statute of conviction - set the relevant "maximum" sentence.. For that reason, the Supreme Court held that Guideline enhancements routinely violated the rule in Apprendi" 976 F3d 63 Shea, 1c, 2020 stg Booker 543 us at 234.

228. Thus, even if Booker gave judge freedom to depart, the departure should start from 0-6 months range on Counts 8 and 9, for example. Not from the judge-found enhancements of 41 months.

[28] "Relevant conduct losses must be calculated separately from losses of offence of conviction." *U.S. v. Hymas*, 780 F.3d 1285 (9th Cir. 2014).

229. Additionally, upward departures ridden on hearsay allegations of stale, unindicted, untried conduct violated the Fifth and the Sixth Amendments.[29] The sentence was in part based on "failure to show remorse," but "It is a violation of the Fifth Amendment privilege against self-incrimination for court to conclude that defendant had not shown inclination toward repentance and to predicate length of their sentences on whether defendants confessed to their crimes when defendants had pleaded 'not guilty,' were convicted, and still refused to confess or repent of their crimes." *U.S. v. Laca*, 499 F.2d 922 (5th Cir. 1974). "It is fundamentally unfair to attach defendant for invoking right to remain silent." *Doyle v. Ohio*, 426 U.S. 610 (S.Ct. 1976).

B. Clear and convincing standard was required to enhance sentence disproportionally.

230. Even if court disregards constitutional protections above, it should apply clear and convincing evidence standard of proof due to the disproportionate effect of enhancements. "Where the enhancement represents the overwhelming proportion of the punishment imposed, a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations." *U.S. v. Treadwell*, 593 F.3d 990 (9th Cir. 2010). "When combined impact of contested sentencing enhancements is disproportionate relative to the offense of conviction, the district court must apply the clear and convincing evidence standard of proof." *U.S. v. Taskov*, 564 F. App'x 292 (9th Cir. 2014). "When a sentencing factor has an extremely disproportionate effect on sentence relative to the offense of conviction... the Ninth circuit applies the higher clear and convincing evidence standard." *U.S. v. Temkin*, Case No. 16-50137 (9th Cir. 2017)."Evidence is clear and convincing only when it triggers an abiding conviction in the correctness of the

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[29] The Fifth Amendment guarantees that "No person shall be held to answer for capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury." "Felony is, as consequence of punishment imposable thereof, "infamous crime," prosecution for which may only be on presentment or indictment by grand jury." *Michel v. Louisiana*, 350 U.S. 91 (1955). "At the founding a 'prosecution' of an individual simply referred to the 'manner of [his] formal accusation.'" *U.S. v. Haymond*, 139 S. Ct. 2369 (2019).
Prosecution violated this guarantee when it introduced formal accusations of various "crimes" at sentencing.
Due Process clause the Fifth Amendment protects against prejudicial pre-accusation delay. "As we said in U.S. v. *Ewell* [383 U.S. 122], the applicable statute of limitations is the primary guarantee against bringing overly stale criminal charges." *U.S. v. Marion*, 404 U.S. 307, 325 (S.Ct. 1971).
The various "crimes" alleged by prosecutor were over 5 years old. "The theory is that, even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation, and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Bowen v. City of New York*, 476 U.S. 467 (1986).
"The Fifth Amendment requires that the government proves "all elements of the offence charged... beyond a reasonable doubt." *Sullivan v. Louisiana*, 508 U.S. 275 (S.Ct. 1993). "Element" is what "increases the penalty to which the defendant is subjected." *Alleyne v. U.S.*, 570 U.S. 99, 117 (S.Ct. 2013). Prosecution neither addressed the elements, nor proved them.
The Sixth Amendment guarantees "the accused shall enjoy the right... to be informed of the nature and cause of the accusations" (prosecution did not inform), "to be confronted with the witnesses against him" (prosecution presented no witnesses at sentencing). "We held that the enhancement could not rest entirely on hearsay." *U.S. v. Pridgette*, 831 F.3d 1253 (9th Cir. 2016).
"Sixth Amendment requires that defendant accused of serious crime be afforded right to jury trial." Duncan v. Louisiana, 391 U.S. 145 (S.Ct. 1967).
Alena's Fifth and Sixth Amendment rights were violated when the district judge, not jury, found facts that increased her guideline authorized sentence. "The very reason the Framers put a jury-trial guarantee in the constitution is that they were unwilling to trust government to mark out the role of jury." *Blakely v. Washington*, 542 U.S. 296 (S.Ct. 2004). "Giving judges the exclusive power to find facts necessary to sentence in the higher range would make the jury mere gatekeeper to the more important trial before a judge alone." *Rita v. U.S.*, 551 U.S. 338 (S.Ct. 2007).

government's position, 'instantly tilting the evidentiary scales' when weighed against the defendant's contrary evidence." *United States v. Seaton*, 773 F. App'x 1013 (10th Cir. 2019)

231. In *U.S. v. Alvarez* (714 Fed.App'x 671(2017), the Ninth circuit found the sentence was impermissibly disproportionate under *Valensia* [222 F.3d 1173, 1182 (9th Cir. 2000)], thus mandating clear and convincing standard of proof. In *Alvarez* sentence, the court 1) departed from the sentencing guideline by more than 4 levels and 2) more than doubled the length of the initial (unenhanced) sentence. (See table above).

232. In U.S. v. Aleykina, the court 1) departed from initial sentence by 8, 14, and 16 levels, and 2) nearly tripled the initial sentence. The enhancement in Alena's sentence greatly exceeded those in *Alvarez*, thus also requiring clear and convincing standard of proof. Moreover, government introduced allegations of new offence (subornation of perjury), which is an additional argument for clear and convincing standard of proof under *Valensia.*

233. Government cannot show the sentence was proven by clear and convincing evidence. For example, when prosecution introduced unindicted allegations of obstruction crime "Aleykina had her sister testify falsely", it failed to prove every element by clear and convincing evidence. The elements of proof were not even a factor. But "[t]he fact that a defendant who testified at trial is disbelieved by the [trier of fact] and convicted is not alone sufficient evidence of perjury to bring about sentence enhancement." *Rodrigues*, 2002 Lexis 17599. (citing *Dunnigan*, 507 U.S. 87, 95 (1933)). The allegation was objected to in PSR, but the district judge failed to rule on it as required per Fed. R. Crim. P. 32(i)(3)(B).

234. Sophisticated means [of concealment] were mere speculations. "But courts are not bound to accept as true a legal conclusion couched as a factual allegation." *Aschcroft v. Iqbal*, 556 U.S. 662, 678 (S.Ct. 2009).

235. Position of trust. IRS entrusted Alena with a gun and radio, and not with preparation, filing, or audit of tax returns. (RT 672, 67, Doc. 116, p. 36).[30] Alena's tax returns charged in Counts 1 – 6 were not in any way prepared within the scope of her employment and "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 v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996). "People may be fiduciaries when they do certain things but be entitled to act in their own interest when they do others." *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1988 (7th Cir. 1994).

In Moored 997 F2d at 145 court prevented application of the enhancement where relied on position of trust had only "some remote connection with defendants crime".

10 months upward departure. At sentencing court said the 10 month departure was insignificant because it only amounted to aprox 2 point increase. For departures that are "insignificant", "parsimony required the lesser sentence be imposed" 651 Fed Appx 653, Brown, 9c, 2016.

[30] ("Position of trust must be established from the perspective of the victim." *U.S. v. Thomsen*, No. 13-50235 (9th Cir. 2016). ""Abuse of trust enhancement applies where the offender has abused discretionary authority entrusted to the defendant by the victim." *U.S. v. Fiorito*, 640 F.3d 338 (8th Cir. 2011).

C. Request for resentencing on existing record.

236. Government received defense's objections to the proposed enhancements in PSR but based its proof only on hearsay and speculations.

237. Upon remand, this Court should order resentencing on closed (existing) record because government had opportunity but failed to prove disputed increased sentence. While generally, the Ninth Circuit remands for resentencing on an open record, the Court in *Pridggette* stated:

> "We have long recognized a closed remand is appropriate when the government tries but fails to prove facts supporting an increased sentence. *U.S. v. Reyes-Oseguera* is instructive. 106 F.3d 1481 (9th Cir. 1997). Second exemption to *U.S. v. Matthews*, 287 F.3d 880, 886 (9th Cir. 2002) calls for closed record sentencing 'where there was a failure of proof after a full inquiry into factual question at issue.'
>
> We held that the enhancement could not rest entirely on hearsay. *U.S. v. Reyes-Oseguera*, 106 F.3d at 1484. Rather than allowing the government to prove the enhancement with non-hearsay evidence, we remanded with instructions that the district court enter a specific lower sentence.
>
> If the government fails to meet its burden of proof even when given such an opportunity, we may remand for resentencing on the existing record." S*ee Espinoza-Morales,* 621 F.3d at 1152; *Reyes-Oseguera,* 106 F.3d, at 1484; *Ponce,* 51 F.3d at 829; *Becerra,* 992 F.2d at 967."
>
> *U.S. v. Pridgette*, 831 F.3d 1253 (9th Cir. 2016).

238. Moreover, the resentencing should be on closed record based on prosecution's habit to misstate law and evidence, and prosecution may again mislead the court:

> "The government had the burdens of production and persuasion, and we see no reason why it should get a second bit at the apple. No special circumstances justified or even explained, the government's failure to sustain these burdens... The government at resentencing should not be allowed to introduce additional evidence... One bite at the apple is enough... We therefore reverse and remand for resentencing on the record as it now stands."
>
> *U.S. v. Matthews*, 240 F.3d 806 (9th Cir. 2000)

D. Trial and appellate attorneys were ineffective by failing to assert the Fifth and Sixth Amendment rights at sentencing, and/or rights to clear and convincing standard of proof.

239. Trial and appellate attorneys failed to assert rights under Apprendi-Booker, failed to monitor correct base offense levels, failed to argue against wholesale application of enhancements to all counts, failed to raise or inadequately raised Alena's right to clear and convincing burden of proof, as described above. Any increase in defendant's sentence is prejudicial.

240. "Maximum sentence authorized by facts found by jury was 6-12 months, and therefore defendant's substantial rights were affected by the 46 months sentence." *U.S. v. Hughes*, 401 F.3d 540 (2004). "The error of imposing a sentence enhanced by facts not found by the jury is plain, and the prejudice is presumed, remand for resentencing." *U.S. v. Jenkins*, 229 F. App'x 362 (6th Cir. 2005).

Prejudice: the incorrect aplication of the guigeline is prejuclicial and is not affected by the advisory nature of post-Booker guidelines (421 F3d 932, 2005)
"Because he was entitled to a lower Guideline range than that under which he was actually sentenced, the outcome of [the defendant's] sentencing was affected such that our confidence in that outcome is undermined" 421 F3d 932, 949, 9c, 2002., see Molina 136 S.Ct 1338, 1347

APPENDIX B - REQUEST TO REMAND TO A DIFFERENT JUDGE.

A. The fact that Court followed prosecutor's argument instead of evidence indicates bias.

Rule 29 Motion.

241. When prosecutors tell statements and arguments, the law is that "questions, statements, objections, and arguments by the lawyers are not evidence." (RT 1092 – 1093). Trial judge exhibited bias when he trusted prosecution's argument instead of the evidence presented.

B

242. In Rule 29 Motion, prosecutor argued that Alena deleted DC1 files by using disc defragmenter and copying "Loheit" (RT 875). The judge did not say: "your computer expert just said, 'there was no defrag that actually occurred' (RT 248) and 'copying 'Loheit' would not write over [delete] the files in the recycle bin' (RT 234). And DC1 files would not be even relevant because they were somehow deleted between 'morning and 2 pm,' before agents arrived and notified of investigation.' (RT 442)".

243. The judge did not say "the indictment is for destruction of the file stored on laptop and government server and government failed to prove neither Alena's access to the server, nor destruction of any file." The judge just sided with the government and denied the motion.

Government's burden of proof.

244. When the prosecutors argue base offense level and sentencing enhancements, the law is that "The government bears the burden of proof to establish base offense level and sentence enhancements." *U.S. v. Ameline*, 409 F.3d 1073 (9th Cir. 2005).

245. The only evidence supporting base offense level and enhancements were conclusory statements. In case of several sentencing enhancements, courts have to evaluate "combine impact" of contested enhancements and must apply the clear and convincing evidence standard of proof to disproportionate enhancements. See *U.S. v. Taskov*, 564 F. App'x 292 (9th Cir. 2014), *U.S. v. Temkin*, Case No. 16-50137 (9th Cir. 2017). The trial judge exhibited bias when he relieved the government of its burden of proof to establish the base offense level and sentencing enhancements. *U.S. v. Ameline*, 409 F.3d 1073 (9th Cir. 2005).

246. In criminal fraud cases, the Ninth Circuit has endorsed a loss causation principle that permits a district court to impose sentencing enhancements only for losses that resulted from defendant's fraud. *U.S. v. Berger*, No 08-50171 (9th Cir. 2009).

247. At sentencing, government simply presented a tax loss number, which they then changed in the middle of sentencing hearing. Tax loss has to be criminal, and not merely resulting from disagreement or improperly calculated tax returns. See *Witte v. U.S.*, 515 U.S. 389, 403 (5th Cir. 1995).

Policing subject matter jurisdiction.

248. Prosecution presented issues that were outside of the trial court's subject matter jurisdiction. The law is that: "Subject matter limitation of Federal jurisdiction must be policed by the courts on their own initiative even at highest level." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (5th Cir. 1999).

249. The trial judge exhibited bias when he failed to police its limitation of jurisdiction. "A federal court lacks jurisdiction to review final determination of state courts, as well as claim 'inextricably intertwined' with state court judgments." *District Court of Columbia Ct. of Appeals v. Feldman,* 460 U.S. 462 (1983), *Rooker v. Fidelity Trust Co,* 263 U.S. 413 (S.Ct. 1923). "Federal review of state court judgment may be obtained only in the U.S. Supreme Court." *Smith v. Krieger*, 389 F. App'x 789 (10th Cir. 2010). Trial court lacked jurisdiction to evaluate validity of Alena's civil "legal separation."

B. The fact court allowed trial on laws misstated by prosecutors indicates bias.

250. "Arguments of counsel which misstate the law are subject to objection and corrections by the court." *Boyde v. California*, 494 U.S. 370, 384 (S.Ct. 1990). "Art. VI of the United States Constitution declares that "the Judges in every State shall be bound" by the Federal Constitution, laws, and treaties." *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

Compelled statements.

251. "It is emphatically the province and duty of the judicial department to say what the law [including the Constitution] is." *Bond v. U.S.* (2013), *Marbury v. Madison* (1803). At trial and sentencing the district judge exhibited bias and expressed views and findings contrary to the U.S. law when the prosecution moved to introduce defendant's compelled testimony. The law is that "Statute prohibits prosecutorial authorities from using the compelled testimony in any respect (*See Kastigar*) and it provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." *Pillsburry v. Conboy*, 459 U.S. 248 (1983).

252. District judge exhibited bias when he not only failed to "say what the law is," but (with prosecutor's help) misstated the law to rule in prosecutor's favor: "[Government] submitting it as a false statement. And she [Alena] does not get any protection because it was a false statement." (RT 295). The Supreme Court "made it clear that the truth or falsity of a statement is not the determining factor in the decision whether or not to exclude it." *Michigan v. Tucker*, 417 U.S. 433 (S.Ct. 1974) (citations omitted).

253. "When coercion, impermissible under the Fifth Amendment, has actually produced an involuntary statement, we have invariably held that the fruits of that unconstitutional coercion may not be used to prosecute the individual involved for crime. *Williams v. U.S.*, 401 U.S. 646 (9th Cir. 1971). "Our accusatory system of

criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labor, rather than the cruel, simple expedient way of compelling it from his own mouth." *U.S. v. Dionisio*, 410 U.S. 1 (S.Ct. 1973), citing *Miranda v. Arizona*, 384 U.S. 436 (1966).

Article IV Sec 1 of the U.S. Constitution.

254. When prosecution based the trial on theory of invalid/false legal separation, the law is "The separation decree is entitled to receive "full faith and credit" in the U.S. court." U.S. Constitution, Art. IV, Sec. 1. 28 U.S.C. §1738: State court judgments have preclusive effect in Federal courts. "If a judgment is conclusive in State where it is rendered, it is equally conclusive everywhere in the courts of the United States." *Cheever v. Wilson*, 76 U.S. 108 (1869)

255. At sentencing defense objected, "They [government] are not computing it [loss] under head of household filing because they are disregarding the Yolo County [legal] separation." Trial judge answered: "Right, the government evidence was overwhelming on that, and I disagree." (Sentencing Transcript, 12).

256. The trial judge exhibited bias when he allowed this case to be submitted and tried, over objections, on a ground which is invalid under Federal Constitution. "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).

C. The fact court allowed trial on inadmissible evidence indicates bias.

Revenue Agent's summaries.

257. Court has a gatekeeper duty to ensure the trial on admissible evidence. Court has to be extra careful when admitting evidence from an expert, because "There is virtual unanimity among courts and commentators that [expert's] evidence perceived by jurors to be "scientific" in nature will have particularly persuasive effect." *U.S. v. Williams*, 382 F.Supp.3d 928 (9th Cir. 2019)

258. When Revenue Agent offered his "net worth" summaries into evidence, "The following precautionary measures should be take when summary charts are used: 1) The trial court, out of the presence of the jury, should carefully examine the summary charts to determine that everything contained in them is supported by the proof; 2) Trial court should not admit the charts as evidence or allow their use by the jury during deliberations." *U.S. v. Soulard*, 730 F.2d 1292 (9th Cir. 1983).

259. At trial, the court both – admitted the summaries without examining them and allowed the jury to see them.

Prior immunized testimony.

260. It has been long established that "The government…cannot use the immunized testimony or any evidence derived from it either directly or indirectly." *U.S. v. Harris*, 973 F.2d 333 (4th Cir. 1992). The court allowed immunized statement to be used on cross examination of defense witness J.R. (See Sec VI.D), which was contrary to the law and for the benefit of prosecution.

Impeachment by memorandum.

261. "Only those statements which could properly be called witness' own words should be made available… for purposes of impeachment." *Palermo v. U.S.*, 360 U.S. 343, 352 (S.Ct. 1959). The court allowed impeachment with unadmitted hearsay memorandum, which was contrary to the law and for benefit of prosecution.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALENA ALEYKINA, Defendant-Appellant.	No. 18-10420 D.C. No. 2:16-cr-00142-JAM-1 Eastern District of California, Sacramento ORDER

Before: SCHROEDER, W. FLETCHER, and VANDYKE, Circuit Judges.

Judge Schroeder recommended that the panel deny Appellant's Petition for Rehearing En Banc (ECF No. 101), and Judges Fletcher and VanDyke voted to deny the petition.

The full court has been advised of the petition, and no judge has requested a vote on whether to rehear the matter en banc.

Accordingly, the petition is DENIED.

Appellant also filed a Motion for Judicial Notice in the same document as the petition (ECF No. 101). The motion is DENIED as moot.

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALENA ALEYKINA, Defendant-Appellant.	No. 18-10420 D.C. No. 2:16-cr-00142-JAM-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted September 14, 2020
San Francisco, California

Before: SCHROEDER, W. FLETCHER, and VANDYKE, Circuit Judges.

Alena Aleykina, a former Internal Revenue Service ("IRS") Special Agent who investigated criminal tax fraud, appeals her jury trial convictions for filing false tax returns, stealing government money, and obstructing justice. We affirm the district court judgment in its entirety.

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

We review de novo the denial of a motion for acquittal brought under Federal Rule of Criminal Procedure 29. *United States v. Johnson*, 357 F.3d 980, 983 (9th Cir. 2004). "[A]fter viewing the evidence in the light most favorable to the prosecution," we determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (internal quotation marks & citation omitted). "The admissibility of lay opinion testimony under Rule 701 is committed to the sound discretion of the trial judge and his decision will be overturned only if it constitutes a clear abuse of discretion." *United States v. Gadson*, 763 F.3d 1189, 1209 (9th Cir. 2014) (internal quotation marks & citation omitted). "We review the district court's decision to admit expert testimony for abuse of discretion." *Id.* at 1202.

First, Aleykina claims that she did not violate 18 U.S.C. § 1519—which, among other things, prohibits obstruction of justice by destroying evidence—because forensic experts successfully recovered some of the files she deleted on her IRS laptop.[1] This argument fails because Aleykina succeeded in destroying *some* of the files on the laptop. And even if she had failed in her attempt to destroy all the files, in her attempt to do so she still altered evidence, which 18 U.S.C. § 1519 also prohibits, and which the government also charged along with destruction.

[1] Because the parties are familiar with the facts, we will not recite them here except as necessary.

Second, Aleykina challenges the district court's decision to limit her husband's testimony about her demeanor and behavior. Her briefing is unclear as to why she argues her husband should have been allowed to testify more about her demeanor and behavior. She appears to claim that her husband's testimony would undercut the government's ability to prove mens rea or criminal intent. But the testimony that her husband would have given—including such things as his observations of Aleykina "planting fruit trees randomly in the back yard; purchasing spare kitchen appliances for no apparent reason; placing clean clothes on a pile in the middle of the room; keeping clothes, half-eaten food, and paperwork in her car; and frequently and randomly changing residences"—is not incompatible with the ability to form the requisite mens rea or criminal intent for the crimes Aleykina was charged with. Indeed, there was ample evidence properly before the jury that Aleykina was capable of forming the required criminal intent, including that she was still performing her duties as an IRS Special Agent investigating criminal tax fraud, and filing her own (false) tax returns, as well as her husband's.

Even if the district court had erred in limiting Aleykina's husband's testimony related to his observations of her behavior and demeanor, the error would be harmless because there is no reasonable probability that the jury's verdict would have changed if the excluded testimony had been offered. *See United States v. Edwards*, 235 F.3d 1173, 1178–79 (9th Cir. 2000). This is especially true given that

if the district court improperly allowed the expert to opine about Aleykina's separation during his testimony, the evidence that the expert relied on, and that the jury would have heard anyway, would lead a reasonable juror to reach the same conclusion.

AFFIRMED.

Additional material from this filing is available in the Clerk's Office.