

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LUZ HERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court issued an order of restitution in the amount of over \$4.7 million pursuant to the government's *ex parte* motion filed after petitioner's attorney had withdrawn from the case and in the absence of actual notice to or consent by petitioner. In the motion, the government claimed that the former attorney had agreed to the restitution judgment and thus that no restitution hearing was required.

Does the imposition of financial penalties as part of a felony sentencing violate a defendant's Fifth Amendment right to due process and Sixth Amendment right to counsel where the defendant lacks notice of, and the assistance of counsel regarding, the government's *ex parte* request for such penalties?

INTERESTED PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Luz Hernandez respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case numbers 19-12702, 19-12907 on October 23, 2020.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, unpublished and available at 831 Fed.Appx. 932, is contained in the Appendix (App. 1) as is a copy of the denial of petitioner's request for rehearing. App. 10.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Court of Appeals issued its decision on October 23, 2020. App. 1–9. Petitioner filed a timely petition for panel rehearing on December 14, 2020, and the Court of Appeals denied the petition on January 11, 2021, App. 10. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the following constitutional and statutory provisions:

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

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to

be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

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

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The petitioner was charged by indictment with one count of conspiracy to commit bank and wire fraud, four counts of bank fraud, and three counts of wire fraud in connection with real estate mortgage transactions. After a jury trial, she was convicted on all charges.

The presentence investigation report (PSI) prepared in advance of sentencing reported that restitution was mandatory in petitioner's case, that the government had identified certain victims of the offenses of conviction, and that, according to the government, Hernandez was responsible for restitution totaling \$4,720,515.56. Because not all of the alleged victims had provided declarations of their losses to the probation officer, the probation officer reported that he had been unable to determine the amount of restitution owed, and thus the PSI contained no restitution findings. While the PSI reported that the government sought to hold Hernandez responsible for

restitution in the amount of \$4.7 million, there was no consensus about the restitution obligation.

During the June 26, 2019, sentencing hearing, the prosecutor advised the district court that questions remained concerning the award of restitution. Immediately thereafter, and with the parties' agreement, the court scheduled a restitution hearing for July 25, 2019. At the conclusion of the sentencing hearing, the district court imposed an 87-month term of imprisonment on petitioner.

On July 8, 2019, the district court granted a motion by trial counsel, Juan De Jesus Gonzalez, to withdraw from his representation of petitioner and to appoint new counsel for petitioner's appeal. In his motion to withdraw, trial counsel referred to his participation in the case in the past tense, and gave no indication that he would provide further representation once the withdrawal motion was granted. App. 17 (stating "Counsel has represented the Defendant at pre-indictment, trial, post-conviction and sentencing."); *see also* App. 18 (same). Additionally, the district court did not expect trial counsel to continue representing petitioner, stating unambiguously in its July 8, 2019 order, "[Trial counsel] Juan de Jesus Gonzalez is relieved of further responsibility in this matter." App. 19. Trial counsel's representation of petitioner thus ended on July 8, 2019, when the district court granted counsel's motion to withdraw as trial counsel and to appoint appellate counsel. At

that time, counsel was appointed to represent petitioner on appeal, but no new counsel was ever appointed to represent petitioner in the trial court.

On July 10, 2019, two days after petitioner's trial attorney withdrew, the government filed a motion seeking payment of restitution to six victims in a total amount of \$4,719,711.45. At the time the motion was filed, petitioner was unrepresented in the district court. Further, because petitioner's former counsel had withdrawn, former counsel was not served with the motion. Nevertheless, the government presented the motion as an agreed motion, asserting that an assistant United States attorney had conferred with petitioner's former attorney, who was misrepresented in the motion as the defendant's "counsel of record." App. 20 (government motion stating: "In an attempt to obviate the need for [a restitution] hearing, the undersigned [AUSA] has conferred with Juan De Jesus Gonzalez, Esq., counsel of record for the defendant, and the parties are in agreement that the Court should order restitution" in amounts listed in the motion).

The government's motion did not reflect that petitioner had been advised of the representations made in the motion or that she agreed to them. Moreover, the restitution motion qualified any purported agreement, stating, "This agreement does not affect the defendant's ability to advance and pursue all previously preserved objections." App. 20 n. 1.

The motion also did not reflect that petitioner had agreed to waive participation in the scheduled restitution hearing. Nor did the government assert that it had sought to consult with the appellate attorney, who was appointed for petitioner just two days before the filing of the restitution motion and whose appointment was limited to appellate matters.

On the following day, July 11, 2019, the district court granted the restitution motion and issued an amended judgment ordering petitioner to pay \$4,719,711.45 in restitution. App. 11. The amended judgment did not list the recipients or the amounts but stated that the payees were to be provided by the United States Probation Officer.

Petitioner appealed the original and amended judgments, including on the basis that restitution was imposed unconstitutionally, without notice and without adherence to petitioner's right to counsel. The Eleventh Circuit affirmed in an unpublished opinion entered October 23, 2020, rejecting, *inter alia*, petitioner's constitutional challenge to the imposition of restitution. *United States v. Hernandez*, 831 Fed.Appx. 932 (11th Cir. Oct. 23, 2020).

Petitioner filed a timely petition for rehearing, arguing that the Eleventh Circuit erred when it disregarded the facts of record showing that the petitioner was deprived of her constitutional rights to counsel and to notice prior to imposition of restitution and prior to the government's filing of its motion for restitution, which was not served on the defense attorney who represented petitioner at sentencing or on petitioner, who

was *pro se* in the district court. On January 11, 2021, the Eleventh Circuit denied the rehearing petition. App. 10.

REASONS FOR GRANTING THE PETITION

The decision of the Eleventh Court, in upholding an order granting the government's *ex parte* motion to impose restitution of more than \$4.7 million, where petitioner lacked counsel and was neither notified of nor consented to the restitution sought, contravened petitioner's fundamental rights to due process and to counsel, as guaranteed by the Fifth and Sixth Amendments, and is in conflict with at least one other Circuit Court of Appeals.

The district court granted restitution pursuant to an *ex parte* government motion that recited a purported stipulation by the defense attorney who had represented petitioner at her sentencing. Two days before the government's motion was filed, however, that attorney was granted leave to withdraw from representation and the district court removed him from the case, such that he was not counsel when the motion was filed and was removed from the list of persons who received notice of filings in the district court under the present-day electronic filing and serve system operated by the federal courts. Neither the attorney nor the petitioner received notice of the government's motion and its allegations that the former attorney had stipulated to the extreme financial penalty of \$4.7 million. Petitioner was *pro se* in the district

court when the government moved for restitution, but the district court did not provide to petitioner any notice of the government's motion for restitution. Neither did petitioner take any personal action to consent to the restitution judgment.

Despite these undisputed facts of record, showing petitioner lacked representation during the pendency of the restitution motion and lacked actual or imputed notice of the government's action, the Eleventh Circuit concluded that the petitioner's representation by her former counsel continued even after counsel had withdrawn from such representation and despite the fact that former counsel had not received notice of the government's motion seeking restitution.

The court of appeals, in allowing a former attorney—who did not even receive notice of the government's motion, which contained alleged stipulations of former counsel—to be presumed to have authority to waive fundamental rights of the defendant to defend against severe financial penalties imposed without her presence and without her actual consent manifests an unsupportable disregard for the rights of defendants with regard to financial penalties in general. Certiorari relief is warranted in this case to ensure a criminal defendant's Sixth Amendment right to counsel and Fifth Amendment right to due process are preserved before restitution can be imposed.

Importantly, the imposition of financial penalties leaves defendants with permanent impediments to the exercise of civil rights. *See, e.g., Jones v. Governor*

of Florida, 975 F.3d 1016, 1025, 1053 (11th Cir. 2020) (*en banc*) (upholding, against constitutional challenge, Florida’s preclusion of felons who have not paid financial penalties imposed by their criminal sentences from ability to restore their right to vote). Even after the expiration of the restitution judgment, twenty years following its imposition, a defendant who cannot pay such exorbitant penalties would be barred from the right to vote in Florida.

Contrary to the Eleventh Circuit, prior consultation does not establish continuing representation. Petitioner’s trial counsel did not join in filing the motion, and the record does not show that he had any opportunity to review the motion after it was filed. The motion may have incorporated misunderstandings or errors, including clerical errors. Because petitioner lacked representation, no one had the duty or opportunity to review the motion to ensure that it accurately reflected her position. Because petitioner was not represented by counsel when the government filed the restitution motion, it cannot be determined reliably that there was no dispute. Accordingly, the court of appeals’ assumption that no dispute existed regarding restitution is unsupported.

Before a defendant is ordered to pay restitution, she has a due process right to notice and an opportunity to be heard. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (“The Due Process Clause of the Fifth Amendment

prohibits the United States...from depriving any person of property without ‘due process of law,’” which includes “notice and an opportunity to be heard.”) (some internal quotation marks omitted). It can be inferred from the record that the district court assumed no response would be filed, because the government presented the motion as an agreed motion. Such an inference cannot be justified, however, where the motion was not jointly signed by petitioner or by an attorney representing her. A motion filed by just one party may incorporate inaccurate or misunderstood information, despite best intentions.

Moreover, trial counsel had no authority to consent to the restitution figures set forth in the government’s motion without securing petitioner’s on-the-record consent. This might be the case if petitioner had been in communication with competent counsel who represented her at the pertinent time. Trial counsel had no authority, however, to decide to waive petitioner’s procedural rights relating to a motion filed by the government after trial counsel’s representation concluded. Petitioner was entitled to notice of the restitution amounts sought and an opportunity to dispute those amounts. 18 U.S.C. § 3664(e). Moreover, she was entitled to put the government to its burden of proving the restitution amounts. *Id.* When she was assessed a \$4.7 million restitution obligation without being afforded those opportunities, she was denied her right to due process. *See James Daniel Good Real Property*, 510 U.S. at

48 (addressing the right to “notice and an opportunity to be heard”) (internal quotation marks omitted). After the district court relieved trial counsel of any further responsibility in the case, former counsel had no authority to speak on petitioner’s behalf.

The Eleventh Circuit, in reviewing the order of restitution—imposed against petitioner following the filing of the government’s *ex parte* motion alleging that former counsel for petitioner had agreed to the imposition of a multi-million-dollar financial penalty—concluded that “the record refutes her argument” that she was denied the assistance of counsel under the Sixth Amendment with respect to imposition of restitution because the government’s restitution motion recites that her former trial counsel had previously agreed to the motion. *See App. 7*. The Eleventh Circuit concluded that this government representation overcame the circumstance that trial counsel had withdrawn before the motion was filed and that counsel’s withdrawal had left petitioner with no trial court representation during the pendency of the restitution motion and when the district court entered its restitution ruling the following day, imposing restitution in an amount of nearly \$5 million.

In reaching its erroneous decision that approves a fundamental derogation of petitioner’s constitutional rights, the Eleventh Circuit overlooked the key fact that petitioner’s former counsel was never served with the government’s motion for

restitution. No service was made on the counsel who purportedly waived petitioner's fundamental rights, and absent service on that attorney, no claim of his waiver of petitioner's rights by former counsel can be found. Because notice is essential to due process in this context and because adequate service was essential to the validity of the government's motion, it cannot be presumed that the government's representation was correct or binding on petitioner. Nothing about the *ex parte* motion can simply be credited to the petitioner's prejudice—where she was *pro se* and unserved with the motion.

In light of the circumstance that petitioner's former counsel was not afforded notice of the government's restitution motion—and instead, when the district court granted his motion to withdraw, counsel was removed from the electronic service list and the government did not otherwise indicate service of the motion on counsel—the record offers no basis to confirm whether or not former counsel in fact agreed to the motion or had authority to do so and no basis to dispute petitioner's insistence that she did not authorize counsel to waive her restitution hearing rights.

Given that trial counsel had previously withdrawn and that petitioner had no attorney in the district court at the time the government filed the motion and the court considered and ruled on it, the lack of notice to counsel or even constructive notice to

petitioner of the filing of the motion asserting a stipulation invalidates the restitution order.

The denial of notice and the deprivation of counsel are fundamental constitutional violations, even when they affect only the financial penalty of restitution. *See Paroline v. United States*, 572 U.S. 434, 453–54 (2014) (“Aside from the manifest procedural differences between criminal sentencing and civil tort lawsuits, restitution serves purposes that differ from (though they overlap with) the purposes of tort law. ... Legal fictions developed in the law of torts cannot be imported into criminal restitution and applied to their utmost limits without due consideration of these differences.”).

But because this is a criminal case, the fundamental violations of petitioner’s rights in relation to restitution cannot be corrected on 28 U.S.C. § 2255 review, because they concern a non-incarcerative component of the sentence. *See Blaik v. United States*, 161 F.3d 1341, 1343 (11th Cir. 1998) (“[W]e hold that § 2255 cannot be utilized by a federal prisoner who challenges only the restitution portion of his sentence.”). Thus, the Eleventh Circuit’s failure to address on direct appeal the plain record of the due process and deprivation of counsel violations creates a manifest injustice for which no collateral remedy is available.

These circumstances establish that petitioner was not represented by counsel either when the government filed the restitution motion, or when the district court granted the motion the following day. Because the imposition of a restitution obligation is part of a defendant's criminal sentencing, it is a critical stage in the criminal proceeding. Petitioner therefore was entitled to be represented by counsel.

The Fifth Circuit Court of Appeals confronted a similar situation in *United States v. Pleitez*, 876 F.3d 150, 153 (5th Cir. 2017), where a defendant's restitution obligation was increased during a brief period when he lacked representation in the district court. The Fifth Circuit held that the district court's entry of an amended judgment that increased the defendant's restitution amount was a critical stage in the criminal proceedings that required access to counsel, and that the district court violated the defendant's Sixth Amendment right to counsel by amending the judgment and issuing a new restitution order while the defendant was not represented in the proceeding.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The right to counsel extends to "all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). "[S]entencing is a critical stage of the criminal proceeding at which [the defendant]

is entitled to the effective assistance of counsel.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Moreover, restitution is a penalty imposed as part of a criminal sentence. *See* 18 U.S.C. § 3572(d)(1) (describing restitution as a “monetary penalty”); *Pasquantino v. United States*, 544 U.S. 349, 365 (2005) (the purpose of awarding restitution under 18 U.S.C. § 3663A is “to mete out appropriate criminal punishment”).

Importantly, the statute that sets out procedures for issuing orders of restitution establishes that a restitution decision must be made through the use of the adversarial process. The Fifth Circuit noted in *Pleitez*, 876 F.3d at 159, that 18 U.S.C. § 3664(e) requires the sentencing court to resolve disputes concerning restitution by a preponderance of the evidence. The Fifth Circuit also noted that § 3664(d)(5) (which requires a court to “set a date for the final determination of the victim’s losses”) implies “that a defendant should be afforded the opportunity to be heard” before a decision is made. *Pleitez*, 876 F.3d at 159. The adversarial nature of the restitution proceeding bolsters the conclusion that the imposition of a restitution obligation is a critical stage of the criminal proceedings that requires the assistance of counsel. *Id.* For these reasons, petitioner was entitled to the assistance of counsel when the district court considered and imposed a restitution obligation of \$4.7 million. Moreover, petitioner need not show that she would have received a different outcome to warrant

relief. Notably, this Court has made clear that there is no expediency exception to the Sixth Amendment. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 145–52 (1996) (erroneous disqualification of counsel violated criminal defendant’s Sixth Amendment right to counsel of choice and constituted structural error; no showing of prejudice beyond erroneous deprivation of counsel was needed). Where a criminal defendant is denied counsel at a critical stage, entitlement to relief is automatic. *See Holloway v. Arkansas*, 435 U.S. 475, 489 (1978); *see also United States v. Cronin*, 466 U.S. 648, 659 & n.25 (1984).

Given all of these circumstances, petitioner’s case presents an excellent opportunity to resolve a question of great importance and resolve a circuit conflict.

CONCLUSION

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

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.
Counsel for Petitioner

Miami, Florida
June 2021

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 19-12702; 19-12907
Non-Argument Calendar

D.C. Docket No. 1:18-cr-20698-CMA-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUZ HERNANDEZ,
a.k.a. Lucy Hernandez,

Defendant-Appellant.

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

(October 23, 2020)

Before WILLIAM PRYOR, Chief Judge, MARTIN and BRANCH, Circuit Judges.

PER CURIAM:

Luz Hernandez appeals her convictions and sentence for conspiring to commit bank and wire fraud, 18 U.S.C. § 1349, two counts of bank fraud and one count of wire fraud arising from two loans fraudulently obtained for one property in Miami Beach, Florida, *id.* §§ 1343, 1344, and two counts of bank fraud and of wire fraud arising from two loans fraudulently obtained for two properties in Miami, *id.* Hernandez argues that the district court erred by instructing the jury on disguised handwriting as consciousness of guilt, that insufficient evidence supports her convictions for the frauds involving the two properties in Miami, and that her order of restitution is invalid. We affirm.

Three standards of review govern this appeal. Because Hernandez challenges the jury instruction on a ground not raised in the district court, we review that issue for plain error. *United States v. Wright*, 392 F.3d 1269, 1277 (11th Cir. 2004). Because Hernandez presented evidence “after denial of [her] motion for judgment of acquittal and then fail[ed] to renew [that] motion . . . at the end of all of the evidence,” we will reverse her convictions for bank fraud and for wire fraud arising from the fraudulent loans for the Miami properties only to prevent a “manifest miscarriage of justice.” *United States v. House*, 684 F.3d 1173, 1196 (11th Cir. 2012) (internal quotation marks omitted). And we review *de novo* the legality of Hernandez’s order of restitution. *United States v. Valladares*, 544 F.3d 1257, 1269 (11th Cir. 2008).

The district court did not err, much less plainly err, by instructing the jury to determine whether Hernandez disguised her handwriting and whether her conduct was probative of consciousness of guilt. The act of a “defendant to attempt[] to avoid providing a valid handwriting sample by intentionally distorting [her] handwriting” can “impl[y] a consciousness of guilt,” *United States v. Stenbridge*, 477 F.2d 874, 876 (5th Cir. 1973), like flight and resisting arrest, *United States v. Borders*, 693 F.2d 1318, 1325 (11th Cir. 1982) (flight); *United States v. Wright*, 392 F.3d 1269, 1278–79 (11th Cir. 2004) (resisting arrest). The district court reasonably decided to give a jury instruction on distorted handwriting because the evidence concerning Hernandez’s conduct was “logically and legally relevant to show consciousness of guilt.” *Id.* at 1278. Hernandez’s behavior was probative to her guilt or innocence because it supported a chain of four inferences: (1) from her behavior to the deliberate distortion of her handwriting; (2) from the distortion to consciousness of guilt; (3) from consciousness of guilt to the crimes charged; and (4) from consciousness of guilt of the crimes charged to actual guilt of the crimes charged. *See Wright*, 392 F.3d at 1278 (applying four-step process to evidence of resisting arrest); *Borders*, 693 F.3d at 1325–26 (applying process to evidence of flight).

Testimony from Agent Detective Patrick McDonough of the Federal Bureau of Investigation and Linda Eisenhart, a forensic document examiner, the

documents used to obtain the four fraudulent loans, and Hernandez's exemplars provided "sturd[y] support" for the jury to find that she distorted her handwriting to avoid conviction for the crimes charged in her indictment. *See Wright*, 392 F.3d at 1278. The jury could infer that Hernandez disguised her handwriting from McDonough's account that she wrote slowly while gripping her pen with her three middle fingers and from Eisenhart's opinion that the heavy and even pen pressure, significant tremor, angularity in rounded letters, and blunt beginning and ending strokes on every template were consistent with handwriting distortion. The jury could also find that Hernandez distorted her handwriting based on the dissimilar scripts in her exemplars and in samples of her genuine handwriting. And the jury could infer that Hernandez disguised her handwriting on documents that she knew implicated her in the crimes charged against her. When McDonough gave Hernandez copies of 18 documents used in the four fraudulent loan transactions that had typewritten words in the place of handwriting and instructed her to write the typewritten words on templates of the documents, she distorted her handwriting on every template. The documents included a check Hernandez allegedly wrote to the mortgage broker and a certification of income that she notarized that were used to obtain the two loans on the Miami Beach property; an identification verification for Michael Angel Mayenberg that Hernandez signed as notary public using the false name Cathy Walker and submitted to obtain the loan for 12580 Southwest

76th Street in Miami; and a compliance agreement for Armando Moya Castro that Hernandez signed using the false name Roberta Prida and submitted to obtain the loan for 5600 Southwest 74 Court in Miami.

Hernandez argues that the distortion of her handwriting could stem from consciousness of guilt for any of the fraudulent transactions, but that fact did not prevent the issue from being submitted to the jury. Because Hernandez's behavior supported the admission of evidence of distorted handwriting and was "sufficient[] [to] establish [her] consciousness of guilt" for every fraudulent loan transaction, *see Wright*, 392 F.3d at 1278–79, the responsibility rested with the jury to determine whether Hernandez's guilt corresponded to one or more of the transactions, *see id.* at 1279. And the district court made that plain in its instructions that the jury had to "determine [the] significance and qualitative value, if any," of the handwriting evidence. *See Borders*, 693 F.3d at 1327. The district court instructed the jury that it "may, but . . . need not, infer that [Hernandez] believed that she was guilty," that it "may not, however, infer on the basis of this alone, that [she] is, in fact, guilty of the crimes for which she is charged," and that the issues of "[w]hether or not evidence that [Hernandez] disguised her handwriting shows that [she] believed that she was guilty and the significance, if any, to be given to such evidence, are matters for . . . [it] to decide."

Substantial evidence supports Hernandez's convictions for the frauds involving the two properties in Miami. Those mortgage scams bore the same hallmarks as those Hernandez, a licensed title agent, used to aid Javier Coballes to fraudulently obtain the two loans for the property in Miami Beach. For those loans, Hernandez concocted a sham title company whose name mimicked a real title company, contacted the loan broker on behalf of the sham company, posed as its title agent using the name Cathy Walker, and used that false name to create an email address and to prepare and submit false closing documents, including a fraudulent warranty deed that bore a notary stamp she had altered using Adobe Photoshop. The process used to obtain loans for the properties at 76th Street and at 74 Court in Miami was virtually identical. The fraudsters, who included Coballes, prepared and submitted false closing documents using a sham title company, America's Title & Escrow Corporation, and a fake title agent, Roberta Prida, whose names were strikingly similar to Hernandez's former employer of two years, America's Title Corporation, and her fellow closing agent, Roberto Prida. The sham title company used the real company's former business address, its HUD settlement statement, which changed after Hernandez left, and a "funky-looking R" that all its closing agents used as their signature. Records of Hernandez's bank account at Wells Fargo reflected that she made cash deposits of \$34,100 in 2015 and of \$57,710 in 2016, which corresponded with the laundering and disbursement

of the proceeds of the four fraudulent loan transactions and she did not report as taxable income. And when presented with the falsified documents, Hernandez “attempt[ed] to avoid providing a valid handwriting sample by intentionally distorting [her] handwriting,” which the jury treated as evidence of “a consciousness of guilt.” *See Stenbridge*, 477 F.2d at 876. Although Hernandez presented some testimony that she was disgruntled with Coballes and that his cohorts might have acquired some information about her former employer and coworker by other means, none of the evidence concerning her involvement in the mortgage scams for the two Miami properties “is so tenuous that [Hernandez’s] conviction[s] [are] shocking.” *See House*, 684 F.3d at 1196 (quoting *United States v. Milkintas*, 470 F.3d 1339, 1343 (11th Cir.2006)).

Hernandez argues that the order of restitution is invalid because she was denied the assistance of counsel, but the record refutes her argument. *See United States v. Roy*, 855 F.3d 1133, 1144 (11th Cir. 2017) (en banc) (discussing *United States v. Cronin*, 466 U.S. 648 (1984)). During sentencing, Hernandez’s attorney, Juan De Jesus Gonzalez, agreed to meet with the government about dividing up the amount of restitution, and two weeks later, the government filed an “Agreed-Upon Motion” that stated it had “conferred with . . . Gonzalez, as counsel of record for the defendant,” and they were “in agreement” for the district court to enter an order of restitution that awarded specific amounts of restitution to six defrauded lenders.

That Gonzalez, in the interim, moved to withdraw from representing Hernandez does not make the statements in the joint motion outside the scope of his representation. To the contrary, Gonzalez's motion states that Hernandez retained him "for trial purposes only," that he represented Hernandez throughout her trial proceedings, including sentencing, and that he sought "to withdraw as attorney o[f] record for purposes of appeal" and for the district court to "appoint CJA appellate counsel."

Hernandez argues that "[t]he district court erred when it ordered her to pay \$4.7 million in restitution," but she invited any error in the calculation of the amount of restitution. "[W]here a party invites the trial court to commit error, he cannot later cry foul on appeal," *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009), and Hernandez remained silent when the government stated at sentencing that the parties agreed as to the amount of restitution and had only to resolve how to divide the amount. Hernandez is bound by her agreement to pay \$4,719,711.56 in restitution.

Hernandez also argues that the order of restitution in the amended judgment is defective for two reasons, but her arguments fail. First, Hernandez argues that she was entitled to a 14-day period to respond to the motion filed by the government and to a hearing on the matter. But the motion stated plainly that Gonzalez, on Hernandez's behalf, agreed to the order of restitution, which

eliminated the need for a response or for a hearing. *See United States v. Remillong*, 55 F.3d 572, 576 (11th Cir. 1995) (“We have determined that district courts are not required to make factual findings whenever they impose a restitution order if the appellate record provides sufficient reasons for the decision to order full restitution.”). Second, Hernandez argues that the amended judgment requires the probation officer to identify the payees and could “expose [her] to greater financial obligations,” but the judgment imposes restitution in the same amount requested in the agreed-upon order, which eliminates any confusion or uncertainty as to the identities of the victims for whom restitution is being collected or the amount to which each victim is entitled.

We **AFFIRM** Hernandez’s convictions and sentence.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-12702-JJ ; 19-12907 -JJ

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

LUZ HERNANDEZ,
a.k.a. Lucy Hernandez,

Defendant - Appellant.

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

BEFORE: WILLIAM PRYOR, Chief Judge, MARTIN and BRANCH, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Luz Hernandez is DENIED.

ORD-41

United States District Court
Southern District of Florida
MIAMI DIVISION

UNITED STATES OF AMERICA**AMENDED JUDGMENT IN A CRIMINAL CASE****v.****Case Number - 1:18-20698-CR-ALTONAGA-2****LUZ HERNANDEZ**

USM Number: 19145-104

Counsel for Defendant: Juan De Jesus Gonzalez

Counsel for the United States: Sean Paul Cronin

Court Reporter: Stephanie McCarn

Date of Original Judgment: June 26, 2019**Reason for Amendment:** Modification of Restitution Order (18 U.S.C. § 3664)

The defendant was found guilty of Counts 1-8 of the Indictment.

The defendant is adjudicated guilty of the following offenses:

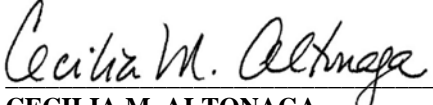
<u>TITLE/SECTION NUMBER</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. § 1349	Conspiracy to Commit Bank and Wire Fraud	June 2016	1
18 U.S.C. § 1344	Bank Fraud	June 18, 2015	2
18 U.S.C. § 1344	Bank Fraud	September 14, 2015	3
18 U.S.C. § 1344	Bank Fraud	April 11, 2016	4
18 U.S.C. § 1344	Bank Fraud	June 14, 2016	5
18 U.S.C. § 1343	Wire Fraud	June 18, 2015	6
18 U.S.C. § 1343	Wire Fraud	April 12, 2016	7
18 U.S.C. § 1343	Wire Fraud	June 15, 2016	8

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

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

Date of Imposition of Sentence:

June 26, 2019


CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

DEFENDANT: LUZ HERNANDEZ
CASE NUMBER: 1:18-20698-CR-ALTONAGA-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **87 months**. This sentence consists of concurrent terms of 87 months as to each of Counts One through Eight.

The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant be designated to a facility located in or near South Florida and that she be considered for the Prison's 500 Hour Drug Program.

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

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

DEFENDANT: LUZ HERNANDEZ
CASE NUMBER: 1:18-20698-CR-ALTONAGA-2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**. This term consists of concurrent terms of five years as to each of Counts One through Eight.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

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

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

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: LUZ HERNANDEZ
CASE NUMBER: 1:18-20698-CR-ALTONAGA-2

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

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

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

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

Relinquishment of Licensure - Upon request of the appropriate regulatory agency, the defendant shall relinquish his/her license to said agency. The defendant is on notice that such relinquishment is permanent and will be considered disciplinary action.

Travel - Defendant is not permitted to travel outside of the Southern District of Florida unless restitution is paid in full.

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

DEFENDANT: LUZ HERNANDEZ
CASE NUMBER: 1:18-20698-CR-ALTONAGA-2

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$800.00	0	\$4,719,711.56

Restitution with Imprisonment -

It is further ordered that the defendant shall pay restitution in the amount of \$4,719,711.56. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of \$50.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 15% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Amount of Loss</u>	<u>Amount of Restitution Ordered</u>	<u>Priority Order or Percentage of Payment</u>
TO BE PROVIDED BY THE UNITED STATES PROBATION OFFICER		\$4,719,711.56	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: LUZ HERNANDEZ
CASE NUMBER: 1:18-20698-CR-ALTONAGA-2

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of **\$800.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

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

**U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716**

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

Defendant shall pay restitution in the amount of \$4,719,711.56 jointly and severally with her co-defendants, Javier Coballes and Rene Navarro.

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 19-CR-20698-ALTONAGA

UNITED STATES OF AMERICA,

v.

LUZ HERNANDEZ.

**AMENDED UNOPPOSED MOTION TO WITHDRAW AS ATTORNEY OF RECORD
AND TO APPOINT APPELLATE COUNSEL**

COMES NOW the Defendant, Luz Hernandez, by and through undersigned counsel and moves this Honorable Court to permit counsel to withdraw from the instant case and to appoint counsel to represent the Defendant for appeal and states:

1. Undersigned counsel filed a Notice of Appearance for trial purposes only in the foregoing cause.
2. Counsel has represented the Defendant at pre-indictment, trial, post-conviction and sentencing.
3. As described in the PSI, the Defendant does not have the means to employ a lawyer to represent her on appeal. The appeal will address contested issues raised during the trial, post-trial, and sentencing.
4. The PSI and the testimony of the government's financial expert at trial clearly establishes that Ms. Hernandez qualifies for the services of a CJA Appellate Lawyer.
5. The Defendant Luz Hernandez has executed CJA form 23 Financial Affidavit which is attached hereto. The Affidavit also establishes Luz Hernandez' eligibility for the appointment of a CJA appellate lawyer.

6. Counsel has conferred with A.U.S.A. Sean Cronin who does not object to granting of the motion to withdraw as attorney of record and takes no position on the motion to have CJA counsel appointed for appeal.

WHEREFORE undersigned counsel respectfully prays this Honorable Court enter an Order allowing undersigned counsel to withdraw as attorney of record for purposes of appeal and appoint CJA appellate counsel.

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to all relevant parties via the CM/ECF filing system this 3rd day of July 2019.

Respectfully submitted,

/s/ Juan de Jesus Gonzalez

Juan de Jesus Gonzalez
For Luz Hernandez
JUAN DE JESUS GONZALEZ, LAWYER, PA
12905 Bird Road, Suite 204
Miami, Florida 33175
Tel: (305) 596-4500
Fax: (305) 596-4515
JuanGonzalezLaw@aol.com

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 18-20698-CR-ALTONAGA

UNITED STATES OF AMERICA,

Plaintiff,
vs.

LUZ HERNANDEZ,


Defendant.
_____ /

ORDER

THIS CAUSE came before the Court on the Amended Unopposed Motion to Withdraw as Attorney of Record and to Appoint Appellate Counsel [ECF No. 147], filed July 3, 2019. Being fully advised, it is

ORDERED AND ADJUDGED that the Motion is **GRANTED**. Jacqueline E. Shapiro is appointed to represent Defendant, Luz Hernandez, for her appeal. Juan de Jesus Gonzalez is relieved of further responsibility in this matter.

DONE AND ORDERED in Miami, Florida, this 8th day of July, 2019.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 18-20698-ALTONAGA
Magistrate Judge Goodman**

UNITED STATES OF AMERICA

vs.

**LUZ HERNANDEZ,
a/k/a Lucy Hernandez,

Defendant.**

_____ /

AGREED-UPON MOTION FOR ORDER OF RESTITUTION

The United States of America, by and through the undersigned Assistant United States Attorney, hereby moves this Court for the entry of a Restitution Order.

On June 26, 2019, this Court conducted a sentencing hearing (DE 141). The issue of restitution was left unresolved at the conclusion of that hearing, and the Court has scheduled a restitution hearing for July 25, 2019 at 8:30 a.m. (DE 143). In an attempt to obviate the need for that hearing, the undersigned has conferred with Juan De Jesus Gonzalez, Esq., counsel of record for the defendant, and the parties are in agreement¹ that the Court should order restitution in the following amounts:

- ▶ **\$1,500,000** in restitution to the victim, Wells Fargo Bank, N.A., c/o Amy Rubin, Esq., 222 Lakeview Avenue, Suite 700, West Palm Beach, FL 33401.
- ▶ **\$375,000** in restitution to the victim, Bankers Mortgage Lending, c/o Ari Sweetbaum, Esq., 4000 Ponce De Leon Blvd., Suite 800, Coral Gables, FL 33146.
- ▶ **\$119,000** in restitution to the victim, Citadel Servicing Corp., c/o Chetna Vora, Esq., General Counsel, 15707 Rockfield Blvd., Suite 320, Irvine, CA 92618.

¹ This agreement does not affect the defendant's ability to advance and pursue all previously preserved objections.

- ▶ **\$1,578,211.56** in restitution to the victim, Continental Casualty Company, Attn: Specialty Claims, 500 College Road East, Suite 401, Princeton, NJ 08540.
- ▶ **\$150,000** in restitution to the victim, City National Bank of Florida, Attn: Legal Department, 25 West Flagler Street, Miami, FL 33101.
- ▶ **\$997,500** in restitution to the victim, Civic Financial Services LLC, 2015 Manhattan Beach Blvd., Suite 106, Redondo Beach, CA 90278.

Wherefore, with the agreement of counsel for the defendant, the United States respectfully requests that this Court enter the attached Restitution Order and cancel the currently-scheduled restitution hearing.

Respectfully submitted,

ARIANA FAJARDO ORSHAN
UNITED STATES ATTORNEY

By: /s/ Sean Paul Cronin
Sean Paul Cronin
Assistant United States Attorney
Court No.A5500940
99 N.E. 4th Street, Suite 400
Miami, FL 33132
Tel# (305) 961-9194
Fax: (305) 530-6168
sean.p.cronin@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 10, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ Sean Paul Cronin
Sean Paul Cronin
Assistant United States Attorney

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 18-20698-ALTONAGA
Magistrate Judge Goodman**

UNITED STATES OF AMERICA

vs.

**LUZ HERNANDEZ,
a/k/a Lucy Hernandez**

Defendant.

_____ /

[PROPOSED] RESTITUTION ORDER

The Court hereby orders the defendant to pay restitution in the following amounts to the following victims:

- ▶ **\$1,500,000** in restitution to the victim, Wells Fargo Bank, N.A., c/o Amy Rubin, Esq., 222 Lakeview Avenue, Suite 700, West Palm Beach, FL 33401.
- ▶ **\$375,000** in restitution to the victim, Bankers Mortgage Lending, c/o Ari Sweetbaum, Esq., 4000 Ponce De Leon Blvd., Suite 800, Coral Gables, FL 33146.
- ▶ **\$119,000** in restitution to the victim, Citadel Servicing Corp., c/o Chetna Vora, Esq., General Counsel, 15707 Rockfield Blvd., Suite 320, Irvine, CA 92618.
- ▶ **\$1,578,211.56** in restitution to the victim, Continental Casualty Company, Attn: Specialty Claims, 500 College Road East, Suite 401, Princeton, NJ 08540.
- ▶ **\$150,000** in restitution to the victim, City National Bank of Florida, Attn: Legal Department, 25 West Flagler Street, Miami, FL 33101.
- ▶ **\$997,500** in restitution to the victim, Civic Financial Services LLC, 2015 Manhattan Beach Blvd., Suite 106, Redondo Beach, CA 90278

The defendant is ordered to pay this restitution jointly and severally with her co-conspirators.

Further, the restitution hearing scheduled for February 28, 2014 is CANCELLED.

DONE and ORDERED in Miami, Florida, this _____ day of July 2019.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

Copies Provided to: Parties of Record