

# APPENDIX

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*Appendix A*

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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No. 19-10415

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

APRIL DIANE MYRES,

*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Northern District of California

No. 3:17-cr-00180-RS-1

Richard Seeborg, District Judge, Presiding

Argued and Submitted January 14, 2021  
San Francisco, California

Filed February 16, 2021  
Dkt Entry No. 48-1

**NOT FOR PUBLICATION**

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**MEMORANDUM\***

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

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Before: WALLACE and M. SMITH, Circuit Judges,  
and LASNIK,\*\* District Judge.

April Myres was convicted by a jury for mail fraud, in violation of 18 U.S.C. § 1341, and wire fraud, in violation of 18 U.S.C. § 1343. Myres' convictions stemmed from an insurance claim she filed after she reported a burglary at her home. Myres was sentenced to fourteen months' imprisonment. On appeal, Myres argues that the district court made four errors in evidentiary rulings at trial and that the court erred in sentencing. Because the parties are familiar with the facts, we do not recount them in detail, except as necessary to provide context to our ruling. We have jurisdiction under 18 U.S.C. § 1291.

### I. Evidentiary Admissions at Trial

We review evidentiary rulings to admit or exclude evidence for abuse of discretion. *United States v. Alvirez*, 831 F.3d 1115, 1120 (9th Cir. 2016). Where an evidentiary error has occurred in a criminal prosecution, this Court reviews *de novo* whether the error "rises to the level of a constitutional violation." *United States v. Haischer*, 780 F.3d 1277, 1281 (9th Cir. 2015). We conclude that the district court properly denied Myres' evidentiary objections and constitutional challenges.

First, the district court did not commit constitutional error in allowing testimony from an insurance claims adjuster regarding his impression of Myres' response to a request that federal law

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\*\* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

enforcement agents made during a visit to Myres' home. Myres contends that admitting this testimony amounted to constitutional error based on *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978). We held in *Prescott* that a "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *Prescott*, 581 F.2d at 1351. Unlike testimony regarding law enforcement's breaking down of a door in *Prescott*, which we determined "would lead to the conclusion that [the defendant] had refused permission to enter," *id.* at 1353, testimony about Myres' comment to the agents that "she didn't have time" for "something" they had asked her, does not lead to the conclusion that Myres refused a warrantless search. We decline to extend *Prescott* to testimony so vague that the jury could not reasonably connect it to constitutionally protected conduct.

Even if, *arguendo*, the testimony in question were considered a comment on the exercise of Myres' Fourth Amendment rights, the testimony was admitted for a proper purpose: to undermine Myres' theme that she was the victim of a burglary. *See Leavitt v. Arave*, 383 F.3d 809, 828 (9th Cir. 2004) (holding that a prosecutor was entitled to question a defendant's theme of cooperation by showing that defendant was in fact uncooperative).

Second, the district court did not commit constitutional error in allowing testimony from a law enforcement officer regarding Myres not responding to the officer's calls after she had invoked her right to counsel. Myres relies upon two cases that concern comments referencing a defendant's retention of

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counsel. *See Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983); *United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995). The witness testimony Myres takes issue with, however, does not contain any comments regarding Myres' retention of counsel. Moreover, the government did not elicit testimony regarding Myres retaining an attorney, and the government never implied that retaining an attorney was a sign of guilt. *Cf. Kallin*, 50 F.3d at 693–94; *Bruno*, 721 F.2d at 1194–95. Therefore, the district court did not err in admitting this testimony.

Third, the district court did not abuse its discretion in admitting a recording of a jail call between Myres and her ex-boyfriend, Antoine Fowler. A district court has “wide latitude” in determining admissibility of evidence under Rule 403 . . . and its decision is accorded considerable deference.” *United States v. Joetzki*, 952 F.2d 1090, 1094 (9th Cir. 1991) (citation omitted). Myres made statements in the call that tended to show that she was aware that Fowler faced danger upon his release from jail. These statements had probative value because they made it more likely that Myres knew Fowler would seek out a firearm for protection, which was relevant to the charges the government was trying to prove. Although other witness testimony established that Fowler was a known “snitch,” it did not get as directly at Myres’ expectation that Fowler would face danger upon his release. Myres argued that the call was unfairly prejudicial, but when viewed in the context of Fowler’s own behavior toward Myres, the call did not unfairly vilify Myres.

Fourth, the district court did not abuse its discretion when it permitted testimony regarding a court order prohibiting Myres from possessing a firearm. In particular, the testimony concerned Myres' employer, the San Francisco Sheriff's Department (SFSD), repossessing a firearm from Myres as a result of a court order. This testimony was probative because it tended to show that Myres was aware she was not the owner of the firearm; rather, she understood that SFSD was the owner. Given that Myres wrote on her second proof of loss to her insurer that SFSD equipment became hers after four years of service, her understanding of the firearm's ownership was relevant to evaluating her intent in making this statement. Additionally, the likelihood of unfair prejudice was slight because the reference to the court order was brief, and it was unlikely to provoke an emotional response where the jury learned that the confiscated firearm was eventually returned to Myres. *See United States v. Fagan*, 996 F.2d 1009, 1015 (9th Cir. 1993) (concluding that a "brief reference to [the defendant's] gang membership was not likely to provoke an emotional response in the jury").

The district court did not commit constitutional error, and it acted within its discretion to admit the evidence Myres challenges on appeal. While the district court faced challenging legal questions, it issued thoughtful rulings to ensure Myres received a fair trial. *See Ross v. Oklahoma*, 487 U.S. 81, 91 (1988) (observing that the "Constitution entitles a criminal defendant to a fair trial, not a perfect one").

## II. Sentencing

We review the district court’s interpretation of the Guidelines issued by the United Sentencing Commission (the Guidelines) *de novo*, application of the Guidelines to the facts for abuse of discretion, and factual findings for clear error. *United States v. Staten*, 466 F.3d 708, 713 (9th Cir. 2006). We conclude that the district court erred when it failed to make findings on the record regarding Myres’ intent with respect to the amount of intended loss.

When a defendant has committed fraud, the base offense level increases consistent with the amount of “loss.” *See* U.S.S.G. § 2B1.1. The Guidelines define “loss” as “the greater of actual loss or intended loss.” U.S.S.G. § 2B1.1, cmt. n.3 (A). The amount of “intended loss” is equivalent to “the pecuniary harm that the defendant purposely sought to inflict.”<sup>1</sup> U.S.S.G. § 2B1.1, cmt. n.3 (A)(ii). The government must “prove the loss by a preponderance of the evidence.” *United States v. Walter-Eze*, 869 F.3d 891, 912 (9th Cir. 2017) (quoting *United States v. Torlai*, 728 F.3d 932, 946 n.13 (9th Cir. 2013)). A district court may “impose sentencing enhancements only for losses that ‘resulted from’ the defendant’s fraud.” *United States v. Berger*, 587 F.3d 1038, 1043 (9th Cir. 2009) (quoting *United States v. Hicks*, 217 F.3d 1038, 1048 (9th Cir. 2000)).

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<sup>1</sup> The amount of intended loss also “includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).” U.S.S.G. § 2B1.1, cmt. n.3 (A)(ii).

The district court's responses to defense counsel during sentencing suggested that the court considered Myres' motives irrelevant, and the court did not provide explicit reasoning or factual findings to support its conclusion that the intended loss was the entire claim. Accordingly, we must vacate the sentence and remand for the district court to explain fully its reasoning. See *United States v. Jimenez-Ortega*, 472 F.3d 1102 (2007) (remanding where sentencing court failed to make a finding about the materiality of defendant's false statements).

AFFIRMED IN PART, VACATED  
AND REMANDED IN PART.

*Appendix B*

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA**

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USDC Case Number: CR-17-00180-001 RS  
BOP Case Number: DCAN317CR00180-001  
USM Number: 24102-111  
Defendant's Attorney:  
Michael J. Shepard (Appointed)

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UNITED STATES OF AMERICA,  
*Plaintiff,*  
v.  
APRIL DIANE MYRES,  
*Defendant.*

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**JUDGMENT IN A CRIMINAL CASE**

**THE DEFENDANT:**

- pleaded guilty to count(s):
- pleaded nolo contendere to count(s): which was accepted by the court.
- was found guilty on counts: One and Two after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1341	Mail Fraud	05/04/2016	One

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18 U.S.C. § 1343	Wire Fraud	05/14/2016	Two

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s):
- Count(s) dismissed on the motion of the United States.

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

11/19/2019

Date of Imposition of Judgment

/s/ [handwritten signature]

Signature of Judge

The Honorable Richard Seeborg

United States District Judge

Name & Title of Judge

11/21/2019

Date

DEFENDANT: April Diane Myres  
CASE NUMBER: CR-17-00180-001 RS

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

14 months. This term consists of terms of 14 months on each of counts One and Two, both counts to be served concurrently.

The appearance bond is hereby exonerated, or upon surrender of the defendant as noted below. Any cash bail plus interest shall be returned to the owner(s) listed on the Affidavit of Owner of Cash Security form on file in the Clerk's Office.

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

The defendant be housed at the camp facility in Dublin, California.

- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
  - at on (no later than 2:00 pm).
  - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - at 02:00 pm on 1/28/2020 (no later than 2:00 pm).
  - as notified by the United States Marshal.

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as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

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UNITED STATES MARSHAL

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By DEPUTY UNITED STATES MARSHAL

DEFENDANT: April Diane Myres

CASE NUMBER: CR-17-00180-001 RS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three years. This term consists of terms of three years on each of Counts One and Two, all such terms to run concurrently

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

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- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

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

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

### STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) The defendant shall support his or her dependents and meet other family responsibilities;

- 5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

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- 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: April Diane Myres

CASE NUMBER: CR-17-00180-001 RS

**SPECIAL CONDITIONS OF SUPERVISION**

1. You must pay any special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.
2. You must not open any new lines of credit and/or incur new debt without the prior permission of the probation officer.
3. You must provide the probation officer with access to any financial information, including tax returns, and shall authorize the probation officer to conduct credit checks and obtain copies of income tax returns.
4. You must cooperate in the collection of DNA as directed by the probation officer.

DEFENDANT: April Diane Myres  
CASE NUMBER: CR-17-00180-001 RS

**CRIMINAL MONETARY PENALTIES**

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$200	Waived	N/A

- The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- 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.

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Name of Payee	Total Loss*	Restitution Ordered	Priority of Percentage
* * *			
<b>TOTALS</b>	<b>\$0.00</b>	<b>\$0.00</b>	

- Restitution amount ordered pursuant to plea agreement \$
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the.
  - the interest requirement is waived for the is modified as follows:

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

DEFENDANT: April Diane Myres  
CASE NUMBER: CR-17-00180-001 RS

**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 \_\_\_\_\_ due immediately, balance due
  - not later than , or
  - in accordance with  C,  D, or  E, and/or  F below); or
- B  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C  Payment in equal (e.g., weekly, monthly, quarterly) installments of \_\_ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or
- D  Payment in equal (e.g., weekly, monthly, quarterly) installments of \_\_ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

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\* 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.

E  Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F  Special instructions regarding the payment of criminal monetary penalties:  
It is further ordered that the defendant shall pay to the United States a special assessment of \$200. Payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102. During imprisonment, payment of criminal monetary penalties are due at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

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.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Correspond- ing Payee, if appropriate

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:
- The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future, *but such future orders do not affect the defendant's responsibility for the full amount of the restitution ordered.*

*Appendix C*

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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No. 19-10415

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

APRIL DIANE MYRES,

*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Northern District of California

No. 3:17-cr-00180-RS-1

San Francisco, California

Filed April 26, 2021  
Dkt Entry No. 54

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**ORDER\***

Before: WALLACE and M. SMITH, Circuit Judges,  
and LASNIK,\* District Judge.

The full court has been advised of the petition for  
rehearing en banc and no judge of the court has  
requested a vote on it. Fed. R. App. P. 35. The petition  
for rehearing en banc is DENIED.

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\* The Honorable Robert S. Lasnik, United States District Judge  
for the Western District of Washington, sitting by designation.