

No.

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# Supreme Court of the United States

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MIHRAN MELKONYAN,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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## APPENDIX

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COMES NOW PETITIONER Mihran Melkonyan and submits the attached appendix  
pursuant to Supreme Court Rules.

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Mihran Melkonyan  
Petitioner  
72465-097  
P.O. Box 9  
Mendota, CA 93640

Date: \_\_\_\_\_

**APPENDIX A**  
**ORDER & JUDGMENT OF THE COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**  
**DATED 12-15-20**

**United States v. Melkonyan**

United States Court of Appeals for the Ninth Circuit

December 10, 2020\*\*, Submitted, San Francisco, California; December 15, 2020, Filed

No. 19-10026

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\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

**Reporter**

831 Fed. Appx. 319 \*; 2020 U.S. App. LEXIS 39305 \*\*; 2020 WL 7364798

UNITED STATES OF AMERICA, Plaintiff-  
Appellee, v. MIHRAN MELKONYAN,  
Defendant-Appellant.

**Notice: PLEASE REFER TO FEDERAL RULES  
OF APPELLATE PROCEDURE RULE 32.1  
GOVERNING THE CITATION TO  
UNPUBLISHED OPINIONS.**

**Subsequent History:** Rehearing denied by, En  
banc, Rehearing denied by United States v.  
Melkonyan, 2021 U.S. App. LEXIS 5304 (9th Cir.  
Cal., Feb. 23, 2021)

**Prior History:** **[\*\*1]** Appeal from the United  
States District Court for the Eastern District of  
California Garland E. Burrell, Senior District  
Judge, Presiding. D.C. No. 2:14-CR-00083-GEB-  
EFB-1.

United States v. Melkonyan, 2017 U.S. Dist.  
LEXIS 10574, 2017 WL 363197 (E.D. Cal., Jan.  
24, 2017)

**Disposition:** AFFIRMED.

**Counsel:** For UNITED STATES OF AMERICA,  
Plaintiff - Appellee: Michael D. Anderson,  
Assistant U.S. Attorney, Kurt Didier, Assistant U.S.  
Attorney, USSAC - Office of the US Attorney,  
Sacramento, CA; Aaron Daniel Pennekamp,  
Attorney, DOJ-USAO, Sacramento, CA.

For MIHRAN MELKONYAN, Defendant -  
Appellant: Timothy Edward Warriner, Attorney,  
Law Office of Tim Warriner, Sacramento, CA.

**Judges:** Before: W. FLETCHER and IKUTA,  
Circuit Judges, and SCHREIER,\*\*\* District Judge.

**Opinion**

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\*\*\* The Honorable Karen E. Schreier, United States District Judge for  
the District of South Dakota, sitting by designation.

**[\*319] MEMORANDUM\***

Mihran Melkonyan appeals his sentence after a jury  
found him guilty of 24 counts of wire fraud, in  
violation of 18 U.S.C. § 1343, and 2 counts of mail  
fraud, in violation of 18 U.S.C. § 1341. We have  
jurisdiction under 28 U.S.C. § 1291, and we affirm.

The district court's findings satisfy Fed. R. Crim. P.  
32. At sentencing, the court stated, "Defendant's  
objections are not supported by the trial record,"  
and "I adopt the findings in the presentence report  
to the extent they're not inconsistent with the  
findings that I have made during this proceeding."  
The court made clear that it was aware of  
defendant's objections, but disagreed **[\*\*2]** with  
them, and expressly relied on the trial record as  
well as the Presentence Report's (PSR) resolution  
of disputed issues. See *United States v. Wijegoonaaratna*, 922 F.3d 983, 990 (9th Cir. 2019);  
*United States v. McClain*, 30 F.3d 1172, 1174 (9th  
Cir. 1994) (per curiam). This satisfies the court's  
duty to state its resolution of disputed issues.

The district court correctly calculated a 22-level  
increase to Melkonyan's offense level for amount of  
loss. The \$500 amount in Application Note 3(F)(i)  
to U.S.S.G. § 2B1.1 establishes "a presumed loss,  
setting a floor beneath which neither 'actual' nor  
'intended' loss may fall." *United States v. Yellowe*,  
24 F.3d 1110, 1113 (9th Cir. 1994) (emphasis  
omitted); see also *United States v. King*, 861 F.3d  
692, 694 n.1 (7th Cir. 2017) (noting that in 2000,  
the Sentencing Commission moved Application  
Note 4 to Application Note 3(F)(i) and changed the  
minimum loss amount from \$100 to \$500 per  
device). Here, because the number of unauthorized  
access devices is not in dispute,<sup>1</sup> multiplying that

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<sup>1</sup>This disposition is not appropriate for publication and is not  
precedent except as provided by Ninth Circuit Rule 36-3.

<sup>2</sup>See *United States v. Gainza*, No. 19-10430, 982 F.3d 762, 2020

number by [\*320] \$500 is the correct application of the Sentencing Guidelines, and the defendant's subjective intent as to actual loss is immaterial. *See Yellowe*, 24 F.3d at 1113.

The court adequately explained Melkonyan's sentence when it addressed the parties' objections to the PSR and heard separate arguments weighing the factors under 18 U.S.C. § 3553. The court considered the facts in the trial record and those presented in the PSR. The court specifically noted that the Guideline range [\*3] of 210 to 262 months was "high," but that it was supported by the court's findings and based on "illegal choices the defendant made." Because the court demonstrated that it made a reasoned decision, no procedural error occurred. *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc).

Melkonyan essentially makes three arguments in support of his claim that the sentence is substantively unreasonable: (1) the loss enhancement greatly exceeds actual loss, (2) the sentence is disproportionately high under the § 3553(a) factors, and (3) the court should have imposed the 168-month sentence recommended in the PSR. The first two arguments are foreclosed by the court's proper calculation of the amount of loss and its explanation of the sentence. The third argument ignores the fact that the 168-month recommendation in the PSR pre-dated a 2-level enhancement and resulting guideline range adjustment at the sentencing hearing. In light of the written objections and oral arguments made by the parties, and the court's subsequent findings of fact and explanation, the court did not abuse its discretion in choosing a guideline-range sentence of 230 months.

Finally, the district court correctly applied the preponderance of the evidence standard to establish [\*4] facts at sentencing. When a

"sentencing enhancement for amount of loss [is] not based on uncharged or acquitted conduct," the district court does not err when it uses a preponderance of the evidence standard. *United States v. Garro*, 517 F.3d 1163, 1169 (9th Cir. 2008); *see also United States v. Valle*, 940 F.3d 473, 480 n.8 (9th Cir. 2019). The superseding indictment charged Melkonyan with participating in a scheme to defraud. His conviction established that he knowingly participated in the scheme and that the actions taken as part of the scheme were reasonably foreseeable to him. Because the conduct leading to the loss enhancement was charged in the indictment and Melkonyan was convicted of those charges, the court did not err when it applied the preponderance of the evidence standard.

**AFFIRMED.**

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End of Document

U.S. App. LEXIS 38172, 2020 WL 7222136 (9th Cir. Dec. 8, 2020) (referring with approval to the court's use of the \$500 minimum per access device found in Application Note 3(F)(i) to determine amount of loss, even when the number of access devices was disputed by the defendant).

**APPENDIX B**  
**JUDGMENT OF THE UNITED STATES DISTRICT COURT**  
**FOR THE EASTERN DISTRICT OF CALIFORNIA**  
**ENTERED 1-22-19**

UNITED STATES DISTRICT COURT  
Eastern District of California

UNITED STATES OF AMERICA  
v.  
MIHRAN MELKONYAN

JUDGMENT IN A CRIMINAL CASE  
Case Number: 2:14CR00083-1  
Defendant's Attorney: Toni White

THE DEFENDANT:

pleaded guilty to count(s) \_\_\_\_.  
 pleaded nolo contendere to count(s) \_\_\_\_, which was accepted by the court.  
 was found guilty on count(s) 1 through 26 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 1343	WIRE FRAUD	3/5/14	1 - 24
18 USC 1341	MAIL FRAUD	5/10/13	26
18 USC 1341	MAIL FRAUD	4/15/13	25

The defendant is sentenced as provided in pages 2 through 8 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.  
 Indictment is to be dismissed by District Court on motion of the United States.  
 Appeal rights given.  Appeal rights waived.

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 or fine, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/4/2019

Date of Imposition of Judgment



Signature of Judicial Officer

**Garland E. Burrell, Jr., Senior U. S. District Judge**

Name & Title of Judicial Officer

1/22/2019

Date

### IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 230 months per count to be served concurrently, for a total term of 230 months.

No TSR: Defendant shall cooperate in the collection of DNA.

The court makes the following recommendations to the Bureau of Prisons:  
The Court recommends that the defendant be incarcerated in a California facility, but only insofar as this accords with security classification and space availability.

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 \_\_\_\_  
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:  
 before \_\_\_\_ on \_\_\_\_  
 as notified by the United States Marshal.  
 as notified by the Probation or Pretrial Services Officer.  
If no such institution has been designated, to the United States Marshal for this district.

### RETURN

I have executed this judgment as follows:

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

\_\_\_\_\_  
United States Marshal

\_\_\_\_\_  
By Deputy United States Marshal

### SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:  
36 months per count to be served concurrently, for a total term of 36 months.

### MANDATORY CONDITIONS

You must not commit another federal, state or local crime.

You must not unlawfully possess a controlled substance.

You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
- You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.
- You must cooperate in the collection of DNA as directed by the probation officer.
- You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.
- You must participate in an approved program for domestic violence.

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

### STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

### U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature \_\_\_\_\_ Date \_\_\_\_\_

**SPECIAL CONDITIONS OF SUPERVISION**

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall not dispose of or otherwise dissipate any of his assets until the fine and/or restitution ordered by this Judgment is paid in full, unless the defendant obtains approval of the Court or the probation officer.
3. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any anticipated or unexpected financial gains to any unpaid restitution ordered by this Judgment.
4. The defendant shall provide the probation officer with access to any requested financial information.
5. The defendant shall not open additional lines of credit without the approval of the probation officer.
6. Pursuant to 18 USC 3583(d)(3), upon completion of the term of imprisonment, the defendant is to be surrendered to a duly authorized Immigration official for deportation proceedings in accordance with the established procedures provided by the Immigration and Nationality Act. If ordered deported, the defendant, during the term of supervised release, shall remain outside the United States and shall not re-enter the United States without the consent of the Secretary of the Department of Homeland Security of the United States.

Upon any re-entry, lawful or unlawful, into the United States, the defendant shall report in person to the United States Probation Office in the Eastern District of California within 72 hours.

### CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$2,600.00	\$0.00	\$1,418,959.00

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

The Court orders the defendant to pay restitution to the single victim as outlined in the Restitution Attachment on Sheet 5B.

In addition, the Court gives notice that this case involves other defendants, or may involve 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. Such future orders do not increase the amount of restitution ordered against the defendant.

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.

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  fine  restitution

The interest requirement for the  fine  restitution is modified as follows:

If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

\*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.

**RESTITUTION PAYMENTS**

Restitution of \$1,418,959.00 to:

**AMERICAN EXPRESS**  
**PASENDENA, CA 91117**  
**\$1,418,959.00**

### 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,  E, 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
- E.  Payment during the term of supervised release/probation 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:

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 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:

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) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

**APPENDIX C**  
**ORDER OF THE COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**  
**DATED 2-23-21**

**United States v. Melkonyan**

United States Court of Appeals for the Ninth Circuit

February 23, 2021, Filed

No. 19-10026

**Reporter**

2021 U.S. App. LEXIS 5304 \*

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MIHRAN MELKONYAN, Defendant-Appellant.**

**Prior History:** [\*1] D.C. No. 2:14-cr-00083-GEB-EFB-1, Eastern District of California, Sacramento.

United States v. Melkonyan, 831 Fed. Appx. 319, 2020 U.S. App. LEXIS 39305 (9th Cir. Cal., Dec. 15, 2020)

**Counsel:** For United States of America, Plaintiff - Appellee: Michael D. Anderson, Assistant U.S. Attorney, Kurt Didier, Assistant U.S. Attorney, USSAC - Office of the US Attorney, Sacramento, CA; Aaron Daniel Pennekamp, Attorney, Usao, Sacramento, CA.

For Mihran Melkonyan, Defendant - Appellant: Timothy Edward Warriner, Attorney, Law Office of Tim Warriner, Sacramento, CA.

**Judges:** Before: W. FLETCHER and IKUTA, Circuit Judges, and SCHREIER,\* District Judge.

**Opinion**

**ORDER**

Appellant filed a petition for panel rehearing and rehearing en banc on January 29, 2021 [DE 58]. The panel has voted to deny the petition for panel rehearing. Judges W. Fletcher and Ikuta have voted to deny the petition for rehearing en banc, and Judge Schreier so recommends.

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\*The Honorable Karen E. Schreier, United States District Judge for the District of South Dakota, sitting by designation.

**APPENDIX D**  
**USDC ORDER DENYING OBJECTIONS TO PRESENTENCE REPORT**  
**ENTERED 1-4-19**

2  
UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF CALIFORNIA

4 --00--

5 UNITED STATES OF AMERICA ) Docket No. 14-CR-83  
6 Plaintiff, ) Sacramento, California  
7 v. ) January 4, 2019  
8 MIHRAN MELKONYAN, ) 9:58 a.m.  
9 Defendant. )  
10 )  
11 ) Re: Judgment and Sentencing

12 TRANSCRIPT OF PROCEEDINGS  
13 BEFORE THE HONORABLE GARLAND E. BURRELL, JR.  
14 UNITED STATES SENIOR DISTRICT JUDGE

15 APPEARANCES:

16 For the Plaintiff: HON. McGREGOR W. SCOTT  
17 United States Attorney by  
18 MR. MATTHEW YELOVICH  
19 Assistant U.S. Attorney  
20 501 I Street, Suite 10-100  
21 Sacramento, CA 95814  
22  
23 For the Defendant: LAW OFFICES OF TONI WHITE by  
24 MS. TONI LaSHAY WHITE  
25 P.O. Box 1081  
El Dorado, CA 95623

Interpreted by: EDUARD HAIRULLIN (Russian language)

JENNIFER COULTHARD, RMR, CRR  
Official Court Reporter  
501 I Street, Suite 4-200  
Sacramento, CA 95814  
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(312)617-9858

Mechanical Steno - Computer-Aided Transcription

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1                   And here the counts of conviction are referenced at  
2 2B1.1. In 2B1.1 one of the special rules for calculating loss  
3 is \$500 as a minimum for each access device. There's no real  
4 dispute that there were 119,000 unique American Express account  
5 numbers involved in this scheme. And the defendant's objection  
6 should be overruled largely for the reasons stated in the  
7 government's papers.

8                   THE COURT: I agree. Defendant's objections are not  
9 supported by the trial record. Therefore, they are overruled.  
10 I am adding paragraph 26 to the final presentence report, and  
11 it reads: The defendant's offense involved 10 or more --  
12 strike that.

13                   "The defendant's offense involved the unlawful use of  
14 the means of identification of 10 or more individuals." Then  
15 there will be a period and they cite advisory guideline section  
16 2B1.1(b)(2), and that would be a plus 2 enhancement. That  
17 changes the advisory guidelines in the presentence report, it  
18 changes the offense level from 33 to 35, criminal history  
19 category is Roman numeral III. And is the resulting advisory  
20 guideline range 210 to 262 months?

21                   MR. YEOLOVICH: Yes, Your Honor.

22                   THE COURT: I adopt the findings in the presentence  
23 report to the extent they're not inconsistent with the findings  
24 that I have made during this proceeding. Therefore, the  
25 offense level was 35, criminal history category Roman numeral

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**APPENDIX E**  
**USDC ORDER DENYING MOTION FOR NEW TRIAL**  
**ENTERED 10-17-18**

1

2

3

4

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

7 UNITED STATES OF AMERICA,

NO. 2:14-cr-83-GEB

8

Plaintiff,

9

V.

10 MIHRAN MELKONYAN,

**ORDER DENYING DEFENDANT MIHRAN  
MELKONYAN'S MOTION FOR NEW TRIAL**

11

Defendant.

12

Defendant Mihran Melkony  
on newly discovered evidence a  
counsel. A defendant may move to  
an order granting "a new trial  
requires." Fed. R. Crim. P. 33(a).

17

18 Melkonyan's argues two claims support his motion:  
19 first, that newly discovered evidence from co-defendant Ruslan  
20 Kirilyuk "exonerate[s]" him, Motion at 17-18, and second, that  
21 his counsel was constitutionally ineffective in violation of the  
Sixth Amendment, Motion at 18-34.

22

23 Meikonyan's has not met has burden on his first claim.  
24 "To prevail on a Rule 33 motion for a new trial based on newly  
25 discovered evidence, a defendant must satisfy a five-part test:  
26 '(1) the evidence must be newly discovered; (2) the failure to  
27 discover the evidence sooner must not be the result of a lack of  
diligence on the defendant's part; (3) the evidence must be

1 material to the issues at trial; (4) the evidence must be neither  
2 cumulative nor merely impeaching; and (5) the evidence must  
3 indicate that a new trial would probably result in acquittal.”  
4 United States v. Harrington, 410 F.3d 598, 601, (9th Cir. 2005).

5 The argued new evidence upon which Defendant relies are  
6 conclusory assertions of a co-defendant which have not been shown  
7 to be evidence that would “probably result in acquittal.” Id. at  
8 410 F.3d 601.

9 Nor has defendant shown that his second claim is a  
10 sufficient basis for granting his motion. Allowing Melkonyan to  
11 litigate his ineffective assistance of counsel claims prior to  
12 entry of judgment is inconsistent with “[t]he customary procedure  
13 for challenging the effectiveness of defense counsel in a federal  
14 criminal trial [which] is by collateral attack on the conviction  
15 . . .” United States v. Pirro, 104 F.3d 297, 299 (9th Cir.  
16 1997). As the Ninth Circuit states in Pirro: “We . . . have  
17 rejected the use of direct appeal for ineffective assistance of  
18 counsel claims, except in limited circumstances where the record  
19 is sufficiently developed.” Id. Here the record is not  
20 sufficiently developed.

21 Therefore, Defendant’s motion is denied, and the  
22 October 19, 2018 hearing on the motion is vacated.

23 Dated: October 16, 2018

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25   
26 GARLAND E. BURRELL, JR.  
27 Senior United States District Judge  
28

**APPENDIX F**  
**USDC ORDER DENYING 2255 WITHOUT PREJUDICE**  
**ENTERED 3-27-18**

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA.

No. 2:14-cr-0083-GEB-EFB P

**12** Respondent.

## ORDER

14 MIHRAN MELKONYAN.

### Moyant.

17 Movant, a federal prisoner proceeding pro se, has filed a motion to vacate, set aside or  
18 correct his sentence pursuant to 28 U.S.C. § 2255. The matter was referred to a United States  
19 Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

20 On January 11, 2018, the magistrate judge filed findings and recommendations herein  
21 which were served on all parties and which contained notice to all parties that any objections to  
22 the findings and recommendations were to be filed within fourteen days. Neither party has filed  
23 objections to the findings and recommendations.

24 The court has reviewed the file and finds the findings and recommendations to be  
25 supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY  
26 ORDERED that:

27 | *|||||*

28 *III*

1           1. The findings and recommendations filed January 11, 2018, are adopted in full;  
2           2. Melkonyan's motion to vacate, set aside, or correct his sentence (ECF No. 237) is  
3 denied without prejudice; and  
4           3. The Clerk of the Court is directed to close the companion civil case, No. 2:17-cv-2616-  
5 GEB-EFB.

6 Dated: March 26, 2018

GARLAND E. BURRELL, JR.  
Senior United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 MIHRAN MELKONYAN,  
12 Movant,  
13 v.  
14 UNITED STATES OF AMERICA,  
15 Respondent.

No. 2:14-cr-0083-GEB-EFB P

## **FINDINGS AND RECOMMENDATIONS**

17 Melkonyan, without the assistance of counsel, has filed a motion to vacate, set aside, or  
18 correct his sentence pursuant to 28 U.S.C. § 2255. ECF No. 237. A motion may be brought in a  
19 district court under 28 U.S.C. § 2255 by a person in custody under the sentence of that court. In  
20 this case, the motion is premature because Melkonyan has not been sentenced yet. See ECF No.  
21 244 (minute order continuing movant's sentencing to February 9, 2018). He may re-file his  
22 § 2255 motion within one year of the date his judgment of conviction becomes final, or within  
23 one year of any of the other events identified in 28 U.S.C. § 2255(f).

24 Accordingly, it is hereby RECOMMENDED that Melkonyan's motion to vacate, set  
25 aside, or correct his sentence (ECF No. 237) be denied without prejudice and the Clerk be  
26 directed to close the companion civil case, 2:17-cv-2616-GEB-EPB.

27 These findings and recommendations are submitted to the United States District Judge  
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

1 after being served with these findings and recommendations, any party may file written  
2 objections with the court and serve a copy on all parties. Such a document should be captioned  
3 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections  
4 within the specified time may waive the right to appeal the District Court's order. *Turner v.*  
5 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In  
6 his objections movant may address whether a certificate of appealability should issue in the event  
7 he files an appeal of the judgment in this case.

8 DATED: January 10, 2018.

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11 EDMUND F. BRENNAN  
12 UNITED STATES MAGISTRATE JUDGE  
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**APPENDIX G**  
**USCA ORDER DENYING REMAND FOR 3582 RULING IN USDC**  
**ENTERED 5-26-20**

**United States v. Melkonyan**

United States Court of Appeals for the Ninth Circuit

May 26, 2020, Filed

No. 19-10026

**Reporter**

2020 U.S. App. LEXIS 16702 \*

UNITED STATES OF AMERICA, Plaintiff-  
Appellee, v. MIHRAN MELKONYAN,  
Defendant-Appellant.

remains in effect.

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**Prior History:** [\*1] D.C. No. 2:14-cr-00083-GEB-  
EFB-1, Eastern District of California, Sacramento.

United States v. Melkonyan, 2017 U.S. Dist.  
LEXIS 10574 (E.D. Cal., Jan. 24, 2017)

**Counsel:** For United States of America, Plaintiff-  
Appellee: Michael D. Anderson, Kurt Didier,  
Assistant U.S. Attorney, Assistant U.S. Attorney,  
USSAC - Office of the US Attorney, Sacramento,  
CA; Aaron Daniel Pennekamp, Attorney, Usao,  
Sacramento, CA.

For Mihran Melkonyan, Defendant - Appellant:  
Timothy Edward Warriner, Attorney, Law Office  
of Tim Warriner, Sacramento, CA.

**Judges:** Before: SILVERMAN, NGUYEN, and  
COLLINS, Circuit Judges.

**Opinion**

**ORDER**

Appellant has filed an urgent motion for a limited remand to allow the district court to consider appellant's motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). The district court has not issued an indicative ruling stating "that it would grant the motion or that the motion raises a substantial issue." *See* Fed. R. App. P. 12.1(b); Fed. R. Crim. P. 37(a). Appellant's motion (Docket Entry No. 21) is therefore denied.

The previously established briefing schedule

**APPENDIX H**  
**USDC ORDER DENYING 3582 MOTION**  
**ENTERED 4-27-20**

## United States v. Melkonyan

United States District Court for the Eastern District of California

April 27, 2020, Decided; May 5, 2020, Filed

No. 2:14-cr-0083-JAM

### Reporter

2020 U.S. Dist. LEXIS 79091 \*; 2020 WL 2128591

UNITED STATES OF AMERICA, Plaintiff, v.  
MIHRAN MELKONYAN, Defendant.

**Prior History:** United States v. Melkonyan, 2017  
U.S. Dist. LEXIS 10574 (E.D. Cal., Jan. 24, 2017)

**Counsel:** [\*1] For Mihran Melkonyan, Defendant:  
Toni LaShay White, LEAD ATTORNEY, Law  
Offices Of Toni White, El Dorado, CA.

For Rouslan Akhmerov, Defendant: Dmitry Y.  
Gurovich, LEAD ATTORNEY, Gurovich, Berk &  
Associates, APC, Sherman Oaks, CA.

For Aleksandr Maslov, Defendant: Robert M.  
Wilson, LEAD ATTORNEY, Law Offices of  
Robert M. Wilson, Sacramento, CA.

For Ruslan Kirilyuk, Defendant: Olaf William  
Hedberg, LEAD ATTORNEY, Law Office of Olaf  
W. Hedberg, Sacramento, CA.

For USA, Plaintiff: Michael Dwight Anderson,  
GOVT, LEAD ATTORNEY, Matthew Yelovich,  
GOVT, United States Attorney's Office,  
Sacramento, CA; Kurt Didier, flu, U.S. Attorney's  
Office, Sacramento, CA.

**Judges:** JOHN A. MENDEZ, UNITED STATES  
DISTRICT JUDGE.

**Opinion by:** JOHN A. MENDEZ

### Opinion

**ORDER DENYING DEFENDANT'S MOTION  
TO REDUCE SENTENCE**

Mihran Melkonyan ("Defendant"), a prisoner serving his sentence at the Lompoc Federal Correctional Institution ("Lompoc FCI"), a Bureau of Prisons ("BOP") facility located in Lompoc, California, moves for a reduction of his term of imprisonment under the federal compassionate release statute, 18 U.S.C. § 3582(c)(1)(A). Mot., ECF No. 419. The Government filed an opposition, ECF No. 422, to which Defendant replied, ECF No. 424. After consideration of the parties' [\*2] briefing on the motion and relevant legal authority, the Court DENIES Defendant's Motion to Reduce Sentence.

### I. BACKGROUND

On February 15, 2017, Defendant was found guilty on twenty-four counts of wire fraud, in violation of 18 U.S.C. § 1343, and two counts of mail fraud, in violation of 18 U.S.C. § 1341. Verdict Form, ECF No. 174. On January 4, 2019, Defendant was sentenced to 230 months of imprisonment. Judgment, ECF No. 294. Defendant began service of sentence on January 4, 2019. BOP Inmate Data, Ex. 1 to Opp'n at 3, ECF No. 422-1. His projected release date is August 13, 2031. *Id.*

On January 16, 2019, Defendant filed a notice of appeal. ECF No. 290. Among the issues on appeal, Defendant challenges his 230-month sentence as "substantively unreasonable." Opening Appellate Brief, Ex. D to Mot. at 29-36, ECF No. 419-4. That appeal remains pending before the Ninth Circuit. See United States v. Melkonyan, Case No. 19-10026. Defendant now requests this Court reduce his sentence and release him in advance of his projected release date because he is at risk of

contracting, and experiencing serious complications from, COVID-19 if he remains at Lompoc FCI. Mot. at 2-4.

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## II. OPINION

The procedural posture of this case divests [\*3] this Court of the jurisdiction necessary to consider Defendant's motion. Defendant filed this motion after he filed a notice of appeal in this Court. See ECF No. 290. "The filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." United States v. Ortega-Lopez, 988 F.2d 70, 72 (9th Cir. 1993) (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982)) (internal quotation marks omitted). And although Ortega-Lopez held the district court lacked jurisdiction to modify a sentence under Federal Rule of Criminal Procedure 35(b), not under 18 U.S.C. § 3582(c), "there is no basis for distinguishing between these two types of modifications for jurisdictional purposes." United States v. Maldonado-Rios, 790 F.3d 62, 64 (1st Cir. 2015). On appeal, Defendant challenges the length of his sentence. See Opening Appellate Brief at 29-36. Thus, his sentence is directly involved in the appeal. Accordingly, this Court is divested of its ability to reduce Defendant's sentence. See Ortega-Lopez, 988 F.2d at 72 ("[A] district court is divested of jurisdiction once a notice of appeal has been filed from the original sentence.").

## III. ORDER

For the reasons set forth above, the Court DENIES Defendant's Motion to Reduce Sentence.

IT IS SO ORDERED.

Dated: April 27, 2020

/s/ John A. Menendez

**JOHN A. MENDEZ**

**UNITED STATES DISTRICT JUDGE**