

No. _____

In The
Supreme Court of the United States

NELSON CONTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

Samuel B. Winthrop
Counsel of Record
WINTHROP & GAINES MESSICK, PLLC
706 Harness Road
Statesville, NC
Telephone: (704) 872-9544
Facsimile: (704) 872-7712
sam@winthrop-law.com

Counsel for Petitioner

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FILED: January 25, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4563
(3:19-cr-00183-RJC-DCK-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

NELSON CONTO

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: January 25, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUITNo. 20-4563, US v. Nelson Conto
3:19-cr-00183-RJC-DCK-2

NOTICE OF JUDGMENT

Judgment was entered on this date in accordance with Fed. R. App. P. 36. Please be advised of the following time periods:

PETITION FOR WRIT OF CERTIORARI: The time to file a petition for writ of certiorari runs from the date of entry of the judgment sought to be reviewed, and not from the date of issuance of the mandate. If a petition for rehearing is timely filed in the court of appeals, the time to file the petition for writ of certiorari for all parties runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. See Rule 13 of the Rules of the Supreme Court of the United States; www.supremecourt.gov.

VOUCHERS FOR PAYMENT OF APPOINTED OR ASSIGNED COUNSEL: Vouchers must be submitted within 60 days of entry of judgment or denial of rehearing, whichever is later. If counsel files a petition for certiorari, the 60-day period runs from filing the certiorari petition. (Loc. R. 46(d)). If payment is being made from CJA funds, counsel should submit the CJA 20 or CJA 30 Voucher through the CJA eVoucher system. In cases not covered by the Criminal Justice Act, counsel should submit the Assigned Counsel Voucher to the clerk's office for payment from the Attorney Admission Fund. An Assigned Counsel Voucher will be sent to counsel shortly after entry of judgment. Forms and instructions are also available on the court's web site, www.ca4.uscourts.gov, or from the clerk's office.

BILL OF COSTS: A party to whom costs are allowable, who desires taxation of costs, shall file a Bill of Costs within 14 calendar days of entry of judgment. (FRAP 39, Loc. R. 39(b)).

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC:

A petition for rehearing must be filed within 14 calendar days after entry of judgment, except that in civil cases in which the United States or its officer or agency is a party, the petition must be filed within 45 days after entry of judgment. A petition for rehearing en banc must be filed within the same time limits and in the same document as the petition for rehearing and must be clearly identified in the title. The only grounds for an extension of time to file a petition for rehearing are the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or an extraordinary circumstance wholly beyond the control of counsel or a party proceeding without counsel.

Each case number to which the petition applies must be listed on the petition and included in the docket entry to identify the cases to which the petition applies. A timely filed petition for rehearing or petition for rehearing en banc stays the mandate and tolls the running of time for filing a petition for writ of certiorari. In consolidated criminal appeals, the filing of a petition for rehearing does not stay the mandate as to co-defendants not joining in the petition for rehearing. In consolidated civil appeals arising from the same civil action, the court's mandate will issue at the same time in all appeals.

A petition for rehearing must contain an introduction stating that, in counsel's judgment, one or more of the following situations exist: (1) a material factual or legal matter was overlooked; (2) a change in the law occurred after submission of the case and was overlooked; (3) the opinion conflicts with a decision of the U.S. Supreme Court, this court, or another court of appeals, and the conflict was not addressed; or (4) the case involves one or more questions of exceptional importance. A petition for rehearing, with or without a petition for rehearing en banc, may not exceed 3900 words if prepared by computer and may not exceed 15 pages if handwritten or prepared on a typewriter. Copies are not required unless requested by the court. (FRAP 35 & 40, Loc. R. 40(c)).

MANDATE: In original proceedings before this court, there is no mandate. Unless the court shortens or extends the time, in all other cases, the mandate issues 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay issuance of the mandate. If the petition or motion is denied, the mandate will issue 7 days later. A motion to stay the mandate will ordinarily be denied, unless the motion presents a substantial question or otherwise sets forth good or probable cause for a stay. (FRAP 41, Loc. R. 41).

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 20-4563

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NELSON CONTO,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:19-cr-00183-RJC-DCK-2)

Submitted: December 21, 2021

Decided: January 25, 2022

Before RICHARDSON and QUATTLEBAUM, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Samuel B. Winthrop, WINTHROP & GAINES MESSICK, PLLC, Statesville, North Carolina, for Appellant. William T. Stetzer, Acting United States Attorney, Anthony J. Enright, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A grand jury charged Nelson Conto with conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349; bank fraud, in violation of 18 U.S.C. § 1344(2); and aggravated identity theft, in violation of 18 U.S.C. § 1082A. After trial, the jury convicted Conto of the conspiracy and bank fraud counts but acquitted Conto of the identity theft count. The district court sentenced Conto to 41 months of imprisonment. On appeal, Conto challenges the district court’s denial of his motion in limine seeking the admission of evidence and argues that the court’s loss calculation was clearly erroneous. We affirm.

A district court’s ruling under Fed R. Evid. 106 is reviewed for abuse of discretion. *United States v. Hassan*, 742 F.3d 104, 135 (4th Cir. 2014). Rule 106 provides that “[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.” Rule 106 aims “to prevent a party from misleading the jury by allowing into the record relevant portions of the excluded testimony which clarify or explain the part already received.” *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996). However, Rule 106 does not “render admissible the evidence which is otherwise inadmissible under the hearsay rules.” *Id.* “Nor does it require the admission of self-serving, exculpatory statements made by a party which are being sought for admission by that same party.” *United States v. Lentz*, 524 F.3d 501, 526 (4th Cir. 2008) (internal quotation marks omitted).

On appeal, Conto argues that the district court abused its discretion in admitting excerpts of a recorded post-arrest interview of Conto without admitting the full recording.

However, Conto has consistently failed to explain how any of the excerpted statements admitted at trial were misleading or lacking context. Moreover, the statements Conto proffered would constitute self-serving, exculpatory hearsay if he had been permitted to introduce them. Therefore, we conclude that the district court did not abuse its discretion.

Turning to Conto's sentencing argument, we review a defendant's sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). To pass this review, the sentence must be both procedurally and substantively reasonable. *Id.* at 51. In determining procedural reasonableness, we consider whether the district court properly calculated the defendant's advisory Guidelines range, gave the parties an opportunity to argue for an appropriate sentence, considered the 18 U.S.C. § 3553(a) factors, and sufficiently explained the selected sentence. *Id.* at 49-51. "When reviewing whether a district court properly calculated the Guidelines range we review the district court's legal conclusions *de novo* and its factual findings for clear error." *United States v. Lawing*, 703 F.3d 229, 241 (4th Cir. 2012) (internal quotation marks omitted). "A finding is clearly erroneous [only] when although there is evidence to support it, [we] on the entire evidence [are] left with the definite and firm conviction that a mistake has been committed." *Butts v. United States*, 930 F.3d 234, 238 (4th Cir. 2019) (internal quotation marks omitted), *cert. denied*, 140 S. Ct. 1113 (2020).

The Guidelines instruct that to calculate a loss amount, the district court must take the larger of actual or intended loss. U.S. Sentencing Guidelines Manual § 2B1.1 cmt. n.3(A). The Guidelines commentary defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict." USSG § 2B1.1 cmt. n.3(A)(ii). The loss must

have been reasonably foreseeable, meaning “that the defendant knew or, under the circumstances, reasonably should have known” that the loss was a potential result of the offense. USSG § 2B1.1 cmt. n.3(A)(iv). “The [district] court need only make a reasonable estimate of the loss.” USSG § 2B1.1 cmt. n.3(C). In cases “involving jointly undertaken criminal activity, a particular loss may be attributed to a defendant if it results from the conduct of others so long as the conduct was in furtherance of, and reasonably foreseeable in connection with the criminal activity.” *United States v. Otuya*, 720 F.3d 183, 191 (4th Cir. 2013) (internal quotation marks omitted).

Conto argues that the district court erred by counting losses directly attributed to his coconspirators against him without explaining which coconspirator’s losses were being counted or why they were attributable to Conto. However, Conto fails to show clear error in the district court’s determination that he played more than a minor role in the conspiracy. Moreover, the district court reasonably concluded that Conto could have foreseen the conspiracy’s breadth, particularly given Conto’s own action in recruiting at least one new member into the conspiracy. Finally, we conclude that the district court made “a reasonable estimate of the loss” in calculating the total amount of loss from the conspiracy.

See USSG § 2B1.1 cmt. n.3(C).

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED