

No. _____

**In the Supreme Court of the United
States**

RUSLAN KIRILYUK

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Ninth Circuit

PETITIONER'S APPENDIX

Gene D. Vorobyov (CA Bar # 200193)
2309 Noriega Street, # 46
San Francisco, CA 94122
415 425-2693
gene.law@gmail.com

Attorney for Petitioner-Appellant
RUSLAN KIRILYUK

Table of Contents

Exhibit	Description	Date	Vol.	Page
1	Ninth Circuit Panel Mem Dispo		1	3
2	DC sentencing decision on loss pages Ikrilyuk		1	18
3	Order Denying Rehearing		1	23
4	2024 Amendment to 2B1.1		1	25
5	amended final judgment	06/03/2024	1	29

Exhibit No. 1

Ninth Circuit Panel Mem Dispo

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 30 2025

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RUSLAN KIRILYUK,

Defendant - Appellant.

No. 24-3429

D.C. No.

2:14-cr-00083-DJC-4

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Daniel J. Calabretta, District Court, Presiding

Submitted October 22, 2025**
San Francisco, California

Before: CLIFTON, OWENS, and BUMATAY, Circuit Judges.
Dissent by Judge BUMATAY.

Ruslan Kirilyuk appeals from his 236-month sentence for wire fraud (18 U.S.C. § 1343), mail fraud (18 U.S.C. § 1341), aggravated identity theft (18 U.S.C. § 1028A), and failure to appear (18 U.S.C. § 3146). As the parties are familiar

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

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

with the facts, we do not recount them here. We affirm.

The district court sentenced Kirilyuk according to § 2B1.1 of the then-operative 2023 Sentencing Guidelines. The Guidelines provided for graduated offense level enhancements based on the amount of “loss,” but did not define “loss.” U.S.S.G. § 2B1.1 (2023). Commentary to the Guidelines defined “loss” as the “greater of actual loss or intended loss.” U.S.S.G. § 2B1.1 cmt. n.3(A) (2023). Following this commentary, the district court used the \$3.4 million intended loss in Kirilyuk’s case, not the \$1.4 million actual loss, to calculate his § 2B1.1 sentencing enhancement. Kirilyuk objected that, in his view, the district court erred because intended loss is an impermissible interpretation of “loss” under the Guidelines. Because the error was preserved below, we review this issue de novo. *United States v. Trumbull*, 114 F.4th 1114, 1117 (9th Cir. 2024).

“The Supreme Court has said that the commentary to the Guidelines ‘is akin to an agency’s interpretation of its own legislative rules.’” *Id.* (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993)). “As a result, we apply *Kisor v. Wilkie*, 588 U.S. 558 (2019), to determine whether to defer to the commentary’s interpretation of a Guideline.” *Id.* at 1117–18 (footnote omitted) (citing *United States v. Castillo*, 69 F.4th 648, 655–56 (9th Cir. 2023)).

The first step under *Kisor* is to ask whether the meaning of “loss” in U.S.S.G. § 2B1.1 is “genuinely ambiguous” after “exhaust[ing] all the ‘traditional

tools of construction.” *Castillo*, 69 F.4th at 655 (quoting *Kisor*, 588 U.S. at 575). If “loss” is unambiguous, a court should not defer to the commentary. *Id.* Kirilyuk argues that “loss” unambiguously refers only to actual loss. But we held otherwise in *United States v. Yafa*, 136 F.4th 1194 (9th Cir. 2025). There, we concluded that “because no single meaning of ‘loss’ is evident from § 2B1.1’s text, even after employing the traditional tools of interpretation, a genuine ambiguity exists.” *Yafa*, 136 F.4th at 1198.

Step two under *Kisor* requires asking whether the commentary’s interpretation of the Guidelines is “reasonable,” or whether it “come[s] within the zone of ambiguity the court has identified after employing all its interpretive tools.” *Id.* (alteration in original) (quoting *Kisor*, 588 U.S. at 575–76). Text, structure, history, and purpose—the court’s traditional interpretive tools—indicate that “intended loss” falls within the zone of ambiguity that *Yafa* identified.

Kirilyuk insists that the plain and ordinary meaning of “loss” includes only actual loss. But we have “often recognized ‘intended loss’ as part and parcel of the plain meaning of the term ‘loss.’” *United States v. Hackett*, 123 F.4th 1005, 1012 (9th Cir. 2024) (canvassing Ninth Circuit precedent). *See also United States v. Diop*, No. 24-3774, 2025 WL 2602277, at *2 (9th Cir. Sept. 9, 2025) (concluding “‘intended loss’ is a permissible interpretation of ‘loss.’”).

This has also been the consistent position of the Sentencing Commission.

The Sentencing Guidelines for fraud were originally laid out in § 2F1.1, which set offense levels based on the “estimated, probable or intended loss.” U.S.S.G. § 2F1.1(b)(1) (1987). In 2001, the provision for fraud was consolidated into the provision for theft, § 2B1.1, but nowhere did the Commission indicate an intent to change the longstanding understanding that loss, in fraud cases, could refer to intended or actual loss. *See* U.S.S.G. § 2B1.1 (2001). And in response to the disagreement among courts over whether the commentary definition of “loss” impermissibly expanded § 2B1.1, the Commission clarified its intent by moving the “loss” definition from the commentary into the Guidelines themselves. *See* U.S.S.G. § 2B1.1(b)(1)(A) (2024).

Other provisions of the Guidelines also indicate that “loss” may encompass “intended loss” as well as “actual loss.” U.S.S.G. § 1B1.3(a)(3) describes the relevant sentencing factors as including not only “all harm that resulted from the [defendant’s] acts and omissions” but also “all harm that was the object of such acts and omissions.” In general, “the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the *loss caused or intended* by their crimes.” U.S.S.G. § 2B1.1 cmt. background (2023) (emphasis added). This is because “loss serves as a measure of the seriousness of the offense and the defendant’s relative culpability.” *Id.* Kirilyuk’s interpretation “would hamstring courts in fulfilling this purpose” by preventing them from adequately assessing a

defendant's culpability. *Yafa*, 136 F.4th at 1198. Thus, the commentary's treatment of "loss" as including "intended loss" is reasonable.

Step three under *Kisor* asks whether the Commission's interpretation is entitled "to 'controlling weight.'" *Trumbull*, 114 F.4th at 1118 (quoting *Kisor*, 588 U.S. at 576). *Kisor* instructs courts to assess "whether the interpretation (1) constitutes the agency's 'official position, rather than any more ad hoc statement not reflecting the agency's views,' (2) implicates the agency's 'substantive expertise,' and (3) reflects the agency's 'fair and considered judgment.'" *Yafa*, 136 F.4th at 1199 (quoting *Kisor*, 588 U.S. at 576–79).

In this case, the Commission's interpretation is entitled to controlling weight. We held in *Yafa* that "[t]he commentary is issued by the Commission as its official position." *Id.* Given the research and consideration the Commission gives to § 2B1.1 crimes, "the commentary implicates the Commission's substantive expertise and reflects its fair and considered judgment." *Id.* The interpretation of "loss" as including "intended loss" is longstanding and does not "reflect a 'convenient litigating position' or 'new interpretation . . . that creates 'unfair surprise' to regulated parties.'" *Id.* (omission in original) (quoting *Kisor*, 588 U.S. at 579).

The commentary's interpretation of "loss" as "the greater of actual loss or intended loss" satisfies all three of the *Kisor* factors and is entitled to deference.

Therefore, the district court did not err when it sentenced Kirilyuk according to the loss he intended to inflict.

AFFIRMED.

FILED

OCT 30 2025

United States of America v. Kirilyuk, No. 24-3429
BUMATAY, Circuit Judge, dissenting:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

The government maintains that we should defer to the United States Sentencing Commission’s interpretation of “loss” as “the greater of actual or intended loss.” The majority, applying *Kisor v. Wilkie*, 588 U.S. 558 (2019), agrees and affirms Ruslan Kirilyuk’s sentence. But in my view, the Commission’s interpretation is not a reasonable interpretation entitled to deference. So I respectfully dissent.

“[W]e apply *Kisor v. Wilkie*[] to determine whether to defer to the commentary’s interpretation of a Guideline.” *United States v. Trumbull*, 114 F.4th 1114, 1117–1118 (9th Cir. 2024) (simplified). We will not defer to the Commission’s interpretation of a Sentencing Guideline if the interpretation is not a “reasonable” one. *Kisor*, 588 U.S. at 575–76 (simplified).

The Commission’s interpretation is reasonable if it “come[s] within the zone of ambiguity the court has identified.” *Id.* at 576. When making this determination, a court “employ[s] all its interpretive tools” to “at least establish the outer bounds of permissible interpretation.” *Id.*; see also *United States v. Kirilyuk (Kirilyuk I)*, 29 F.4th 1128, 1137 (9th Cir. 2022) (“In interpreting the Guidelines, we apply the ordinary tools of statutory interpretation[.]”). An agency’s interpretation is not automatically reasonable. Instead, reasonability “is a requirement an agency can fail.” *Kisor*, 588 U.S. at 576. The Commission fails this requirement.

Although “a review of dictionaries reveals that ‘loss’ can have a range of meanings[,]” *Kirilyuk I*, 29 F.4th at 1137, this range is not limitless. Instead, each of the context-specific meanings share a common denominator: they all refer to a diminution that *actually happened*. Take, for instance, a survey of the entries for “loss” in Black’s Law Dictionary. These entries include “actual loss,” “economic loss,” “intangible loss,” and “unrealized loss.” *Loss, Black’s Law Dictionary* (11th ed. 2019). Each of these entries, in turn, have their own definition. An “actual loss” refers to a term of art in insurance law, specifically the “real and substantial destruction of insured property.” *Id.* An “economic loss” is a “monetary loss such as wages or lost profits.” *Economic Loss, Black’s Law Dictionary* (11th ed. 2019). “Intangible loss” is “damage caused by the disruption of an intangible right or benefit.” And an “unrealized loss” is when an asset “has decreased in market value.” *Loss, Black’s Law Dictionary* (11th ed. 2019).

This cursory survey reveals what common sense suggests: when “ordinary speakers of the English language say ‘loss,’ they mean something that actually occurred.” *United States v. Boler*, 115 F.4th 316, 333 (4th Cir. 2024) (Quattlebaum, J., dissenting). When insured property is destroyed, the destruction truly occurs. Similarly, if an investor holds \$100 worth of stock, and that stock decreases in value to \$80, the investor has suffered an unrealized loss of \$20. That the stock’s value may increase to \$150 the very next day does not negate that the stock *actually*

decreased in value the day before. Even if the investor sells the stock when it is valued at \$150 and realizes a gain of \$50, she still experienced an actual diminution in value when the stock value fell to \$80. So even an unrealized loss involves a diminution that truly occurs.

The Guidelines' structure and context do not change this analysis. The majority, for example, cites § 1B1.3 as structural evidence for its view that "intended loss" is a permissible interpretation of "loss." But that's wrong. Section 1B1.3 requires that "[u]nless otherwise specified," both the harm that "resulted from" an offense and the harm that "was the object of" the offense help determine specific offense characteristics. But this section does not expand the permissible range of interpretations for the term "loss." Instead, it offers general application principles for the entire Sentencing Guidelines. *See* U.S.S.G. Part B ("General Application Principles"). Some of the federal offenses in the guidelines are strictly inchoate offenses. *See, e.g.*, U.S.S.G. § 2.X.1.1 ("Other Offenses: Conspiracy, Attempt, Solicitation"). So, of course, the specific offense characteristics for those offenses must be based on the harm that "was the object of" the offense. But § 2B1.1 deals with economic and property offenses. And in the context of an economic or property loss, even an unrealized one, the term "loss" is ordinarily used to convey "an event or state of being that has *actually* happened." *Boler*, 115 F.4th at 330 (Quattlebaum, J., dissenting).

A loss can be tangible or intangible, realized or unrealized. But no reasonable user of the English language, in my view, would use the term “loss” to refer to something that never happened. A reasonable interpretation of “loss” must describe something that actually happened. Because an “intended loss” never happened, it is not a reasonable agency interpretation.

We do not defer to unreasonable agency interpretations. *See Kisor*, 588 U.S. at 575–76 (simplified). And we should not have done so here. I respectfully dissent.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d). The deadlines for seeking reconsideration of a non-dispositive order are set forth in 9th Cir. R. 27-10(a)(2).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

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

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to *(party name(s))*:

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

COST TAXABLE	REQUESTED			
	<i>(each column must be completed)</i>			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			\$	\$
Principal Brief(s) <i>(Opening Brief; Answering Brief; 1st, 2nd, and/or 3rd Brief on Cross-Appeal; Intervenor Brief)</i>			\$	\$
Reply Brief / Cross-Appeal Reply Brief			\$	\$
Supplemental Brief(s)			\$	\$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee / Appeal from Bankruptcy Appellate Panel Docket Fee				\$
TOTAL:				\$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:
No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);
TOTAL: 4 x 500 x \$.10 = \$200.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Exhibit No. 2

**DC sentencing decision on loss
pages Ikrilyuk**

1 points and that his Criminal History category should be Roman
2 Numeral I as a result, so that objection is sustained as to the
3 Criminal History category.

4 With respect to the amount of loss, Mr. Hedberg, did
5 you want to add anything to your briefing in this matter?

6 MR. HEDBERG: Your Honor, this matter -- this issue
7 has been subject to extensive briefing from both sides, and I'm
8 not going to belabor the points I made. My main point is that
9 the word "loss" is not ambiguous, and that the commentary to
10 the guidelines adds material which was not in the guidelines
11 and expands it beyond the scope of the guidelines.

12 The government has claimed that "loss" is actually
13 defined as "the greater of actual or intended loss," but as I
14 put in my brief, that's circular and adds nothing to the
15 concept of "loss." In fact, the words "actual" or "intended
16 loss" are adjectives. They're not definitions of "loss." Just
17 the fact that the claimed definition of "loss" includes the
18 word "loss" in it demonstrates the circular nature of the
19 quote, unquote "definition" proffered by the government.

20 Your Honor, the "intended loss" concept goes beyond
21 that which is in the guidelines and should not be included,
22 that's the gravamen of my argument.

23 THE COURT: All right. Mr. Coppola or Mr. Anderson,
24 anything want to add to your briefing?

25 MR. ANDERSON: Your Honor, as I understand it, the

1 defense argument is not challenging the numbers that are
2 presented by the government or the underlying facts. It's
3 solely a legal issue about the interpretation of the guidelines
4 and how the Court should apply the guidelines.

5 The current state of the law in the Ninth Circuit
6 supports the interpretation that the government advances.
7 Unlike the \$500 card exclusion, which the Ninth Circuit
8 invalidated in the appeal, "actual" and "intended loss" simply
9 define the guideline. The Ninth Circuit could have gone
10 further and found that "intended loss" is not something that
11 the Court should apply. It hasn't done that; it hasn't done
12 that in any case in the Ninth Circuit that the government's
13 been able to find or defense has been able to find; therefore,
14 that's the state of the law now, and I would ask the Court to
15 apply that guideline.

16 THE COURT: All right. Thank you. I'm going to
17 overrule the objection on this ground: Application Note 3
18 states that, "Loss is the greater of actual loss or intended
19 loss," which Probation applied in determining the amount of
20 loss.

21 Relying on the Third Circuit's decision in *United*
22 *States v. Banks*, 55 F.4th 246, the defendant argues that the
23 Application Note conflicts with the plain meaning of "loss" in
24 the guidelines and should not be followed. However, as far as
25 the Court is aware, only one case within the Ninth Circuit has

1 considered this argument and that was in *United States versus*
2 *Schena*, case number 5:20-cr-425, it's a Northern District of
3 California case from November 6, 2023 at 2023 Westlaw 7348458.

4 In that decision Judge Davila rejected similar
5 argument noting that while the Third Circuit relied on the
6 Supreme Court decisions in *Kisor versus Wilke*, 588 U.S. 558 in
7 2019, the Ninth Circuit in the appeal arising from this case
8 applied *Stinson versus United States*, 508 U.S. 38, in assessing
9 the validity of the Application Note at issue on the appeal.

10 There's a significant difference between *Kisor* and
11 *Stinson* which the Ninth Circuit noted in this very case.

12 In applying *Kisor*, the Third Circuit in *Banks* stated
13 that it must not, quote, reflexively defer to the Sentencing
14 Commission's commentary, and made its own determination as to
15 the meaning of the word 'loss' in Section 2B1.1.

16 Under *Stinson*, however, an Application Note that,
17 "interprets or explains a guideline is authoritative unless it
18 is inconsistent with or plain and erroneous reading of the
19 guideline."

20 The weight the Third Circuit gave to the commentary in
21 *Banks* is inconsistent with the Ninth Circuit case law requiring
22 application of *Stinson* and is thus of limited value.

23 Applying *Stinson* and the Ninth Circuit's decision in
24 this case, the Court concludes that the Application Note's use
25 of "intended loss" is not inconsistent with or plainly

1 erroneous reading of the guidelines.

2 The Court notes that no other circuit has adopted the
3 reading of *Banks* and that several decisions in other circuits
4 have declined to follow *Banks*, at least in part due to the
5 Third Circuit's reliance on *Kisor* rather than *Stinson*. Here it
6 cites *United States versus Foreman*, 10th Circuit decision, at
7 2024 Westlaw 548644.

8 Even applying *Kisor*, however, a Sixth Circuit Court
9 has also rejected the challenge to the use of "intended loss"
10 and that's *United States versus You*, Y-0-U, 74 F.4th at 378.
11 Furthermore, there are numerous Ninth Circuit decisions
12 applying the "intended loss." There's *United States versus*
13 *Wills*, 881 F.2d at 823 at 827 in which the Ninth Circuit
14 concluded that the guidelines allow the judge to calculate the
15 offense level by the estimated "probable" or "intended loss."
16 Or *United States versus Mullins*, 992 F.2d 1472 at 1479 where
17 the Court stated that, quote, "It is the probable or intended
18 loss resulting from a crime, however, not the actual loss
19 suffered, that the district court must determine for sentencing
20 purposes," end quote.

21 So, I think I'm bound by those decisions. Even if I
22 weren't, the weight of authority is not with the Third Circuit,
23 so, therefore, I will follow the directive in Application Note
24 3 and consider the intended loss and overrule the objection.

25 Finally, defense objects to the four-point enhancement

Exhibit No. 3

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 26 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RUSLAN KIRILYUK,

Defendant - Appellant.

No. 24-3429

D.C. No.

2:14-cr-00083-DJC-4

Eastern District of California,
Sacramento

ORDER

Before: CLIFTON, OWENS, and BUMATAY, Circuit Judges.

Judges Owens and Bumatay have voted to deny the petition for rehearing en banc, and Judge Clifton has so recommended.

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.

The petition for rehearing en banc is DENIED.

Exhibit No. 4

2024 Amendment to 2B1.1

conduct can properly be considered as part of relevant conduct based on the individual facts in those cases.

The amendment limits the scope of “acquitted conduct” to only those charges of which the defendant has been acquitted in federal court. This limitation reflects the principles of the dual-sovereignty doctrine and responds to concerns about administrability. The chief concern regarding administrability raised by commenters throughout the amendment cycle was whether courts would be able to parse acquitted conduct from convicted conduct in cases in which some conduct relates to both the acquitted and convicted counts. The Commission appreciates that federal courts may have greater difficulty making this determination if it involves proceedings that occurred in another jurisdiction and at different times.

Third, and finally, the amendment makes corresponding changes to §6A1.3 (Resolution of Disputed Factors (Policy Statement)), restating the principle provided in §1B1.3(c) and further clarifying that “nothing in the Guidelines Manual abrogates a court’s authority under 18 U.S.C. § 3661.”

2. Amendment: Section 2B1.1(b)(1) is amended by inserting the following at the end:

“*Notes to Table:

- (A) *Loss*.—Loss is the greater of actual loss or intended loss.
- (B) *Gain*.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.
- (C) For purposes of this guideline—
 - (i) ‘Actual loss’ means the reasonably foreseeable pecuniary harm that resulted from the offense.
 - (ii) ‘Intended loss’ (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) 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).
 - (iii) ‘Pecuniary harm’ means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
 - (iv) ‘Reasonably foreseeable pecuniary harm’ means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.”

The Commentary to §2B1.1 captioned “Application Notes” is amended in Note 3—

by striking subparagraphs (A) and (B) as follows:

“(A) *General Rule.*—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

- (i) *Actual Loss.*—‘Actual loss’ means the reasonably foreseeable pecuniary harm that resulted from the offense.
- (ii) *Intended Loss.*—‘Intended loss’ (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) 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).
- (iii) *Pecuniary Harm.*—‘Pecuniary harm’ means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
- (iv) *Reasonably Foreseeable Pecuniary Harm.*—For purposes of this guideline, ‘reasonably foreseeable pecuniary harm’ means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.
- (v) *Rules of Construction in Certain Cases.*—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:
 - (I) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim’s business operations caused by the product substitution.
 - (II) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any

increased costs to procure the product or service involved that was reasonably foreseeable.

(III) *Offenses Under 18 U.S.C. § 1030.*—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) *Gain.*—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.”;

inserting the following new subparagraph (A):

“(A) *Rules of Construction in Certain Cases.*—In the cases described in clauses (i) through (iii), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(i) *Product Substitution Cases.*—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim’s business operations caused by the product substitution.

(ii) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(iii) *Offenses Under 18 U.S.C. § 1030.*—In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.”;

Exhibit No. 5

amended final judgment

06/03/2024

**UNITED STATES DISTRICT COURT
Eastern District of California**

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

v.

Case Number: **2:14CR00083-4**

RUSLAN KIRILYUK

Defendant's Attorney: Olaf Hedberg, Appointed

Date of Original Judgment: December 06, 2019
(Or Date of Last Amended Judgment)

THE DEFENDANT:

- pleaded guilty to count(s) ____.
- pleaded nolo contendere to count(s) ____, which was accepted by the court.
- was found guilty on Counts 1-28 after a plea of not guilty to the Second Superseding Indictment.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1343	Wire Fraud (Class C Felony)	10/15/2013	1-24
18 U.S.C. § 1341	Mail Fraud (Class C Felony)	5/10/2013	25-26
18 U.S.C. § 1028A(a)(1)	Aggravated Identity Theft (Class E Felony)	10/15/2013	27
18 U.S.C. §§ 3146(a)(1) and (b)(1)(A)(i)	Failure to Appear (Class C Felony)	2/7/2017	28

The defendant is sentenced as provided in pages 2 through ____ 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.

5/30/2024

Date of Imposition of Judgment



Signature of Judicial Officer

Daniel J. Calabretta, United States District Judge

Name & Title of Judicial Officer

6/3/2024

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total of: 188 months on each of Counts 1-26, to be served concurrently with each other and consecutively to the 24-month term of imprisonment imposed on Count 27 and the 24-month term of imprisonment on Count 28. The time imposed on Counts 27 and 28 are to be served consecutively to each other and consecutively to the terms of imprisonment imposed on Counts 1-26, for a total term of imprisonment of 236 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 at Beaumont, Texas, 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.
- Other, Please Specify:

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 United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

36 months on each of Counts 1-26 and Count 28 and 12 months on Count 27, all to be served concurrently with each other, for a total term of supervision of 36 months (unsupervised, if deported).

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.

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer or any law enforcement officer under the immediate and personal supervision of the probation officer, based upon reasonable suspicion of unlawful conduct or a violation of a condition of supervision, without a search warrant. Failure to submit to a search may be grounds for revocation. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.
2. You must participate in an outpatient substance abuse/alcohol abuse treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program.
3. You must submit to substance abuse/alcohol abuse testing to determine if you have used a prohibited substance. You must not attempt to obstruct or tamper with the testing methods.
4. You must abstain from the use of alcoholic beverages and shall not enter, visit, or be present at those places where alcohol is the chief item of sale.
5. You must not dispose of or otherwise dissipate any of your assets until the fine and/or restitution ordered by this Judgment is paid in full, unless you obtain approval of the Court.
6. You must apply all monies received from income tax refunds, lottery winnings, inheritance, judgments, and any anticipated or unexpected financial gains to any unpaid fine and/or restitution ordered by this Judgment.
7. You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.
8. You must not incur new credit charges or open additional lines of credit without the approval of the probation officer.
9. You must participate in a co-payment plan for treatment, testing and/or medication and shall make payment directly to the vendor under contract with the United States Probation Office. Your co-payment will be determined utilizing a Sliding Fee Scale based upon your disposable income.

CRIMINAL MONETARY PENALTIES

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

TOTALS

<u>Processing Fee</u>	<u>Assessment</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>	<u>Fine</u>	<u>Restitution</u>
	\$2,800.00	\$0.00	\$0.00	\$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.

DEFENDANT: **RUSLAN KIRILYUK**
CASE NUMBER: **2:14CR00083-4**

RESTITUTION PAYMENTS

Restitution of \$1,418,959.00, jointly and severally with co-defendant Aleksandr Maslov (2:14-cr-00083-3), Mihran Melkonyan (2:14-cr-00083-1) and Rouslan Akhmerov (2:14-cr-00083-2), to:

AMERICAN EXPRESS
PASADENA, 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 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 defendants 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.

- Restitution shall be joint and several with any co-defendant as listed on the Restitution Attachment.
- 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 Preliminary Order of Forfeiture is hereby made final as to this defendant and shall be incorporated into the Judgment.

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.