

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2010

4 Petition for Rehearing Filed: February 9, 2011

5 Decided: November 29, 2011

6 Docket No. 09-3266-cr(CON)

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9 UNITED STATES OF AMERICA,

10 Appellee,

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12  
13 v.

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15 CHRISTIAAN DEWET SPIES, also known as David,

16  
17 Defendant-Appellant-Petitioner,

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19 NIKOLAI NADIRASHVILI, also known as Nikoloz Nadirashvili, also  
20 known as Nikush, LEVAN CHVELIDZE, DIMITRIY VOROBAYCHIK, IOSEB  
21 KHARABADZE, also known as Soso, and ARTUR SOLOMONYAN, also known  
22 as Alex,

23  
24 Defendants-Appellants,

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26 JOSEPH COLPANI, also known as Joe, MICHAEL GUY DEMARE, also known  
27 as Michel, ARMEN RAZMIK BARSEGHYAN, SPARTAK VAHAGN YERIBEKYAN,  
28 LEVON SOLOMONYAN, ALLAH MCQUEEN, RAJAB CHAVIS, also known as  
29 Jabs, also known as Keith Chavis, GAREGIN GASPARYAN, also known  
30 as Garik, MICHAEL JIMENEZ, also known as Mike, NIEMAN MYLES, also  
31 known as Luis, WILLIAM JESUS THOMAS, VAKHTANG MACHITIDZE, TIGRAN  
32 GEVORGYAN, also known as Tiko, ARMAND ABRAMIAN, also known as  
33 Armo,

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35 Defendants.

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1 B e f o r e: WINTER, POOLER, and HALL, Circuit Judges.

2 On appellant Spies's Petition for Rehearing by the Panel.

3 The Petition for Rehearing is granted. We find that the  
4 district court used the incorrect standard in applying certain  
5 offense level enhancements under Section 2K2.1(b) of the Federal  
6 Sentencing Guidelines during the sentencing of appellants Spies  
7 and Kharabadze. Therefore, we vacate their sentences and remand  
8 for resentencing in accordance with our prior opinion.

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10 John Burke, Brooklyn, New York, for  
11 Defendant-Appellant-Petitioner  
12 Spies.  
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14 WINTER, Circuit Judge:

15 Appellant Spies petitions for a rehearing of our decision in  
16 United States v. Nadirashvili, --- F.3d ---, 2011 WL 3672467 (2d  
17 Cir. 2011). In that decision, we, inter alia, vacated appellant  
18 Solomonyan's sentence because the district court used the  
19 incorrect standard -- preponderance of the evidence -- in  
20 applying two offense level enhancements under the Federal  
21 Sentencing Guidelines for the involvement of: (i) 200 or more  
22 firearms, under U.S.S.G. § 2K2.1(b)(1)(E); and (ii) a destructive  
23 device, under U.S.S.G. § 2K2.1(b)(3)(A).

24 Spies argues that his sentence should also be vacated  
25 because the district court used the preponderance of the evidence  
26 standard in applying the same offense enhancements in the  
27 calculation of his guidelines sentence. We agree. We also, sua

1 sponte, take note that the same incorrect standard was used in  
2 applying the destructive device enhancement as to appellant  
3 Kharabadze. While neither appellant argued this point in their  
4 respective briefs,<sup>1</sup> and Kharabadze has not filed a motion for  
5 rehearing, we believe that it is in the interest of justice to  
6 vacate both of their sentences.

7 We therefore grant the petition for rehearing, vacate the  
8 sentences of Spies and Kharabadze, and remand to the district  
9 court for resentencing consistent with our prior opinion.

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<sup>1</sup> Spies did state in his brief that he intended to join the arguments of his co-appellants applicable to him but did not reference his sentencing procedure, which was of course separate from that of Solomonyan. Nevertheless, the interests of justice require us to address the argument.