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MEMORANDUM* OPINION OF THE NINTH CIRCUIT (MARCH 14, 2018)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CINDY OMIDI, A/K/A NAHID OMIDI,
A/K/A CINDY PEZESHK, A/K/A NAHID PEZESHK,

Defendant-Appellant.

Nos. 15-50376, 15-50537

D.C. No. 2:13-cr-00739-SVW-1

Appeals from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted March 5, 2018
Pasadena, California

Before: GRABER and OWENS, Circuit Judges, and MAHAN,** District Judge.

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

Cindy Omidi appeals from her conviction for one count of structuring in violation of 31 U.S.C. § 5324 (a)(3), (d)(2), and 18 U.S.C. § 2. Omidi also appeals from the $290,800 money judgment entered against her. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The indictment was not constructively amended. The indictment listed the specific transactions Omidi was charged with structuring, and the only those, transactions. *See United States v. Hui Hsiung*, 778 F.3d 738, 757-58 (9th Cir. 2015) (holding no constructive amendment where the indictment of the jury instruction); *United States v. Olson*, 925 F.2d 1170, 1174-75 (9th Cir. 1991) (holding no constructive amendment where the government "did not try to prove" that the defendant engaged in the uncharged conduct), *abrogated in part on other grounds by United States v. Cotton*, 535 U.S. 625, 630 (2002).

2. Substantial evidence supported Omidi's conviction. The government offered proof that Omidi purchased over 300 money orders between July 2008 and December 2009 at numerous postal offices, often on consecutive days, in amounts reporting requirements. *See* 31 C.F.R. § 1010.415. Although Omidi presses her would have resolved the conflicts, made the inferences, or considered the evidence *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc).

** The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

3. We decline to reverse based on cumulative error. Assuming error for all of claims that we review for plain error—the summary chart's admission, the improper jury instruction, the absence of an attempt instruction, the sustaining of hearsay objections, and the instruction permitting the jury to convict upon "agreeing on a purchase or group of purchases"—we find it unlikely that any of those alleged errors "affected the outcome of the district court proceedings." *United States v. Olano*, 507 U.S. 725, 734 (1993). We also find that the district court did not abuse its discretion by instructing the jury on aiding and abetting. Because sufficient evidence supports Omidi's structuring conviction, we reject her argument that there was insufficient evidence of specific intent to permit her conviction for aiding and abetting the same. *See* 31 U.S.C. § 5324(a) (prohibiting the reporting requirements); *see also United States v. Pang*, 362 F.3d 1187, 1193-94 (9th Cir. 2004). And when we consider all of these claimed errors at once, we conclude that their cumulative effect "is also harmless because it is more probable than not that, taken together, they did not materially affect the verdict." *United States v. Fernandez*, 388 F.3d 1199, 1257 (9th Cir. 2004).

4. We affirm the money judgment entered by the district court. Section 5317 of Title 31, the forfeiture statute for structuring convictions, incorporates the procedures established in 21 U.S.C. § 853. 31 U.S.C. § 5317(c)(1)(B) ("Forfeitures under this paragraph shall be governed by the procedures established in section 413 of the Controlled Substances Act [21 U.S.C. § 853]."). "Section 853(p) provides a procedure for the forfeiture of substitute property," *United States v.*

Lo, 839 F.3d 777, 790 (9th Cir. 2016) (emphasis added), *cert. denied*, 138 S. Ct. 354 (2017) and "mandates imposition of a money judgment on substitute property," *United States v. Casey*, 444 F.3d 1071, 1077 (9th Cir. 2006). Relying on § 853(p), the district court properly entered the money judgment against Omidi as a substitute for the money orders involved in her offense.

AFFIRMED.

IN CHAMBERS ORDER GRANTING PLAINTIFF'S APPLICATION FOR ORDER OF MONEY JUDGMENT [240] AND JUDGMENT
***** CORRECTED *****
(DECEMBER 1, 2015)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINDY OMIDI,

Defendant(s).
[noted present]

Case No. 2:13-cr-00739-SVW-1

Before: The Hon. Stephen V. WILSON,
United States District Judge.

On October 10, 2015. Defendant Cindy Omidi ("Omidi" or "Defendant") was found guilty of structuring under 31 U.S.C. § 5324. Dkt. 181. On April 1, 2015. Plaintiff filed an application for entry of money judgment against Omidi. Dkt. 240. Subsequently, on April 10, 2015, the parties agreed to delay the briefing and hearing on the application until after the other issues were resolved at the sentencing hearing. Dkt. 247. The sentencing hearing took place on August 10, 2015.

Dkt. 442. The Court determined that the total offense level was 20 and the Guideline Range sentence was 33-41 months. *Id.* In its judgment, the Court sentenced Omidi to three years of probation and a fine of $75,000. Dkt. 443. The Court did not include a criminal forfeiture order in the judgment. *See id.*

Plaintiff requests a money judgment in the sum of $290,800, pursuant to Federal Rule of Criminal Procedure 32.2 and 31 U.S.C. § 5317(c). Dkt. 240. 3. Defendant argues that the money judgment requested by the government (1) is not properly before the Court, (2) is not authorized under the circumstances, or (3) is excessive. *See* Dkt. 448.

Factual Background

In this case, the government presented evidence that Omidi purchased around 100 postal money orders just below the $3,000 threshold for reporting in a pattern that could not be readily explained for an innocuous reason, even though she was aware of the reporting requirements. The jury found that Omidi "structured. attempted to structure. or assisted in structuring at least one transaction with a domestic financial institution to avoid a reporting requirement" and that the structuring involved "more than $100,000 in a 12-month period . . . ending no earlier than October 12, 2008." Dkt. 187.

Discussion

Jurisdiction

First, Defendant argues that the Court may be without jurisdiction to hear the forfeiture motion. Dkt. 448, 3. For this proposition, she relies on two

cases from the Eleventh Circuit. In *United States v. Petrie*, 302 F.3d 1280 (11th Cir. 2002), the Eleventh Circuit held that the district court lacked subject matter jurisdiction to enter a preliminary forfeiture order six months after sentencing. In *Petrie*, the special forfeiture verdict returned by the jury was not mentioned at the sentencing hearing and the judgment only stated that the defendant "was subject to forfeiture as cited in count two." *Id.* at 1284. The government waited six months after sentencing to move for entry of a preliminary forfeiture order. *Id.* The court determined that the procedure mandated by Rule 32.2 "contemplates final disposition of forfeiture issues, as regards a defendant, at the time of sentencing." *Id.* Thus, "the rule requires that the forfeiture order be made a part of the sentence and included in the judgment." *Id.* One year later, in *United States v. Pease*, 331 F.3d 809 (11th Cir. 2003), the Eleventh Circuit found that the government could not enforce a preliminary forfeiture order that was not included in the district court's final judgment. The court reasoned that a criminal forfeiture had to be a part of the defendant's judgment under Rule 32 and the district court lacked jurisdiction to correct clerical mistakes under Rule 36, because the case was still pending on appeal at the time of the changes. *Id.* at 814-16.

But in providing the Court with persuasive authority from the Eleventh Circuit, the Defendant ignores significant authority to the contrary. Even the Eleventh Circuit has acknowledged that *Pease* has been superseded by the 2009 amendment to Rule 32.2. In *United States v. Cano*, 558 F. App'x 936, 939 (11th Cir.), the Eleventh Circuit held that the rule stated

in *Pease* was no longer operable due to the revision to Rule 32.2(b)(4)(B). Under the revised rule:

> The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36.

Fed. R. Crim. P. 32.2(b)(4)(B). Thus, the revised rule makes it clear that the failure to announce a forfeiture at sentencing does not divest a court of jurisdiction to enter an order of forfeiture. The first sentence can be satisfied by a defendant's knowledge of the forfeiture. Here, it is clear that the Defendant was aware of the forfeiture at sentencing because of the government's forfeiture allegation in the indictment and the numerous stipulations to defer a decision on this very issue. *See* Dkts. 1, 240, 247, 252, 275, 278, 305, 308, 332, 334, 336, 445. The second sentence acts to confirm that the court can amend the judgment to include the forfeiture through Rule 36, even after the judgment has been rendered.

The Court acknowledges that Rule 36 is generally only a vehicle for correcting clerical errors. *United States v. Penna*, 319 F.3d 509, 513 (9th Cir. 2003). But "[i]n the area of forfeiture, however, most courts that have reached the issue have allowed Rule 36 amendment to add an obviously warranted order of forfeiture." *United States v. Bennett*, 423 F.3d 271, 279 (3d Cir. 2005) (citing decisions from the First, Fourth, and Eighth Circuits in determining not to follow *Pease*); *see also United States v. Quintero*, 572

F.3d 351, 353 (7th Cir. 2009) (finding that the district court retained jurisdiction even after appeal for the purposes of a Rule 36 forfeiture amendment). Based on the text of the rules and the existing persuasive authority, the Court finds that it has jurisdiction to amend the judgment to include criminal forfeiture that was clearly contemplated by the parties before the sentencing.

Statutory Authority

Next, the Court must find whether there is a statutory provision authorizing the forfeiture requested. Here, the government's forfeiture allegation in the criminal indictment sought all property involved in or traceable to the offense and a sum of money equal to the amount involved in the offense. Dkt. 1, 6. The government bases this application on Federal Rule of Criminal Procedure 32.2(b)(1)(A) and 31 U.S.C. § 5317 (c). Dkt. 240, 2-3. Under § 5317, "[t]he court in imposing sentence for any violation of section 5313, 5316, or 5324 of this title, or any conspiracy to commit such violation, shall order the defendant to forfeit all property, real or personal, involved in the offense and any property traceable thereto." 31 U.S.C. § 5317(c)(1)(A). This statutory provision employs mandatory language because it requires that the Court "shall order" the forfeiture. *See United States v. Newman*, 659 F.3d 1235, 1240 (9th Cir. 2011). Therefore, the Court must grant the government's request "subject only to statutory and constitutional limits." *Id.*

Though § 5317 employs mandatory language the Defendant argues that because there is no property available for forfeiture, § 5317(c)(1)(A) does not provide statutory authorization for a money judgment. It

is clear that if the postal money orders involved in the underlying offense were still available, they would be subject to forfeiture. *See, e.g.*, *United States v. One Hundred Thirty Three (133) U.S. Postal Serv. Money Orders*, 780 F. Supp. 2d 1084, 1093 (D. Haw. 2011). However, the Defendant contends that "[b]ecause the structured money orders have since been dissipated, and there are no assets 'traceable' to this offense, the government is without recourse under § 5317(c)(1)(A) and the Court must deny the request for money judgment[.]" Dkt. 448, 5. And Defendant contends that the section's incorporation of other procedures, does not provide a further reach. Section 5317(c)(1)(B) states that criminal forfeiture for violations of § 5324 are "governed by the procedures established in" 21 U.S.C. § 853. But Defendant argues that Congress' use of the term "procedures" necessarily limits the reach of criminal forfeiture for structuring violations by foreclosing the government's ability to obtain substitute property under § 853(p).

Defendant argues that Congress' limited incorporation of § 853 is confirmed by the different wording of adjacent statutes. Because they use similar language, courts have generally interpreted § 5317 and 18 U.S.C. § 982 to cover the same property. *United States v. Seher*, 562 F.3d 1344, 1369 (11th Cir. 2009) ("it seems incongruous to interpret those provisions as covering different arrays of property"). But there is one noticeable difference in how the two statutes are worded. Section 982 provides that "[t]he forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the *provisions* of [§ 853] (other than subsection (d) of that

section). . . . " 18 U.S.C. § 982(b)(1) (emphasis added). Defendant essentially concedes that Plaintiff could seek a money judgment in this case if the forfeiture were authorized under § 982. *See* Dkt. 448, 6. But Defendant argues that Plaintiff cannot seek forfeiture of substitute property in the instant case because unlike § 982, that incorporates the "provisions" of § 853, § 5317 only incorporates its "procedures."[1] *Id.* Defendant argues that § 853(p) is not procedural because it alters a defendant's property rights. *Id.* at 7-8. Notwithstanding this linguistic difference, Defendant is unable to cite any case supporting her limited reading of § 5317.

Cases discussing Defendant's argument have found that the government should be able to seek a money judgment. Faced with this exact argument, the District

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[1] While the Court is familiar with the canon of construction that "when Congress uses different text in 'adjacent' statutes it intends that the different terms carry a different meaning," *White v. Lambert*, 370 F.3d 1002, 1011 (9th Cir. 2004) *overruled on other grounds by Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), it is not clear that these terms must be interpreted differently in this context. The two sections come from different titles and Defendant has not presented evidence that Congress purposely crafted the two provisions to cover different types of property. Further, it is not evident to the Court that the terms "provisions" and "procedures" necessarily cover different portions of § 853. *See* Black's Law Dictionary (10th ed. 2014) (defining provision as "[a] clause in a statute" and defining procedure as "[a] specific method or course of action"). Though the term "provisions" is generally more inclusive than the term "procedures," it could conceivably cover the same subject matter within § 853. And given the awkward incorporation of a statute within the Comprehensive Drug Abuse Prevention and Control Act of 1970, it is clear that neither § 982 nor § 5317 incorporates every aspect of § 853.

Court for the Western District of Pennsylvania held that criminal forfeiture of substitute assets was authorized by § 5317, subject to the limitations of § 853(p). *United States v. Manfredi*, 628 F. Supp. 2d 608, 633 (W.D. Pa. 2009). The court reasoned that because the Third Circuit had authorized the pursuit of substitute assets under the similarly worded § 2461(c), in *United States v. Vampire Nation*, 451 F.3d 189 (3d Cir. 2006), it must also be authorized under § 5317. *Id.* In *United States v. Capoccia*, the Second Circuit, interpreting § 2461(c), rejected a defendant's argument that "while the pertinent criminal forfeiture statute—28 U.S.C. § 2461(c)—incorporates the forfeiture 'procedures' of the Controlled Substances Act that are codified in 21 U.S.C. § 853, it does not incorporate the provision for forfeiture of substitute property codified in subsection (p) of § 853, which [defendant] contends is a 'substantive' rather than 'procedural' aspect of § 853." 402 F. App'x 639, 640-41 (2d Cir. 2010).

Finally, the Ninth Circuit has interpreted § 853 in a manner that suggests that it is procedural. *See United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 (9th Cir. 1996) (explaining that the "proceedings" of § 982 are "governed by 21 U.S.C. §§ 853(c) and (e) through (p)."); *Newman*, 659 F.3d at 1242 (describing subsection (p) as "permitting the substitution of property in some circumstances"). And the Court is not inclined to read the statute to reach structured funds except in cases where the defendant has dissipated them such that they are no longer traceable. Because Omidi has allowed the funds to be dissipated, the government is authorized to seek a money judgment instead of the specific property.

Constitutional Limitation

Next, Defendant argues that in light of the circumstances the requested forfeiture violates the Excessive Fines Clause of the Eighth Amendment. Dkt. 448, 10-19.

Claims that forfeitures violate the Excessive Fines Clause are evaluated under the "gross disproportionality" standard. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).[2] Under the "grossly disproportional" standard, the Court "must compare the amount of the forfeiture to the gravity of the defendant's offense. If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." 524 U.S. at 336-37. In the Ninth Circuit, courts must consider four factors under *Bajakajian*: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed

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[2] In *Bajakajian*, the defendant attempted to leave the United States carrying over $350,000 in his bags, in violation of the statute requiring individuals to file a CMIR when they transport more than $10,000 in currency. *Bajakajian*, 524 U.S. at 324-35. In finding that forfeiture of the entire amount violated the Excessive Fines Clause of the Eighth Amendment, the Court found several aspects of the forfeiture important. The "crime was solely a reporting offense" because the defendant's activity was otherwise lawful. *Id.* at 337. The violation "was unrelated to any other illegal activities." *Id.* at 338. That is, "[t]he money was the proceeds of legal activity and was to be used to repay a lawful debt." *Id.* And therefore the defendant did "not fit into the class of persons for whom the statute was principally designed." *Id.* The light maximum sentence "confirm[ed] a minimal level of culpability." *Id.* The harm caused by the defendant was "minimal." *Id.* And the penalty had "no articulable correlation to any injury suffered by the Government." *Id.*

for the violation, and (4) the extent of the harm caused." *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004). The Court discusses each factor separately:

Nature and Extent of the Crime

Here, the crime is more serious than the Currency and Monetary Instrument Report ("CMIR") violation in *Bajakajian*. Courts have readily distinguished the single violation required for a CMIR violation with the repeated conduct necessary for a structuring violation. *See, e.g.*, *United States v. Ahmad*, 213 F.3d 805, 819 (4th Cir. 2000); *United States v. Castello*, 611 F.3d 116, 121-22 (2d Cir. 2010). Nonetheless, unlike the typical structuring case, the government has not produced evidence of an underlying criminal motivation. *E.g. United States v. Haleamau*, 887 F. Supp. 2d 1051, 1065 (D. Haw. 2012) (tax evasion). But despite the lack of a clear motive, "numerous violations of the statute and the prolonged period of time over which they occurred" weigh in favor of the forfeiture. *United States v. Malewicka*, 664 F.3d 1099, 1105 (7th Cir. 2011). Therefore, this factor weighs in favor of forfeiture.

Relation to other Illegal Activities

Second, the government has not produced clear evidence that the funds were used in other illegal activity. This is not a case where the government has tied Omidi to a "complicated larger scheme," *Ahmad*, 213 F.3d at 816, produced evidence that Omidi "enabled" others to commit crimes, *Castello*, 611 F.3d at 122, or shown that Omidi was "connected to" a criminal enterprise, *United States v. $132,245.00 in U.S. Currency*, 764 F.3d 1055, 1058 (9th Cir. 2014).

The Court declines to take the government's invitation to speculate that there may have been an unproven criminal scheme. Omidi has not been charged with any related criminal activity. Thus, this factor weighs against the government's requested forfeiture.

Other Penalties

The Court must consider the other penalties authorized by the legislature and the maximum punishment authorized by the Sentencing Guidelines.[3] *United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197 (9th Cir. 1999). "[T]he maximum penalties under the Sentencing Guidelines should be given greater weight than the statutory maximum because the Guidelines take into account the specific culpability of the offender." *United States v. $132,245.00 in U.S. Currency*, 764 F.3d 1055, 1060 (9th Cir. 2014) (quoting *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004)); *see also Thurman*, 164 F.3d at 1197 ("*Bajakajian* suggests that the maximum penalties under the Guidelines should be given greater weight than the maximum penalty authorized by statute, because the Guidelines take into consideration the specific level of culpability of the offender."); *United States v. Mackby*, 339 F.3d 1013, 1017-18 (9th Cir. 2003) (Explaining that it is still ap-

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[3] The fact that the Court imposed a $75,000 fine as a part of Defendant's sentence does not change the analysis in this case. *See* Dkt. 443. Criminal forfeiture is an additional penalty and is considered separately from the fine. *See Bajakajian*, 524 U.S. 321, 326 (1998) (considering only $15,000 forfeiture when the district court also ordered a fine of $5,000); *United States v. Judge*, 413 F. App'x 340, 342 (2d Cir. 2011) (forfeiture and fine do not offset one another).

propriate to consider the statutory maximum fine). Courts consider both the hypothetical fines authorized and potential imprisonment authorized. *$132,245.00*, 764 F.3d at 1060.

Omidi was subject to an enhancement under § 5324(d)(2) and the Sentencing Guidelines called for a prison sentence of between 33 and 41 months and a fine in the range of $7,500 to $75,000. *See* Dkt. 250, 24. Additionally, Omidi was subject to a maximum statutory term of imprisonment of ten years and a maximum fine of $500,000. *Id.*

The government seeks $290,800 in criminal forfeiture, which is 3.9 times the maximum fine under the Sentencing Guidelines. There is no set formula for determining the proportionality of a forfeiture penalty. Where, as here, the forfeiture requested exceeds the Sentencing Guidelines but falls far below the maximum statutory fine, the request is not a per se violation of the Eighth Amendment. *$132,245.00*, 764 F.3d at 1060 -61 (finding forfeiture of "only" 2.6 times the maximum fine under the Sentencing Guidelines constitutional). Instead, the relevant question is whether requested forfeiture is "out of line" with the punishments available. *See id.*

The Court finds that the penalties available demonstrate Congress believed that the gravity of Omidi's offense was significant. First, unlike in *Bajakajian*, Omidi's guideline and statutory maximum penalties do not "confirm a minimal level of culpability." *See Bajakajian*, 524 U.S. at 339 (maximum six-month imprisonment and $5,000 fine show minimal culpability); *$132,245.00*, 764 F.3d at 1061 (finding 27-month maximum Sentencing Guideline term of imprisonment not indicative of minimal level of culpability);

United States v. Mackby, 339 F.3d 1013, 1018 (9th Cir. 2003) (finding 37-46 month imprisonment and $7,500 to $75,000 fine under the Sentencing Guideline did not indicate minimal level of culpability). Even after taking the specific circumstances of Omidi's conduct into account through the Sentencing Guidelines, she was subject to a $75,000 fine and a maximum sentence of over three years in prison. *See* Dkt. 250, 24. This stands in contrast to *Bajakajian* where the statute authorized a $250,000 fine and five years' imprisonment, but the Sentencing Guideline called for only a $5,000 fine and six-month prison term. *Bajakajian*, 524 U.S. at 338-39 & n.14.

Second, the requested forfeiture is not facially excessive in relation to the maximum fine authorized by the Sentencing Guidelines. *Compare Bajakajian*, 524 U.S. at 339 (forfeiture over 70 times greater than fine imposed by district court), with *$132,245.00*, 764 F.3d at 1060 (finding forfeiture 2.6 times above maximum authorized fine under the Sentencing Guidelines not excessive given potential 27-month imprisonment), *Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 699 (9th Cir. 2000) (holding that $225,500 penalty for was not excessive in part because the maximum authorized penalty was $528,000), *United States v. Sperrazza*, 804 F.3d 1113, 1127 (11th Cir. 2015) (holding $870, 238.99 forfeiture constitutional given maximum statutory fine of $500,000 under § 5324(d)), *and United States v. Deskins*, No. 1:13CR00025, 2014 WL 670910, at *3 (W.D. Va. Feb. 20, 2014) (holding forfeiture of full amount of structured funds not excessive). Though the Court is mindful that the Ninth Circuit places more emphasis on the Sentencing Guidelines than on the maximum statutory fine, the facts of this case are

closer to the forfeiture approved in *$100,348.00* than the forfeiture found unconstitutional in *Bajakajian*. The government seeks a smaller forfeiture than in *Bajakajian* and the Sentencing Guidelines call for a much larger fine and much longer period of imprisonment. While this factor would be more favorable to the government if the requested forfeiture were closer to the maximum fine under the Sentencing Guidelines, a forfeiture that is 3.9 times the maximum Sentencing Guideline fine is much closer to the 2.6 times fine approved in *$100,348.00* than the 70 times fine rejected in *Bajakajian*. Thus, the third factor weighs in favor of the government's forfeiture request.

Extent of the Harm Caused

As with the first factor, the extent of the harm caused by the Defendant is somewhat greater than the defendant in *Bajakajian*. Unlike a CMIR violation, where the government is the only affected party, failure to file currency transaction reports ("CTRs") causes financial institutions to fail to comply with their reporting requirements.[4] *See, e.g.*, *Ahmad,* 213 F.3d at 816; *United States v. Interest in the Real Prop. Located at 2101 Lincoln Blvd., Los Angeles, California*, No. CV-05-5353-SVW-PJW, 2011 WL 672620, at *6

[4] While it was not argued by the parties, the Court notes that the extent of harm caused by preventing the United States Postal Service from filing CTRs is probably less than the harm caused when the reporting entity is a private institution. Nonetheless, the United States Postal Service has a duty to report under the statutory scheme and structuring transactions prevents it from fulfilling its duties. *See United States v. Vosburgh*, 166 F.3d 344 (9th Cir. 1998).

(C.D. Cal. Jan. 14, 2011) (subjecting financial institutions to risks and causing them to fail to meet their legal duties). But this is also not a case where the Defendant utilized the structured funds to further another harmful enterprise. *See, e.g.*, *Haleamau*, 887 F. Supp. 2d at 1067 (structuring related to sale of dangerous illegal fireworks). Therefore, this factor weighs somewhat in favor of the requested forfeiture.

Conclusion as to Disproportionality

While the *Bajikajian* factors are not as favorable to the government's position as they are in other cases, *see, e.g.*, *Castello*, 611 F.3d at 121-24, the factors do not establish a grossly disproportional forfeiture. As in *Bajikajian*, the government has not connected the structured funds to other illegal activities. But the other *Bajikajian* factors do not bolster the Defendant's argument that the forfeiture requested would violate her constitutional rights. Omidi's crime caused the United States Postal Service to fail to comply with its CTR obligations, involved many transactions that took place over a significant period of time, and the forfeiture requested is not out of line with the Sentencing Guidelines and maximum statutory fine. All of these factors suggest that there is a relationship between the Defendant's culpability and the forfeiture requested. If the money judgment appears large, it is only because there were many structured transactions in the underlying offense.[5]

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[5] At the hearing on November 16, 2015, Defendant argued that *United States v. Abair*, 746 F.3d 260 (7th Cir. 2014), supports a finding that her forfeiture should be reduced under the "gross disproportionality" standard. But the facts of that case are readily distinguishable from the present case. In *Abair*, the defendant

Because the requested money judgment is not grossly disproportional to the crime, the Court lacks the discretion to reduce the forfeiture requested by the government and must grant the requested forfeiture. When a criminal forfeiture uses mandatory language "the district court must impose criminal forfeiture, subject only to statutory and constitutional limits." *Newman*, 659 F.3d at 1240. "Unlike a fine, which the district court retains discretion to reduce or eliminate, the district court has no discretion to reduce or eliminate mandatory criminal forfeiture." *Id.* Because § 5317 employs mandatory language, having found that the forfeiture request is not grossly disproportional, the Court lacks discretion to reduce or eliminate the forfeiture, and must grant the government's request.

Order

For the aforementioned reasons, the Court GRANTS the Plaintiff's application for money judgment in the amount of $290,800.

Judgment entered in favor of the Plaintiff, in the amount of $290,800.

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frantically withdrew money from her Russian bank account and deposited it into her American bank account over the course of several weeks so that she would have enough money to close the sale of a new home. *See* 746 F.3d at 261-62. As the Seventh Circuit noted, the structuring in *Abair* lasted for a short period of time and was for a small amount of money. *See id.* at 267. Here, the structuring violation occurred over a much longer time period, involved significantly more money, and did not have an innocent explanation.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL (MAY 1, 2015)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINDY OMIDI,

Defendant.

Case No. CR 13-739-SVW

Before: Stephen V. WILSON,
United States District Judge.

Cindy Omidi moves for a new trial. She contends that the Court constructively amended her indictment, a juror was racially prejudiced against her, and the jury prematurely determined her guilt.

BACKGROUND

A grand jury indicted Omidi for one count of structuring a transaction with a domestic financial institution for the purpose of evading federal reporting requirements. *See* 31 U.S.C. § 5324(a)(3). At trial, the Government introduced evidence that Omidi purchased hundreds of postal money orders below the $3,000

reporting threshold in a pattern that proved she intended to evade the reporting requirements. The jury then convicted Omidi, and she moved for a new trial under Federal Rule of Criminal Procedure 33.

LEGAL STANDARD

A court may grant a new trial in the interest of justice. *See* Fed. R. Crim. P. 33. A new trial is appropriate if the evidence indicates that a "serious miscarriage of justice" may have occurred. *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000) (quoting *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir. 1992)).

DISCUSSION

Omidi advances two theories of relief. First, she argues that the Court constructively amended the indictment. Second, she submits that jury misconduct prejudiced her right to a fair trial.[1]

I. Constructive Amendment

Unlawful structuring requires a "transaction with one or more domestic financial institutions." 31 U.S.C. § 5324(a)(3). The indictment charged Omidi with purchasing postal money orders at four facilities, including the Wilshire Business Center. (Dkt. 1, Indictment, 2:17-28). After identifying the four facilities, the indictment alleged that Omidi structured transac-

[1] To the extent the Court did not deny the Rule 29 motion based on the sufficiency of the evidence, it does so here because the evidence of guilt, with all inferences construed in the Government's favor, was overwhelming. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1974); *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc).

tions "with a domestic financial institution, namely, the USPS." (Indictment, 3:11-19). It then listed several transactions, including many at the Wilshire Business Center. (Indictment, 3:20-5:25). The proof at trial supported these allegations: Omidi purchased 303 postal money orders at the four locations enumerated in the indictment. (Dkt 214-2, Summary Chart). But it also showed that the Wilshire Business Center was a contract postal unit, not a formal post office. (Dkt. 205-2, Exh. D, Tr. Vol. I, 68:13-70:2).[2] At the conclusion of trial, the Court instructed the jury on the substantive elements of structuring. (Dkt. 214-4, Tr. Day 3, 167:20-168:22). The Court told the jury that it had to find "the structured transaction with one or more domestic financial institutions," and it defined "[a] financial institution [as] the United States Postal Service or an issuer, redeemer, or cashier of money orders." (Tr. Day 3, 168:21-22, 175:23-24).

The Court's instructions were correct statements of the law. *See* 31 U.S.C. § 5312(a)(2)(K), (a)(2)(V) (defining "an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments" as well as "the United States Postal Service" as "financial institution[s]"). Nevertheless, Omidi submits that her constitutional rights were violated because the indictment identified only one domestic financial institution (the Postal Service), but the instructions

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[2] A contract postal unit operates like a post office pursuant to a private contract with the United States Postal Service. (Tr. Vol. I, 68:13-70:2); *see also Cooper v. U.S. Postal Service*, 577 F.3d 479, 485-86 (2d Cir. 2009) (describing contract postal units). Nonetheless, the evidence showed that the Wilshire Business Center was an issuer, redeemer, or cashier of money orders as that term is used in 31 U.S.C. § 5312(a)(2)(K).

included an additional definition of a domestic financial institution from 31 U.S.C. § 5312(a)(2).

The Fifth Amendment requires the government to try a defendant only on the charges in the indictment. *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985). The corollary of this right prevents prosecutors and courts from changing indictments' charging terms. *United States v. Ward*, 747 F.3d 1184, 1190 (9th Cir. 2014). Such revisions—known as constructive amendments—are rare but *per se* prejudicial. *United States v. Bhagat*, 436 F.3d 1140, 1145 (9th Cir. 2006); *United States v. Syme*, 276 F.3d 131, 154 n.9 (3d Cir. 2002). Thus, a court must set aside a verdict if "the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (alteration in original) (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)).[3]

This rule is best illustrated through juxtaposition. The pathmarking case is *Stirone v. United States*, 361 U.S. 212 (1960). There, the government charged Stirone with violating the Hobbs Act by obstructing interstate imports of sand to a steel mill, but the evidence also showed that Stirone obstructed exports of steel from the mill. *Id.* at 213-14. Since the jury instructions permitted conviction for interference with sand

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[3] The Ninth Circuit has also found a constructive amendment of the indictment where "there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument." *Adamson*, 291 F.3d at 615 (alteration in original) (quoting *Von Stoll*, 726 F.2d at 586). There was only a single fact arguably different in this case—the status of the Wilshire Business Center—which is insufficient. *Von Stoll*, 726 F.2d at 586.

or steel shipments, the jury could have convicted Stirone for the indicted conduct (interfering with sand imports) or an independent, unindicted crime (interfering with steel exports). *See id.* at 218. Because of this uncertainty, the Court found that the indictment was constructively amended. *Id.*; *Von Stoll*, 726 F.2d at 586-87.

Many other decisions follow this archetype. In *United States v. Ward*, the grand jury indicted the defendant for stealing two particular victims' identities, but the government offered evidence that he stole five individuals' identities; the jury instructions were not cabined to the two victims mentioned in the indictment, so the Ninth Circuit reversed the conviction. 747 F.3d at 1186-92. The indictment in *Howard v. Dagget* alleged that the defendant induced two girls into prostitution, but the government offered evidence of the defendant's relationships with five women; since the jury instructions did not hew to the women named in the indictment, the Ninth Circuit overturned the conviction. 526 F.2d 1388, 1388-90 (9th Cir. 1975) (per curiam). Similarly, the grand jury in *United States v. Carlson* indicted the defendant for embezzling bank funds through specific misapplications; since the jury instructions described a broader range of proscribed misapplications, the Ninth Circuit struck down the conviction. 616 F.2d 446, 447-48 (9th Cir. 1980). Like *Stirone*, these were cases where the juries could have convicted the defendants for independent, unindicted crimes—separate identity thefts (*Ward*),

separate inducements (*Daggett*), and different embezzlements (*Carlson*).[4]

In contrast, a court does not constructively amend an indictment so long as the instructions limit conviction to the charged crime. In *United States v. Von Stoll*, for example, the indictment alleged Von Stoll took the money from one partner, but the evidence

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[4] Other Courts of Appeals have similarly overturned convictions where the evidence and jury instructions permitted convictions on unindicted courses of criminal conduct. *See, e.g.*, *United States v. Phillips*, 477 F.3d 215 (5th Cir. 2007) (overturning a conviction when the indictment alleged intentional access but the jury instructions provided for a knowledge *mens rea*); *United States v. Milstein*, 401 F.3d 53 (2d Cir. 2005) (per curiam) (overturning a conviction after the indictment charged the defendant with misbranding through repackaging, the government presented evidence of alternate misbranding theories, and the instructions permitted conviction on any method of misbranding); *United States v. Chambers*, 408 F.3d 237 (5th Cir. 2005) (overturning a conviction predicated on the transport of ammunition components in interstate commerce when the indictment identified particular ammunition); *United States v. Narog*, 372 F.3d 1243 (11th Cir. 2004) (overturning a conviction after the instructions permitted conviction for intent to manufacture any controlled substance but the indictment specified methamphetamine); *United States v. Randall*, 171 F.3d 195 (4th Cir. 1999) (overturning a conviction after the grand jury indicted the defendant for using identified firearms in furtherance of distributing a controlled substance but the jury instructions referred generally to drug trafficking crimes); *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991) (overturning a conviction after the indictment charged the defendant with carrying "a firearm, to wit: a Mossberg rifle, Model 250CA" and the instructions only mentioned carrying a firearm even though the jury saw evidence of three guns); *United States v. Yeo*, 739 F.2d 385 (8th Cir. 1984) (overturning a conviction for using extortionate means to collect a debt because the indictment described three alleged acts but the evidence and instructions permitted convictions on other conduct).

showed that another partner was the true owner. 726 F.2d at 585-87. The jury instructions did not parse the distinction, requiring the jury to find Von Stoll took the money from "the owner," but the Ninth Circuit affirmed—since the indictment and proof concerned only one theft, there was no possibility that the jury convicted Von Stoll for a separate, unindicted crime. *See id.* at 586-87. *United States v. Olson* was similar: the indictment charged Olson with orchestrating a scheme "to obtain money," but the instructions permitted conviction for a scheme intended "to obtain money or property." 925 F.2d 1170, 1174 (9th Cir. 1991). This transliteration did not change the underlying crime charged, for the jury only could have convicted Olson for a single scheme of fraudulent conduct. *Id.* at 1175-76; *see also United States v. Hartz*, 458 F.3d 1011, 1019-21 (9th Cir. 2006); *United States v. Garcia-Paz*, 282 F.3d 1212, 1214-16 (9th Cir. 2002); *United States v. Antonakeas*, 255 F.3d 714, 718, 721-22 (9th Cir. 2001). Unlike *Stirone* and its progeny, the differences between the indictments, proof, and instructions in these cases did not constructively amend the indictment.[5]

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[5] Other Courts of Appeal echo this distinction. *See, e.g.*, *United States v. Rodriguez-Rodriguez*, 663 F.3d 53 (1st Cir. 2011) (affirming a conviction for attempted sexual activity with a minor because the proven sexual activity was a valid predicate offense even though the indictment specifically alleged sexual intercourse); *United States v. Mubayyid*, 658 F.3d 35 (1st Cir. 2011) (affirming a conviction for defrauding the United States when the instructions permitted fraud for any purpose but the indictment enumerated several particular purposes); *United States v. Dowdell*, 595 F.3d 50 (1st Cir. 2010) (affirming a conviction because amending "cocaine base" to "cocaine" was immaterial since distribution of any controlled substance is criminal); *United States v. McIntosh*, 23 F.3d 1454 (8th Cir. 1994) (affirming a conviction

This case falls within the *Von Stoll-Olson* ambit because the jury only could have convicted Omidi for the conduct charged in her indictment. The indictment identified four facilities where Omidi purchased postal money orders, including the Wilshire Business Center. The government proved she purchased postal money orders at those four facilities. And the jury instructions permitted her conviction only for purchases at those four facilities. Even though the instructions defined a domestic financial institution as the Postal Service as well as an issuer, redeemer, and cashier of money orders, there was no possibility that they allowed the jury to convict Omidi "on the basis of different behavior than that alleged in the original indictment." *Garcia-Paz*, 282 F.3d at 1216.

Indeed, the Second Circuit recently affirmed an analogous conviction in *United States v. D'Amelio*, 683 F.3d 412 (2d Cir. 2012). A grand jury indicted D'Amelio for using the Internet as a facility of interstate commerce to entice a minor to engage in sexual activity. *Id.* at 414. The government adduced evidence that D'Amelio used the Internet and telephones, and the

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after the indictment named the brand of the firearm but the instructions did not because the brand of the gun "did not affect the sufficiency of the complaint or alter the crime charged"); *United States v. Sayan*, 968 F.2d 55, 59-60 (D.C. Cir. 1992) (affirming a conviction after the indictment specified taking money by fraud but the instructions permitted conviction on stealing, converting, or taking by fraud because the evidence at trial ensured the defendant "could not have been convicted of a crime that differed materially from that alleged in the indictment"); *United States v. Knuckles*, 581 F.2d 305 (2d Cir. 1978) (affirming a conviction after the district court instructed the jury that heroin and cocaine were controlled substances even though the indictment alleged that the defendant distributed heroin).

instructions included both within the definition of a facility of interstate commerce. *Id.* at 415. The Second Circuit upheld the conviction, reasoning,

> The essential element at issue is D'Amelio's use of a "facility or means of interstate . . . commerce," not the particular means that were used. Neither the indictment nor proof at trial showed that D'Ameilo committed this crime by means of, for example, use of force, which would have modified an 'essential element' of the crime. Whether D'Amelio used the Internet or a telephone makes no difference under the relevant statute.

Id. at 422. In essence, the core of the criminality—enticing a particular minor through a facility of interstate commerce—remained consistent from indictment to instruction, so there was no constructive amendment. *See id.* at 422-24.

So too here. The indictment charged Omidi with transacting with four postal facilities. The proof showed she transacted with those four facilities. And all of the facilities were domestic financial institutions as defined in 31 U.S.C. § 5312(a)(2)—three were United States Postal Service post-offices, and the Wilshire Business Center (a contract postal unit) was an issuer, redeemer, or cashier of money orders. Thus, her core criminal conduct remained the same: the jury convicted her for purchasing the postal money orders at the facilities spelled out by the indictment and which met the statutory definition of a domestic financial institution. There is no possibility that the jury convicted Omidi for a different, unindicted set of structured transactions. In short,"[t]he facts proved

at [Omidi's] trial corresponded to the facts charged. [She] was not convicted for transactions other than those charged." *Olson*, 925 F.2d at 1175.

II. Jury Misconduct

Omidi advances two jury misconduct arguments. First, she contends that one juror was biased against her. She then argues that the jury deliberated prematurely.

A. Admissibility of Juror Communications under 606(b)

Federal Rule of Evidence 606(b) prevents consideration of juror testimony "about any statement made or incident that occurred during the jury's deliberation; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b). Because the Rule prevents a court from considering both "a juror's affidavit" as well as "evidence of a juror's statement on these matters," *id.*, the Government argued that evidence concerning the jury's internal communications was inadmissible.

1. Predeliberation Testimony

Federal Rule 606(b) bars the admission of any evidence regarding the jurors' deliberations, subject to a limited exception for extraneous influences on the jury. Fed. R. Evid. 606(b); *Warger v. Shauers*, 135 S. Ct. 521, 527 (2014). The question is whether the Rule extends beyond the bounds of formal deliberations—after the jury retires to render its verdict—to "predeliberations," the internal discussions among jurors throughout the trial.

The Ninth Circuit has not yet answered the question.[6] And the other Courts of Appeals are split. The majority bar evidence regarding the jury's internal predeliberations. *See United States v. Richards*, 241 F.3d 335, 343-44 (3d Cir. 2001); *United States v. Logan*, 250 F.3d 350, 380-81 (6th Cir. 2001); *United States v. Williams-Davis*, 90 F.3d 490, 505 (D.C. Cir. 1996); *United States v. Caldwell*, 83 F.3d 954, 956 (8th Cir. 1996); *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990). Two do not. *See United States v. Farmer*, 717 F.3d 559, 565 (7th Cir. 2013); *United States v. Jadlowe*, 628 F.3d 1, 20 (1st Cir. 2010).

The majority position is persuasive. Federal Rule of Evidence 606(b) has two interlocking purposes. *See Warger*, 135 S. Ct. at 526. First, the Rule shields deliberations from post hoc scrutiny and the attendant harassment of jurors. *See id.*; *Logan*, 250 F.3d at 380. Second, it promotes the finality of verdicts. *Warger*, 135 S. Ct. at 526; *Tanner*, 483 U.S. at 120; *McDonald v. Pless*, 238 U.S. 264, 267-78 (1915). Barring evidence of predeliberation discussion serves both these interests. This case illustrates the risk of post-trial scrutiny. In an effort to uncover jury misconduct, the defense investigators hounded the jurors, prying into their privacy and dragging some of them back to court to undergo cross-examination regarding a dispute about what they said to an investigator hired by the defend-

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[6] The Ninth Circuit appears prepared to address this question in the pending appeal of *United States v. Shiu Leung*, No.13-10242. The case was argued February 11, 2015, but it remains under submission. The pendency of this appeal—and the attendant uncertainty regarding the admissibility of testimony concerning predeliberations—was a motivating factor in granting an evidentiary hearing.

ant. *See also Tanner*, 483 U.S. at 119-20 (permitting investigation into improper jury behavior would invite losing parties to harass jurors); *McDonald*, 238 U.S. at 268 (warning that consideration of jury misconduct "would open the door to the most pernicious arts and tampering with jurors"). Moreover, "[a]llegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Id.* at 120. And there is no difference in the disruption caused by considering testimony of predeliberations versus deliberations, for both kinds of evidence serve to question the verdict's finality through scrutiny of the jury's private conduct.

Moreover, the majority's approach is consistent with the Supreme Court's jurisprudence. In *Tanner*, the defendants uncovered evidence that the jury had imbibed alcohol and narcotics throughout the trial. 483 U.S. at 113-16. In the words of one juror, it was "one big party." *Id.* at 115. The Supreme Court found that Rule 606(b) barred admission of this evidence. *Id.* at 127. In doing so, the *Tanner* Court repeatedly emphasized the internal-external distinction recognized at common law and codified in Rule 606(b): courts could consider external influences on the jury, but well-founded concerns prevented intruding into the jury's internal discussions. *See id.* at 117-27. The Supreme Court reiterated this rationale in *Warger*, propounding Rule 606(b)'s expansive reach to all internal matters. 135 S. Ct. at 527, 539-30; *see also United States v. Pimental*, 654 F.2d 538, 542 (9th Cir. 1981) ("Juror testimony is admissible only concerning facts bearing on extraneous influences on the deliberation, in the sense of overt acts of jury tampering."). Even if

these cases do not confront the precise facts here, their rationale is clear: the lever of admissibility is the divide between internal and external forces, not the divide between formal deliberation and predeliberation dialogue. Indeed, that is the conclusion reached by the D.C., Third, Sixth, Eighth, and Eleventh Circuits.

Furthermore, this interpretation of Rule 606(b) is not unduly harsh to the allegedly prejudiced party. Parties can still raise issues of juror misconduct during trial, *Tanner*, 483 U.S. at 127,[7] and courts may relax Rule 606(b)'s bar in exceptional circumstances, *Warger*, 135 S. Ct. at 529 n.3. Thus, parties still have vehicles for eliciting juror testimony about internal misconduct, but those mechanisms are circumscribed to limited circumstances in order to protect the trial's finality and the jury's privacy.

The First and Seventh Circuit's contrary interpretation serves none of these interests. All agree that Rule 606(b) protects against evidence concerning deliberations. But parties have the same incentive to harass jurors if courts consider predeliberation testimony. And verdicts undergo the same uncertainty if they are undermined with the jury's predeliberation discussions. Thus, the First and Seventh Circuit's interpretation frustrates rather than furthers the aims enshrined in Rule 606(b).

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[7] As the Third Circuit noted, "it is far easier for a district court to address allegations of jury misconduct when they come to light mid-trial rather than after the verdict has been entered and the jury discharged." *United States v. Resko*, 3 F.3d 684, 694 (3d Cir. 1993). And there are many opportunities to raise such a concern during trial: the court or its staff can observe indicia of juror misconduct, a juror could complain, and the lawyers or an uninterested witness could detect misconduct.

Therefore, the most sensible interpretation of Rule 606(b) bars all juror testimony concerning the internal communications among jurors, regardless of whether those discussions occurred before or after the jury formally retired.[8] As a result, the testimony concerning jurors' comments to one another during the trial—described more fully below—is inadmissible.

B. Factual Findings

Because Rule 606(b) sweeps broadly, as discussed above, almost all evidence offered by the parties is inadmissible. Nevertheless, the Court, endeavoring to create a full record, held an evidentiary hearing on March 10, 2015. The following discussion represents the Court's findings of fact.

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[8] Dicta from *United States v. Henley* suggests that evidence of racial prejudice should be exempted from Rule 606(b). 238 F.3d 1111, 1121 (9th Cir. 2001). *Henley*'s suggestion, however, is non-binding dictum. *Id.* ("[W]e need not decide today whether or to what extent the rule prohibits juror testimony concerning racist statements made during deliberations or, as in this case, outside of deliberations but during the course of the trial."); *see also United States v. Decoud*, 456 F.3d 996, 1019 (characterizing this portion of *Henley* as dictum). And the Supreme Court's recent decision in *Warger* renders it unpersuasive. *Warger* affirmed that a comment's source (external versus internal) was the driving force behind a piece of evidence's admissibility. *See* 135 S. Ct. at 526-29. Indeed, "[a]s enacted, Rule 606(b) prohibited the use of *any* evidence of juror deliberations, subject only to the express exceptions for extraneous information and outside influences." *Id.* at 527. Thus, *Warger* recognizes that Rule 606(b) is content-neutral, admitting evidence from certain sources and under extreme circumstances.

1. Defense's Investigation

Omidi's investigators interviewed two jurors, Trevor Gill (an alternate juror who did not deliberate) and Raymond Vicari (juror number four), through a similar pattern. First, Brian Oxman, a disbarred lawyer retained by the defendant, contacted the jurors via telephone. (Dkt. 237, Tr. Mar. 10, 2015, 6, 42; Cal. State Bar Member Profile, *available at* http://members.calbar.ca.gov/fal/Member/Detail/72172.). Oxman, his assistant, and his wife (also a lawyer who has been disciplined by the state bar, State Bar Member Profile, *available at* http://members.calbar.ca.gov/fal/Member/Detail/117677) represented themselves as independent consultants interested in learning about the jurors' court experiences, and they asked them a few questions about the trial before requesting an in-person meeting. (Tr. Mar. 10, 2015, 7, 12). In fact, they were not disinterested consultants, but investigators/lawyers probing for evidence of misconduct on behalf of Omidi. (*See* Tr. Mar. 10, 2015, 12, 89). Eventually, Oxman would schedule in-person meetings with the jurors. (Tr. Mar. 10, 2015, 30, 43).

Before Gill agreed to discuss his experience, he received 20-25 phone calls from Oxman and his associates. (Tr. Mar. 10, 2015, 6-7; Dkt 214-2, Exh. 1). Oxman and Omidi's private investigator, Farzin Noohi,[9] interviewed Gill in a hotel lobby. (Tr. Mar. 10, 2015, 7-8). According to Gill, the interviewers still represented themselves as independent consultants. (Tr.

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[9] Oxman's wife's law firm—which does not serve as Omidi's counsel—hired Noohi, (Tr. Mar. 10, 2015, 100, 115), but Noohi says he represented himself as Omidi's private investigator, (Tr. Mar. 10, 2015, 101).

Mar. 10, 2015, 12). Noohi says he immediately introduced himself as Omidi's private investigator. (Tr. Mar. 10, 2015, 101, 112). Regardless, Gill eventually realized that Oxman and Noohi were investigators working on behalf of Omidi. (Tr. Mar. 10, 2015, 42). Noohi tried to set up another meeting later, but Gill refused; he offered to review a declaration, but Noohi insisted on meeting in-person and never sent him a declaration to review. (Tr. Mar. 10, 2015, 110-12).

Noohi then turned to interviewing Vicari. Before scheduling an interview, Oxman plied Vicari him with expensive lunches and dinners during which he feigned interest in Vicari's personal life. (Tr. Mar. 10, 2015, 43-46, 48, 91). Vicari then met with Noohi. (Tr. Mar. 10, 2015, 113). Although Oxman had dined with Vicari several times, Noohi testified that Oxman told him nothing about Vicari other than that he had served as a juror on Omidi's trial. (Tr. Mar. 10, 2015, 99). In any event, Noohi invited Vicari to an interview over dinner. (Tr. Mar. 10, 2015, 45). Instead of taking Vicari to dinner, Noohi took Vicari to his office, drafted a declaration, and had him sign it that night. (Tr. Mar. 10, 2015, 45-46, 113). (In this declaration, Noohi did not include the alleged racial statements Gill had purportedly attributed to Vicari during Gill's interview with Noohi—indeed, Noohi did not even ask Vicari about them. (Dkt. 205-2, Exh. I; Tr. Mar. 10, 2015, 116).) According to Vicari, Noohi said the matter was "urgent," so he "went along with it" even though the declaration was "in [their] terms." (Tr. Mar. 10, 2015, 45-46). Vicari testified that he ultimately felt "misled," that Oxman and Noohi said "[t]hings that were not truth," and that he "told them never to call [him] again." (Tr. Mar. 10, 2015, 46).

2. Voir Dire

During voir dire, the Court asked the prospective jurors whether they had been charged with a crime. (Dkt. 212, Tr. Vol. I, 22:23-23:2). No jurors answered. In fact, Vicari, who would end up as juror number four, had been charged and convicted of driving under the influence on multiple occasions. (Dkt. 205-2, Exhs. K-M). Vicari later explained that in his mind the DUI convictions were akin to traffic violations and not within the criminal umbrella "like robbery or murder, things of that sort." (Tr. Mar. 10, 2015, 63-64). Although Vicari was mistaken, (Tr. Mar. 10, 2015, 64), he appears to have acted in good faith. (*See also* Tr. Vol. I, 67:21-23 (Vicari swearing during voir dire that he would be fair and impartial to both sides)).

3. Premature Deliberations

In his declaration, Vicari stated that an unidentified juror said, "Omidi was going down" and "[t]he decision to convict her was made early in the trial. . . ." (Dkt. 205-2, Exh. I, ¶¶ 2, 4; *see also id.* at ¶ 5). These statements are not credible. First, Vicari's declaration was procured under unreliable circumstances. (Tr. Mar. 10, 2015, 42-46). Second, Vicari's general observations about the jury's conduct were inaccurate. (*See infra* note 10). Third, Gill—an alternate juror who offered credible testimony—did not recall such a comment (or any comment about Omidi's guilt). (Tr. Mar. 10, 2015, 27; Dkt 214-2, Exh. 1). And fourth, Vicari equivocated on this portion of his declaration during his live testimony. (Tr. Mar. 10, 2015, 50-51).

The other specific instance of predeliberation was Gill's comment about a spreadsheet exhibit. The spreadsheet exhibit summarized the money order purchases

introduced during the trial. (Dkt 214-2, Summary Chart). Although it was undisputed that the Gill brought the chart with him to the jury room, Vicari and Gill disagreed over what Gill said about the exhibit.

Vicari stated in his declaration that Gill "said that the chart showed the defendant had done it." (Dkt. 205-2, Exh. I, ¶ 5). Noohi likewise said Gill "explained the chart to the other jurors [including] how [it showed] 'she had done it' and 'where the money went.'" (Dkt. 205-2, Exh. J, ¶ 2B). Neither of these accounts are credible. Vicari again equivocated on this portion of his declaration, (Tr. Mar. 10, 2015, 56-57), and it was part and parcel of his unreliable testimony about what other jurors said during the trial.[10] Noohi's testimony was even less credible. First, it appeared contrived at times. (*See* Tr. Mar. 10, 2015, 105-106). He represented certain remarks as direct quotations in his declaration even though his prior memoranda had not made similar attributions. (Tr. Mar. 10, 2015, 85, 102-10).[11] He destroyed his interview

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[10] While discussing Gill's comments, Vicari testified that the jury whispered incessantly about the case throughout trial. (Tr. Mar. 10, 2015, 57, 137). The Court, however, never observed the jury whispering despite frequently observing them during trial. (Tr. Mar. 10, 2015, 136). Nor did the Government. (Tr. Mar. 10, 2015, 137). (No one from the Omidi's defense said they noticed whispering either.) In addition, Vicari was generally unsettled and eccentric. (Tr. Mar. 10, 2015, 138). The Court therefore cannot credit this portion of his testimony. *See* Ninth Circuit Court of Appeals Model Criminal Jury Instruction 1.7 (2010 ed.) (permitting the fact finder to "believer everything a witness says, or part of it, or none of it").

[11] Noohi testified that he took notes during the interview, (Tr. Mar. 10, 2015, 78), converted those notes into a memorandum,

notes before preparing his declaration, (Tr. Mar. 10, 2015, 80, 83-87, 101-03), aggravating the implausibility of his declaration and drawing his honesty into question (particularly since he was the only member of the defense's investigation with an original set of interview notes, (Tr. Mar. 10, 2015, 10)).[12] And both Vicari and Gill consistently rejected Noohi's (self-serving) formulations of their statements. (Tr. Mar. 10, 2015, 10-11, 23-24, 40-41, 46, 50-53; Dkt. 214-2, Exh. 1).[13]

In contrast, Gill's testimony was believable. He remembered commenting that he liked the chart, which indicated purchases on certain dates, but he ventured no opinion about its inculpatory effect—in fact, he also mentioned that he "liked the way the defense argued what was missing from the chart." (Dkt. 214-2, Exh. 1; *see also* Tr. Mar. 10, 2015, 8-9, 19). Unlike Vicari and Noohi, Gill's forthright demeanor suggested a reliable recollection and honest testimony. Accordingly, the Court accepts his testimony that he made an offhand comment about the summary chart and did not say, "she had done it."

(Tr. Mar. 10, 2015, 80), destroyed the original notes, (Tr. Mar. 10, 2015, 80), and then drafted his declaration months later, (Tr. Mar. 10, 2015, 84).

[12] Although there is no evidence that Noohi was bound by a code of professional ethics to retain his notes, the best practice is to do so while the case remains pending. *See, e.g.*, Federal Bureau of Investigation, Domestic Investigations and Operations Guide 53 (2011).

[13] Moreover, Oxman—despite his active role in coordinating the investigation and interviewing jurors—did not submit a declaration. His failure to corroborate Noohi's unreliable testimony renders Noohi's testimony even less credible.

4. Racial Bias

Omidi, who was born in Iran, also proffered testimony that Vicari made two statements to other jurors allegedly indicative of racial bias. In his declaration, Vicari testified he discussed Omidi's nationality with other jurors, telling them that "men run the show in the Middle East." (Dkt. 205-2, Exh. I, ¶ 5). Noohi testified that Gill had told him that Vicari had said, "[Omidi] is guilty because she is from the Middle East." (Dkt. 205-2, Exh. J, ¶ 2A).

Vicari did not contradict his "men run the show" comment, (Tr. Mar. 10, 2015, 52), and no other witness called it into question, (*see, e.g.*, Tr. Mar. 10, 2015, 22-23 (Gill testifying that Vicari made comments about his experience in the Middle East)). However, as discussed *infra*, this statement does not reveal any racial bias, and it was consistent with Omidi's defense.

Vicari, however, denied making the comment that Omidi was "guilty because she is from the Middle East," and the Court finds his denial credible. First, Noohi was the only person to report the comment, and, as discussed above, he was not credible. Indeed, Noohi—even though he had interviewed Gill beforehand—did not include the statement in Vicari's declaration or even ask him whether he made the comment. (Dkt. 205-2, Exh. I; Tr. Mar. 10, 2015, 237). Moreover, Noohi's statement was double-hearsay—what Gill told him that Vicari said. And Gill and Vicari both contradicted Noohi's account. Vicari vehemently denied saying Omidi was guilty due to her national origin. (Tr. Mar. 10, 2015, 40-41, 46). He also testified that he held no racial prejudices. (Tr. Mar. 10, 2015, 47). Likewise, Gill—Noohi's alleged source—testified that Noohi had it backwards: according to Gill, Vicari said he had

"traveled all over the world to many different ports and that [it was] his hope, particularly with what is going on in the world, that none of the jurors would find defendant guilty solely because she is from the Middle East." (Dkt 214-2, Exh. 1; 11, 22-23). As Gill noted, it was "the opposite of a discriminatory comment." (Dkt. 214-2, Exh. 1). In short, Vicari did not condemn Omidi for her nationality—he exhorted the jury not to hold Omidi's national origin against her.

C. Analysis

Omidi raises two theories of juror misconduct. First, she contends that Vicari was biased against her. Second, she submits that the jury's predeliberations prejudiced her right to a fair trial.

1. Bias

"[E]ven a single partial juror violates a defendant's constitutional right to a fair trial." *United States v. Angulo*, 4 F.3d 843, 848 (9th Cir. 1993). The Ninth Circuit recognizes three forms of juror bias:

> (1) "actual bias, which stems from a pre-set disposition not to decide an issue impartially"; (2) "implied (or presumptive) bias, which may exist in exceptional circumstances where, for example, a prospective juror has a relationship to the crime itself or to someone involved in a trial, or has repeatedly lied about a material fact to get on the jury"; and (3) "so-called *McDonough*-style bias, which turns on the truthfulness of a juror's responses on voir dire" where a truthful response "would have provided a valid basis for a challenge for cause."

United States v. Olsen, 704 F.3d 1172, 1189 (9th Cir. 2013) (quoting *Fields v. Brown*, 503 F.3d 755, 766-67 (9th Cir. 2007) (en banc)). Only one piece of relevant evidence survives Rule 606(b) exclusion—Vicari's failure to reveal his DUI convictions during voir dire—and it cannot establish a claim of juror bias.

Actual bias refers to "a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Mitchell*, 568 F.3d 1147, 1151 (9th Cir. 2009) (quoting *United States v. Gonzalez*, 214 F.3d 1109, 1112 (9th Cir. 2000)). But Vicari's failure to disclose his DUI conviction reveals no actual bias. *See Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1058-59 (9th Cir. 1997) (finding that a juror's past felony conviction did not render him biased without additional proof of actual bias).

Courts will infer bias in "'extreme' or 'extraordinary' cases." *Olsen*, 704 F.3d at 1192. This rule reaches jurors who had a "personal experience that is similar or identical to the fact pattern at issue in the trial," which impedes their impartiality. *Id.* And it also reaches jurors who lied repeatedly during voir dire, implying they "concealed material facts in order to secure a spot on the particular jury." *Id.* (quoting *Fields*, 5034 F.3d at 770). Vicari's omission does not present such an extreme or extraordinary scenario. A DUI is not similar to Omidi's financial crime. And his failure to reveal his convictions, which was premised on a misunderstanding of the criminal justice system, was not a pattern of lies revealing an intent to secure a spot on the jury. *See, e.g.*, *Hamilton v. Ayers*, 583 F.3d 1100, 1107 (9th Cir. 2009) (finding that a juror's inadvertent failure to disclose criminal convictions during voir dire did not imply prejudice); *Dyer v.*

Calderon, 151 F.3d 970, 973 (9th Cir. 1998) ("The Supreme Court has held that an honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation; even an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality.") (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 555-56 (1984)).

Last, courts presume bias if "a juror fail[ed] to answer honestly a material question on voir dire and 'a correct a response would have provided a valid challenge for cause.'" *Olsen*, 704 F.3d at 1195-96 (quoting *Fields*, 503 F.3d at 766-67). In a structuring case, a juror's DUI convictions would not create cause for disqualification. *See Elmore v. Sinclair*,—F.3d—, No. 12-99003, 2015 WL 1447149, at *11 (9th Cir. Apr. 1, 2015) (rejecting a claim of *McDonough* bias because the juror swore he could be impartial and his lie was based on a seemingly honest misinterpretation of criminal law); *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981) ("The challenge for cause is narrowly confined to instances in which threats to impartiality are admitted or presumed from the relationships, pecuniary interests, or clear biases of a prospective juror.").[14]

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[14] Moreover, Omidi could not show bias even if Rule 606(b) did not bar predeliberation evidence. The Court did not credit Noohi's testimony that Gill had told him that Vicari said he believed Omidi was guilty because of her national origin; Vicari in fact said he hoped his fellow jurors would not hold her national origin against her. And Vicari's other remark that "men run the show in the Middle East," does not reveal bias against Omidi—it was consistent with Omidi's theory that her brother orchestrated and carried out the crime, so, if anything, it suggested a predisposition in favor of Omidi's defense.

2. Premature Deliberation

Jurors should not engage in discussions of a case until formal deliberations. *Anderson v. Calderon*, 232 F.3d 1053, 1098 (9th Cir. 2000). Premature deliberations, however, are "not as serious" as other forms of juror misconduct. *Davis v. Woodford*, 384 F.3d 628, 653 (9th Cir. 2004). "The important thing is not that jurors keep silent with each other about the case but that each juror keep an open mind until the case has been submitted to the jury." *United States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1974). Although this Court erred by initially failing to instruct the jury not to discuss the case,[15] Omidi cannot establish, as she must, that the jurors' predeliberations prejudiced her right to a fair trial. *See id.*

To begin, there is no admissible evidence that the jurors predeliberated because all the relevant testimony is barred by Rule 606(b), as discussed above. The claim therefore fails. *Belmontes v. Brown*, 414 F.3d 1094, 1125 (9th Cir. 2005), *rev'd on other grounds sub nom. Ayers v. Belmontes*, 549 U.S. 7 (2006).

Regardless, the same result would follow even if Rule 606(b) did not bar evidence of predeliberations. The only credible evidence of premature deliberations was Gill's offhand comment that he said he liked the summary chart but also liked how the defense tried

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[15] The Court's practice is to instruct the jury not to discuss the case amongst each other until the trial's conclusion. The Court notes that its practice is consistent with the prevailing approach, *United States v. Resko*, 3 F.3d 684, 689 (3d Cir. 1993), but that there is not universal agreement on the necessity of such an instruction, *see, e.g.*, *United States v. Viale*, 312 F.2d 595, 602 (2d Cir. 1963).

to discredit it.[16] That evidence is simply insufficient to show that the jurors predetermined Omidi's guilt.

First, Omidi argues that Gill's comments were *per se* prejudicial because they constituted deliberation by a thirteenth juror. But an alternate juror is not an "outsider" until the jury retires to formally deliberate. *Cuthel*, 903 F.2d 1381; *see also United States v. Beasley*, 464 F.2d 468, 469 (10th Cir. 1972). Consequently, Omidi cannot rely on a presumption of prejudice. *Velez v. Wong*, No. EDCV 06508 AHM JC, 2010 WL 3218523, at *9 (C.D. Cal. June 21, 2010); *see also Klee*, 494 F.2d at 395-96 (requiring showing of prejudice even though the defendant submitted evidence that "eleven of the fourteen jurors (including alternates) discussed the case during recesses").

Second, Omidi cannot show that Gill's comments rendered her trial unfair. He did not venture an opinion regarding guilt or innocence. *See Stockton v. Com. of Va.*, 852 F.2d 740, 747 (4th Cir. 1988) (finding predeliberation conditionals less problematic if they did not concern "[t]he question of defendant's guilt or innocense"). And even if his comment intimated some opinion about the strength of the case against Omidi, it could not have impinged the jury's ability to evaluate Omidi's guilt at the conclusion of trial. *See Farmer*,

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[16] Although Omidi argued—based on Vicari's declaration—that another unidentified juror had concluded Omidi was guilty before the trial's conclusion, the Court found no credible evidence substantiating that allegation. Indeed, Omidi's investigators appeared to have contacted several jurors. (Tr. Mar. 10, 2015, 97-98). The failure to procure evidence corroborating this statement is telling. Rather, it appears that Oxman (with Noohi's aid) manipulated the most vulnerable juror into signing a declaration in support of Omidi's motion for a new trial.

717 F.3d at 565-66 (finding, in a case considering predeliberation evidence, that there was insufficient prejudice after one juror said he reached a preliminary conclusion of guilt and another wanted to vote before the end of trial); *Klee*, 494 F.2d at 396 (finding no prejudice even though jurors "expressed premature opinions about Klee's guilt" because the jury could not have "actually decided upon the defendant's guilt before the case was submitted to them") (emphasis added); *Bey v. Kernan*, No. CV 05-2324-ODW-CW, 2011 WL 3714631, at *11 (C.D. Cal. Apr. 7, 2011) ("Although the juror's comment violated the prohibition on pre-deliberation discussions about the case, nothing about the statement suggests that the juror who made it had predetermined Petitioner's guilt. Rather, the isolated statement merely represented one juror's impression about one aspect of the evidence to which all the jurors were exposed.").

CONCLUSION

For the reasons stated above, the motion for a new trial is DENIED.

IT IS SO ORDERED.

/s/ Stephen V. Wilson
United States District Judge

Dated: May 1, 2015

ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING (APRIL 24, 2018)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CINDY OMIDI, A/K/A NAHID OMIDI,
A/K/A CINDY PEZESHK, A/K/A NAHID PEZESHK,

Defendant-Appellant.

Nos. 15-50376, 15-50537

D.C. No. 2:13-cr-00739-SVW-1
Central District of California, Los Angeles

Before: GRABER and OWENS, Circuit Judges,
and MAHAN,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Graber and Owens voted to deny the petition for rehearing en banc, and Judge Mahan so recommends.

* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

RELEVANT STATUTORY PROVISIONS

21 U.S.C. § 853

(a) Property subject to criminal forfeiture. Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of this title (21 U.S.C. § 848), the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this title or title III, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part [21 U.S.C. §§ 841 et seq.], a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property". Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers. All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption. There is a rebuttable presumption at trial that any property of a person convicted of a felony under this title or title III is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this title or title III or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this title or title III.

(e) Protective orders.

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit.

(A) In general. Pursuant to its authority to enter a pretrial restraining order under this

section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply. Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution. Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of

satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property. Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General. With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims

of a violation of this title, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 511(e) of this title (21 U.S.C. § 881(e)), of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions. Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 511(d) of this title (21 U.S.C. § 881(d)) shall apply to a criminal forfeiture under this section.

(k) Bar on intervention. Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his

alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders. The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions. In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests.

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of

forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine

witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonable without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of

forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction. The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property.

(1) In general. Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property. In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction. In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the

court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites. The court, when sentencing a defendant convicted of an offense under this title or title III involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of title 18, United States Code [18 U.S.C. §§ 3612 and 3664];

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18, United States Code [18 U.S.C. § 3663A].

31 U.S.C. § 5312

(a) In this subchapter [31 U.S.C. §§ 5311 et seq.]—

(1) "financial agency" means a person acting for a person (except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial

institution of which the United States Government is a member) as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.

(2) "financial institution" means—

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. § 1813(h)));

(B) a commercial bank or trust company;

(C) a private banker;

(D) an agency or branch of a foreign bank in the United States;

(E) any credit union;

(F) a thrift institution;

(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a et seq.);

(H) a broker or dealer in securities or commodities;

(I) an investment banker or investment company;

(J) a currency exchange;

(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

(L) an operator of a credit card system;

(M) an insurance company;

(N) a dealer in precious metals, stones, or jewels;

(O) a pawnbroker;

(P) a loan or finance company;

(Q) a travel agency;

(R) a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;

(S) a telegraph company;

(T) a business engaged in vehicle sales, including automobile, airplane, and boat sales;

(U) persons involved in real estate closings and settlements;

(V) the United States Postal Service;

(W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph;

(X) a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $ 1,000,000 which—

(i) is licensed as a casino, gambling casino, or gaming establishment under the laws of any State or any political subdivision of any State; or

(ii) is an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act other than an operation which is limited to class I gaming (as defined in section 4(6) of such Act [25 U.S.C. § 2703(6)]);

(Y) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or

(Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

(3) "monetary instruments" means—

(A) United States coins and currency;

(B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material; and

(C) as the Secretary of the Treasury shall provide by regulation for purposes of sections 5316 and 5331 [31 U.S.C. §§ 5316 and 5331], checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form.

(4) Nonfinancial trade or business. The term "nonfinancial trade or business" means any trade or business other than a financial institution that is subject to the reporting requirements of section 5313 [31 U.S.C. § 5313] and regulations prescribed under such section.

(5) "person", in addition to its meaning under section 1 of title 1, includes a trustee, a representative of an estate and, when the Secretary prescribes, a governmental entity.

(6) "United States" means the States of the United States, the District of Columbia, and, when the Secretary prescribes by regulation, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, a territory or possession of the United States, or a military or diplomatic establishment.

(b) In this subchapter [31 U.S.C. §§ 5311 et seq.]—

(1) "domestic financial agency" and "domestic financial institution" apply to an action in the United States of a financial agency or institution.

(2) "foreign financial agency" and "foreign financial institution" apply to an action outside the United States of a financial agency or institution.

(c) Additional definitions. For purposes of this subchapter [31 U.S.C. §§ 5311 et seq.], the following definitions shall apply:

[(1)] Certain institutions included in definition. The term "financial institution" (as defined in subsection (a)) includes the following:

[(A)] Any futures commission merchant, commodity trading advisor, or commodity pool operator registered, or required to register, under the Commodity Exchange Act [7 U.S.C. §§ 1 et seq.].

31 U.S.C. § 5317

(a) The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title [31 U.S.C. § 5316] has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

(b) Searches at border. For purposes of ensuring compliance with the requirements of section 5316 [31 U.S.C. § 5316], a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States.

(c) Forfeiture.

(1) Criminal forfeiture.

(A) In general. The court in imposing sentence for any violation of section 5313, 5316, or 5324 of this title [31 U.S.C. § 5313, 5316, or 5324], or any conspiracy to commit such violation, shall order the defendant to forfeit all property, real or personal, involved in the offense and any property traceable thereto.

(B) Procedure. Forfeitures under this paragraph shall be governed by the procedures established in section 413 of the Controlled Substances Act [21 U.S.C. § 853].

(2) Civil forfeiture. Any property involved in a violation of section 5313, 5316, or 5324 of this title [31 U.S.C. § 5313, 5316, or 5324], or any conspiracy to commit any such violation, and any property traceable to any such violation or conspiracy, may be seized and forfeited to the United States in accordance with the procedures governing civil forfeitures in money laundering cases pursuant to section 981(a)(1)(A) of title 18, United States Code.

31 U.S.C. § 5324

(a) Domestic coin and currency transactions involving financial institutions. No person shall, for the purpose of evading the reporting requirements of section 5313(a) or 5325 [31 U.S.C. § 5313(a) or 5325] or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326 [31 U.S.C. § 5326], or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act [12 U.S.C. § 1829b] or section 123 of Public Law 91-508 [12 U.S.C. § 1953]—

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) or 5325 [31 U.S.C. § 5313(a) or 5325] or any regulation prescribed under any such section, to file a report or to maintain a record required by an order issued under section 5326 [31 U.S.C. § 5326], or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act [12 U.S.C. § 1829b] or section 123 of Public Law 91-508 [12 U.S.C. § 1953];

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) or 5325 [31 U.S.C. § 5313(a) or 5325] or any regulation prescribed under any such section, to file a report or to maintain a record required by any order issued under section 5326 [31 U.S.C. § 5326], or to maintain a record required pursuant to any regulation prescribed under section 5326 [31 U.S.C. § 5326], or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act [12 U.S.C. § 1829b] or section 123 of Public Law 91-508 [12 U.S.C. § 1953], that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

(b) Domestic coin and currency transactions involving nonfinancial trades or businesses. No person shall, for the purpose of evading the report requirements of section 5331 [31 U.S.C. § 5331] or any regulation prescribed under such section—

(1) cause or attempt to cause a nonfinancial trade or business to fail to file a report required under section 5331 [31 U.S.C. § 5331] or any regulation prescribed under such section;

(2) cause or attempt to cause a nonfinancial trade or business to file a report required under section 5331 [31 U.S.C. § 5331] or any regulation prescribed under such section that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with 1 or more nonfinancial trades or businesses.

(c) International monetary instrument transactions. No person shall, for the purpose of evading the reporting requirements of section 5316 [31 U.S.C. § 5316]—

(1) fail to file a report required by section 5316 [31 U.S.C. § 5316], or cause or attempt to cause a person to fail to file such a report;

(2) file or cause or attempt to cause a person to file a report required under section 5316 [31 U.S.C. § 5316] that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any importation or exportation of monetary instruments.

(d) Criminal penalty.

(1) In general. Whoever violates this section shall be fined in accordance with title 18, United

States Code, imprisoned for not more than 5 years, or both.

(2) Enhanced penalty for aggravated cases. Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than $ 100,000 in a 12-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both.

COURT'S INSTRUCTIONS TO THE JURY, RELEVANT EXCERPTS (OCTOBER 10, 2014)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINDY OMIDI,

Defendant.

Case No. 13-CR-739-SVW

[. . .]

INSTRUCTION NO. 18

Defendant Cindy Omidi is charged in the single-count indictment with structuring transactions to avoid reporting requirements. Title 31, United States Code, Section 5325 and its implementing regulations require that every financial institution that issues or sells money orders totaling $3,000 or more and paid for in currency must prepare a report (Form 8105-A). The institution must furnish, among other things, the identity and address of the person engaging in the transaction, the person or entity, if any, for whom he or she is acting, and the amount of the currency

transaction. The financial institution is also required to verify the purchaser's name and address by examination of an acceptable means of identification such as a state-issued driver's license.

For a defendant to be convicted of structuring the government must prove the following elements beyond a reasonable doubt:

(1) The defendant knowingly structured, attempted to structure, or assisted in structuring a currency transaction on or after October 12, 2008, with all of you agreeing on a purchase or group of purchases of postal money orders that constitutes structuring;

(2) The defendant knew of the financial institution's legal obligation to report currency purchases of money orders of $3,000 or more;

(3) The purpose of the structured transaction was to evade the transaction-reporting requirements.

(4) The structured transaction was with one or more domestic financial institutions.

A person structures a transaction if that person, acting alone or with others, conducts one or more currency transactions in any amount, at one or more financial institutions, on one or more days, for the purpose of evading the reporting requirements described earlier. Structuring includes breaking down a single sum of currency exceeding $3,000 into smaller sums, or conducting a series of currency transactions, including transactions at or below $3,000. Illegal structuring can exist even if no transaction exceeded $3,000 at any single financial institution on any single day.

It is not necessary for the government to prove that the defendant knew that structuring a transaction to avoid triggering the filing requirements was itself illegal. The government must prove beyond a reasonable doubt that the defendant structured, assisted in structuring, or attempted to structure, currency transactions with knowledge of the reporting requirements and with the specific intent to avoid said reporting requirements.

[. . .]

INSTRUCTION NO. 26

A "financial institution" is the United States Postal Service or an issuer, redeemer, or cashier of money orders.

[. . .]

JURY TRIAL TRANSCRIPT
(OCTOBER 9, 2014)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINDY OMIDI,

Defendant.

Case No. CR 13-739-SVW

Before: The Hon. Stephen V. WILSON,
United States District Judge.

Reporter's Transcript of Day 3 of Jury Trial
Thursday, October 9, 2014, 9:07 A.M.
Los Angeles, California

. . . is not on trial for any conduct or offense not charged in the indictment.

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses. In addition to these factors in evaluating eyewitness identification

testimony, you may also consider, one, the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation including lighting and distance.

Two, whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness; three, any inconsistent identifications made by the eyewitness; four, the witness's familiarity with the subject identified; five, the strength of earlier and later identifications; six, lapses of time between the event and the identifications; and seven, the totality of circumstances surrounding the eyewitness's identification.

Defendant Cindy Omidi is charged in the single count indictment with structuring transactions to avoid reporting requirements. Title 31 United States Code Section 5325 and its implementing regulations require that every financial institution that issues or sells money orders totaling $3,000 or more and paid for in currency must prepare a report (form 8105-A).

The institution must furnish, among other things, the identity and address of the person engaging in the transaction, the person or identity, if any, for whom he or she is acting, and the amount of the currency transaction.

The financial institution is also required to verify the purchaser's name and address by examination of any acceptable means of identification such as a state issued driver's license.

For a defendant to be convicted of structuring, the government must prove the following elements beyond a reasonable doubt. One, the defendant knowingly structured, attempted to structure, or assisted in structuring a currency transaction on or after October 12, 2008, with all of you agreeing on a purchase or group of purchases of postal money orders that constitutes structuring.

Two, the defendant knew of the financial institution's legal obligation to report currency purchases of money orders of $3,000 or more; three, the purpose of the structuring transaction was to evade the transaction reporting requirements; four, the structured transaction was with one or more domestic financial institutions.

A person structures a transaction if that person acting alone or with others conducts one or more currency transactions in any amount at one or more financial institutions on one or more days for the purpose of evading the reporting requirements described earlier. Structuring includes breaking down a single sum of currency exceeding $3,000 into smaller sums or conducting a series of currency transactions including transactions at or below $3,000.

Illegal structuring can exist even if no transaction exceeded $3,000 at any single financial institution on any single day. It is not necessary for the government to prove that the defendant knew that structuring a transaction to avoids triggering the filing requirements was itself illegal. The government must prove beyond a reasonable doubt that the defendant structured, assisted in structuring, or attempted to structure currency transac-

tions with knowledge of the reporting requirements and with the specific intent to avoid said reporting requirements.

If you find that the government has proved beyond a reasonable doubt that defendant is guilty of structuring, then you must further determine whether the Government has proved that defendant violated the law as part of a pattern of illegal activity.

To find the defendant guilty of structuring as part of a pattern of illegal activity, you must determine whether the defendant engaged in a series of repeated structured transactions, as structured transactions are defined in these instructions, all related to each other during a specific 12-month period that involved an amount greater than $100,000. The 12-month period must end no earlier than October 12, 2008.

You must agree unanimously to the particular 12-month period, and you must agree unanimously that the defendant engaged in a pattern of structured transactions involving more than $100,000 during that same 12-month period.

The indictment charges that offenses were committed on or about or in or about certain dates. Although it is necessary for the government to prove beyond a reasonable doubt that the offenses were committed on a date reasonably near the dates alleged in the indictment, it is not necessary for the government to prove the offenses were committed precisely on the dates charged.

An act is done—is that instruction appropriate in this case? Who requested that instruction?

MR. KIRMAN: One moment, please, Your Honor.

THE COURT: I don't know that it's relevant here.

MR. SAUNDERS: The knowingly instruction, Your Honor?

THE COURT: No, the on or about.

MR. KIRMAN: It is, Your Honor.

MR. SAUNDERS: We have no objection to it, Your Honor.

THE COURT: All right. Fine.

> An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his or her acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions along with all the other evidence in deciding whether the defendant acted knowingly.
>
> The intent of a person or the knowledge that a person has at any given time may not ordinarily be proved directly because there's no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done or committed by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.
>
> Mere presence at the scene of a crime or mere knowledge that a crime is being committed is not sufficient to establish that the defendant commit-

ted the crime of structuring. The defendant must be a participant and not merely a knowing spectator. The defendant's presence may be considered by the jury along with other evidence in the case.

A defendant may be found guilty of structuring even if the defendant personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt, first, someone committed structuring; second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit each element of structuring; third, the defendant acted before the crime was committed.

I think I misspoke. Third, the defendant acted before the crime was completed. It is not enough that the defendant merely associated with the person committing the crime or unknowingly or unintentionally did things that were helpful to that person or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the crime charged.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

I have some concluding instructions to deliver to you, but they concern how you organize yourselves, communicate with the Court, and how you return

a verdict. I'll await giving you those instructions until the lawyers have argued.

MR. SAUNDERS: Your Honor, there are two more special instructions, 25 and 26.

THE COURT: Oh, did I miss those? I'm sorry.

MR. SAUNDERS: Your Honor, we'd like to approach sidebar with respect to one instruction that the Court previously—

THE COURT: Then do that now.

(The following was held at sidebar outside the presence of the jury.)

MR. SAUNDERS: This is on the pattern instruction. I believe it's 19. I caught this unfortunately for the first time when the Court was reading. I know the Court had revised it. The language the Court said is "to find the defendant guilty, you must determine whether she engaged in." There's no reference in there to the government having the burden to prove it beyond a reasonable doubt which it does. That was in our proposed instructions. To find the defendant guilty of structuring—it should say, "If you find the government has proved beyond a reasonable doubt, then you must further determine whether the government has proved whether the defendant violated the law." Beyond a reasonable doubt—

THE COURT: You must determine whether the government has proved beyond—

MR. SAUNDERS: I think that is important to be in there. Then the last two instructions I think the Court skipped were the definitions of financial institutions—

THE COURT: Okay.

(The following was held in open court in the presence of the jury.)

THE COURT: I'm going to reread just one of the instructions because I may have not said it completely. This has to do with the instruction regarding the pattern of illegal activity. I'll read it in its completion.

If you find that the government has proved beyond a reasonable doubt that defendant is guilty of structuring, then you must further determine whether the government has proved beyond a reasonable doubt that the defendant violated the law as part of a pattern of illegal activity.

To find defendant guilty of structuring as part of a pattern of illegal activity, you must determine whether the defendant engaged in a series of repeated structured transactions, as structured transactions are defined in these instructions, all related to each other during a specific 12-month period that involved an amount greater than $100,000. The 12-month period must end no earlier than October 12, 2008.

You must agree unanimously to the particular 12-month period, and you must unanimously agree that the defendant engaged in a pattern of structured transaction involving more than $100,000 during that same 12-month period.

Then there were just two other instructions.

Currency means the coin and paper money of the United States. Travelers checks and debit transactions are not payments with currency.

And then finally a financial institution is the United States Postal Service or an issuer, redeemer, or cashier of money orders or similar instruments.

I think I'll remove the final words and just repeat it to you. A financial institution is the United States Post Office or an issuer, redeemer, or cashier of money orders period.

Again, I have some parting instructions. But I'll await—they are very short, and I'll await until the lawyers have argued the case. So first we'll hear from the government.

MR. DAVIS: Thank you, Your Honor.

First, thank you ladies and gentlemen. I know this actually took a little bit longer than expected, but you all paid very close attention, and I know we all appreciate it.

Let's say you have a problem and it's the sort of problem that a lot of us would like to have. You have a lot of cash. Maybe it's yours. Maybe it's your son's. Maybe it's your business's. Totaled about $300,000.

But for whatever reason, it's cash that you don't want the government to know about. Some of it you want to deposit in a bank without setting off any alarm bells. But banks file reports on deposits of $10,000 or more of cash. The rest you want to keep tucked away to use later for business and personal purchases.

How can you hide the cash but still use it in big chunks that won't attract government attention? Solution. How about buying a bunch of postal money

orders which are as good as cash but really they are better because they don't have to be . . .

INDICTMENT
(OCTOBER 11, 2013)

UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CINDY OMIDI,
A/K/A "NAHID OMIDI,"
A/K/A "NAHID PEZESHK,"
A/K/A "CINDY PEZESHK",

Defendant.

CR No. 13-00739

[31 U.S.C. §§ 324(a)(3), (d)(2): Structuring Transactions to Evade Reporting Requirements; 18 U.S.C. § 2: Aiding and Abetting and Causing an Act to be Done; 31 U.S.C. § 5317 (c): Criminal Forfeiture]

The Grand Jury Charges:

31 U.S.C. § 5324(a)(3), (d)(2); 18 U.S.C. § 2

A. Introductory Allegations

At all times relevant to this Indictment:

1. The Bank Secrecy Act ("BSA") was a set of laws and regulations enacted to address an increase in criminal money laundering through financial institutions. In order to combat money laundering, the BSA required domestic financial institutions to file reports and maintain customer information for cash transactions that exceeded certain amounts.

2. The United States Postal Service ("USPS") was a domestic financial institution under the BSA.

3. The BSA required the USPS and other financial institutions to obtain information about any customer who purchased $3,000 or more in money orders using cash. The USPS was required to maintain that information and report it to the government upon request. The BSA also required the USPS and other financial institutions to file a Currency Transaction Report ("CTR") for any transaction involving more than $10,000 in cash.

4. The USPS required its customers who used cash to purchase $3,000 or more in money orders to show proper identification and fill out Postal Service Form 8105-A, also called a Funds Transaction Report ("FTR".) FTRs recorded information about the person who brought the cash to the Post Office to purchase the money orders.

5. The USPS operated facilities at the following locations, all within the Central District of California:

a. Wilshire Business Center Post Office, 10920 Wilshire Boulevard, Los Angeles, California 90024 ("Wilshire Business Center");

b. Village Station Post Office, 11000 Wilshire Boulevard, Los Angeles, California 90024 ("Village Station");

c. West LA Finance Center, 11420 Santa Monica Boulevard, Los Angeles, California 90025 ("West LA Finance Center"); and

d. Beverly Hills Main Post Office, 325 Maple Drive, Beverly Hills, California 90210 ("Beverly Hills Main").

6. Defendant CINDY OMIDI, also known as ("aka") "Nahid Omidi," aka "Nahid Pezeshk," aka "Cindy Pezeshk" ("defendant C. OMIDI"), resided in Los Angeles County, California, within the Central District of California, and maintained a Post Office Box at Village Station.

B. Defendant C. Omidi's Structuring

7. Between in or about July 2008 through in or about December 2009, in Los Angeles County, within the Central District of California, and elsewhere, defendant C. OMIDI, together with others known and unknown to the Grand Jury, knowingly and for the purpose of evading the reporting requirements of Sections 5313(a) and 5325 of Title 31, United States Code, and the regulations promulgated thereunder, structured, assisted in structuring, attempted to structure and assist in structuring, and aided and abetted in structuring and caused to be structured, the following transactions, among others, with a domestic financial institution, namely, the USPS, as part of a pattern of illegal activity involving more than $100,000 in a 12-month period:

Date	Sub-total	Money order Amount	Money order Serial	Post Office
8/14/08	$ 900	$ 900	12656224113	Village Station
	$2,900	$1,000	93648743548	Wilshire Business Center
		$1,000	93648743550	
		$ 900	93648743561	
8/25/08	$1,000	$1,000	12656222886	Village Station
	$2,900	$1,000	93648745484	Wilshire Business Center
		$1,000	93648745495	
		$ 900	93648745506	
9/16/08	$ 900	$ 900	12656228207	Village Station
	$2,900	$1,000	93648748151	Wilshire Business Center
		$1,000	93648748162	
		$ 900	93648748173	
9/24/08	$2,900	$1,000	12332452476	Beverly Hills Main
		$1,000	12332452487	
		$ 900	12332452498	
	$2,900	$1,000	12656794781	West LA Finance Station
		$1,000	12656794792	
		$ 900	12656794803	
9/27/08	$2,900	$1,000	12655758936	Beverly

		$1,000	12655758947	Hills Main
		$ 900	12655758958	
	$2,900	$1,000	13013233200	West LA Finance Station
		$1,000	13013233211	
		$ 900	13013233222	
10/15/08	$2,900	$1,000	13013240534	West LA Finance Center
		$1,000	13013240545	
		$ 900	13013240556	
	$2,900	$1,000	93648815807	Wilshire Business Center
		$1,000	93648815818	
		$ 900	93648815820	
	$ 900	$ 900	12656229704	Village Station
10/17/08	$2,900	$1,000	12655770592	Beverly Hills Main
		$1,000	12655770603	
		$ 900	12655770614	
10/20/08	$2,900	$1,000	12655766643	Beverly Hills Main
		$1,000	12655766654	
		$ 900	12655766665	
	$2,900	$1,000	13013248140	West LA Finance Center
		$1,000	13013248151	
		$ 900	13013248162	
10/22/08	$2,900	$1,000	09102144690	Beverly Hills
		$1,000	09102144701	

		$ 900	09102144712	Main
	$2,900	$1,000	93648817945	Wilshire Business Center
		$1,000	93648817956	
		$ 900	93648817967	
10/29/08	$2,900	$1,000	93648818733	Wilshire Business Cent
		$1,000	93648818744	
		$ 900	93648818755	
10/30/08	$2,900	$1,000	93648818867	Wilshire Business Center
		$1,000	93648818878	
		$ 900	93648818902	
10/31/08	$2,900	$1,000	16366202594	Beverly Hills Main
		$1,000	16366202605	
		$ 900	16366202616	
11/5/08	$2,900	$1,000	93552311237	Wilshire Business Center
		$1,000	93552311248	
		$ 900	93552311250	
11/6/08	$2,900	$1,000	16366202752	Beverly Hills Main
		$1,000	16366202763	
		$ 900	16366202774	
11/12/08	$2,900	$1,000	16366183007	Beverly Hills Main
		$1,000	16366183018	
		$ 900	16366183020	
	$2,900	$1,000	93552311981	Wilshire Business
		$1,000	93552311992	

		$ 900	93552312003	Center
11/18/08	$2,900	$1,000	93552313048	Wilshire Business Center
		$1,000	93552313050	
		$ 900	93552313061	
11/19/08	$2,900	$1,000	16366189048	Beverly Hills Main
		$1,000	16366189050	
		$ 900	16366189061	
12/9/08	$2,900	$1,000	16366185145	Beverly Hills Main
		$1,000	16366185156	
		$ 900	16366185167	
12/10/08	$2,900	$1,000	93552316391	Wilshire Business Center
		$1,000	93552316402	
		$ 900	93552316413	
10/15/09	$2,900	$1,000	50239891888	Wilshire Business Center
		$1,000	50239891890	
		$ 900	50239891901	
10/16/09	$1,900	$1,000	50239891991	Wilshire Business Center
		$ 900	50239892013	
11/24/09	$2,900	$1,000	50239896480	Wilshire Business Center
		$1,000	50239896491	
		$ 900	50239896502	
11/25/09	$2,900	$1,000	50239896625	Wilshire Business
		$1,000	50239896636	

		$ 900	50239896647	Center

FORFEITURE ALLEGATION
[31 U.S.C. § 5317(c)]

8. The Grand Jury incorporates and realleges paragraphs One through Seven of this Indictment above as though fully set forth in their entirety herein for the purpose of alleging forfeiture pursuant to the provisions of Title 31, United States Code, Section 5317(c).

9. Defendant C. OMIDI, if convicted of the offense charged in this Indictment, shall forfeit to the United States the following property:

a. All right, title, and interest in any and all property involved in the offense committed in violation of Title 31, United States Code, Section 5324(a)(3), and all property traceable to such property, including the following:

(1) all money or other property that was the subject of each transaction conducted in violation of Title 31, United States Code, Section 5324(a)(3);

(2.) all property traceable to money or property described in, this paragraph 2.a.(1).

b. A sum of money equal to the total amount of money involved in the offense committed in violation of Title 31, United States Code, Section 5324(a)(3).

10. If, as a result of any act or omission by defendant C. OMIDI, any of the foregoing money or property (a) cannot be located upon the exercise of

due diligence; (b) has been transferred or sold to, or deposited with, a third party; (c) has been placed beyond the jurisdiction of the Court; (d) has been substantially diminished in value; or (e) has been commingled with other property that cannot be subdivided without difficulty, then any other property or interests of defendant C. OMIDI, up to the value of the money and property described in the preceding paragraph of this Indictment, shall be subject to forfeiture to the United States.

A TRUE BILL

/s/
Foreperson

Andre Birotte Jr.
United States Attorney

/s/ Robert E. Dugdale
Robert E. Dugdale
Assistant United States Attorney
Chief, Criminal Division

Richard E. Robinson
Assistant United States Attorney
Chief, Major Frauds Section

Consuelo S. Woodhead
Assistant United States Attorney
Deputy Chief, Major Frauds Section

Aaron M. May
Assistant United States Attorney
Major Frauds Section

David L. Kirman
Assistant United States Attorney
Major Frauds Section