No._____

IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH HAYMORE and PAUL LICAUSI,

Petitioners,

-v-

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Whether failure to renew a severance motion at the close of evidence waives the issue, such that it precludes appellate review. Only the Ninth Circuit applies a wholesale waiver rule, which conflicts with the other courts of appeals, Federal Rule of Criminal Procedure 52(b), and this Court's precedent.

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Petitioners Joseph Haymore and Paul Licausi respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit affirmed petitioners' convictions, finding that they "waived review of the district court's denial of [his] motion to sever by failing to renew the motion at the close of evidence." *United States v. Shults, et al.* Nos. 14-50515, 14-50536, 14-50545 & 15-50540 (9th Cir. 2018).[1] After ordering a response from the government, the Ninth Circuit denied a petition for rehearing en banc without analysis.[2]

JURISDICTION

On August 31, 2018, the Ninth Circuit denied the timely petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

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[1] A copy of the memorandum is attached as Appendix A.

[2] A copy of the order denying the petition for rehearing en banc is attached as Appendix B.

STATEMENT OF THE CASE

This case began with a doomed real-estate deal. The defendants promised to provide investors with previously foreclosed homes in habitable condition, renters for those homes, and certain no-lose exit strategies. ER:3-7.[3] Instead, the investors allegedly received defective titles to dilapidated homes that were either never fully delivered, or worth far less than promised. ER:7.

From the outset, the defendants split into factions. In one camp were defendants Haymore and LiCausi. Through their company United Capital (UC), they purchased the bank-owned homes, and allegedly came up with the basic strategy for selling them to investors. The other camp consisted of defendants Shults and Melkonian, who sold the properties to investors at live seminars and online through a company called Creative Realty Solutions (CRS).[4] The prosecution claimed each defendant knew fraudulent representations were made to induce the investors. ER:3.

The defendants denied this accusation. Their versions, however, contrasted sharply not only with the government, but also with each other. Far from a unified

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[3] The Excerpt of Record (ER) is on file with the Ninth Circuit, as is the Presentence Report (PSR).

[4] UC is synonymous with Haymore/LiCausi. CRS is Shults/Melkonian.

front, the two factions claimed the other was guilty. The Shults camp argued he was merely a hired salesman, giving the pitch his bosses told him was true. ER:420-21. Because he was just the messenger, Haymore and LiCausi were to blame for the fraud. As for Melkonian, she was Shults' employee. So she too was just following her superior's directions.

The Haymore camp rejected that account, arguing Shults alone made the misrepresentations. ER:421. Before his involvement, they had a successful business selling foreclosed properties in bulk "as is." They agreed to make the same "as is" properties available to Shults. Without their knowledge, however, Shults created a fraud-filled sales presentation to dupe unsuspecting investors.

The parties repeatedly moved for severance before trial. ARB:4-7. They alerted the district court that their defenses would be antagonistic and mutually exclusive. Although the district court acknowledged the issue was a "close call," ER:623, it denied the motion.

A. The trial.

The parties' warning about mutually exclusive defenses came to fruition. The trial proceeded with the government blaming everyone, while the defense lawyers sought to demonstrate their client's innocence by establishing the other side's guilt. In this way, the attorneys for each camp acted like second (and third

and fourth) prosecutors against the other defendants. Indeed, from the opening statements, counsel for Haymore blamed Shults for the misrepresentations. ER:1104; 1124-1125. Counsel for Shults did the opposite, telling the jury Shults was just following Haymore's script. As Haymore's lawyer later told the district court, "[t]he Government could have sat quietly. [Shults' attorney] and I went toe to toe[.] Toe to toe for eight weeks against each other saying, no it was him; no, it was him . . . . I couldn't have been more controversial toward [Shults'] case nor could he have [toward mine]." ER:7339-40.

1. *Throughout the government's case, the defendants acted as second prosecutors toward each other*.

The initial jabs turned to full-fledged attacks during the government's case. With each alleged victim witness, counsel for Haymore accused Shults of making false promises, while separating his client from any responsibility. *See e.g.*, ER:2328-30, 2414, 2538-39, 3127, 3136, 3141. Shults took the same tack, using his cross-examinations to minimize his involvement while buttressing the government's case against Haymore and LiCausi. ER:3086, 3096-98, 3453-54.

2. *The attacks increased during the defense cases.*

The respective defense cases were even worse. Shults used one of his witnesses to tell the jury he was trying to fix the problems, but there were no similar "efforts by Mr. Haymore or by people at United Capital." ER:4588. With

another witness, Shults continued to hammer home the key point of his defense (and of the prosecution) – that the investor presentation came from Haymore. ER:4669. Nor did Shults shy away from specifically blaming Haymore and LiCausi for the pitiful state of the properties. ER:4681-83.

For his part, Haymore took personal shots at Shults with little relevance to the evidence and a complete disregard for the district court's rulings.

Q. Now, last few questions about -- *about Mr. Shults personally*. You knew him prior to 2009 for how long?

A. Since about February of 2008.

Q. Okay. In your experience with him during 2009, was he managing $9 billion worth of portfolios?

[Counsel for Shults]: Objection. Foundation.

THE COURT: Sustained.

Q. You sat in an office with Mr. Shults nearly every day during 2009 up until July; correct?

A. Correct.

Q. Okay. Did you see any indication that he was managing $9 billion worth of portfolios during that time?

[Counsel for Shults]: Objection. Vague.

[Prosecutor]: Calls for speculation.

[Counsel for Shults]: No foundation.

THE COURT: Sustained.

Q. Did you see whether or not he was managing a thousand homes before he ever went to meet Mr. Haymore and Mr. LiCausi?

[Counsel for Shults]: Objection.

[Prosecutor]: Objection. Lacks foundation, calls for speculation.

[Counsel for Shults]: Hearsay.

THE COURT: Sustained.

Q. Was he working as a banker during 2009?

[Prosecutor]: Same objections.

[Counsel for Shults]: Foundation.

THE COURT: Foundation sustained.

Q. Did Mr. Shults ever tell you that he was a broker in all 50 states in the United States?

[Prosecutor]: Hearsay.

THE COURT: *How can you ask that question*?

ER:4745-46 (emphasis added).

Of course, the answer to the district court's rhetorical question was that Haymore was doing all in his power to bury Shults.

3. *The defendants' closing arguments were replete with gratuitous attacks*.

By the end of trial, as the government described to the jury, it was clear: "they're all pointing the fingers at each other, and Shults seems to be pointing the -- the defense team on that side is pointing over to Mr. Haymore. Mr. Haymore's side is pointing back at Mr. Shults." ER:5648. During its closing argument, the government seized upon the lack of cohesion to divide and conquer. It argued that neither defense camp should be believed. Instead, the jury should convict them all as one "den of thieves." ER:5604, 5608, 5616, 5647, 5648, 5651, 5659.

When it came time for the defenses' closing arguments, the gloves came off. Shults' counsel told the jury everything he said to the investors came "from the people at United Capital." ER:5672. He acknowledged the "battle" with his codefendants "about who did, in fact, devise this program," and then preceded to blame Haymore. ER:5682-85. Counsel told the jury, "when Mr. Shults made all these promises," it was because he was "told to make [them] by this PowerPoint [UC] sent him." ER:5685. As to "who started this program and who devised the program and who ran it, it . . . is clear that it is United Capital and its principals." ER:5694-95.

Haymore responded with venom. His counsel told the jury that Haymore had to fight "prosecutor after prosecutor," the government and Shults. ER:5706.

He then compared Shults to Nazi war criminal Adolf Eichmann: "in the immortal words of one Mr. Eichmann, I did it because I was told to do it, the reference being to killing people in a distant war a long time ago. *That is the defense that has been presented by Mr. Shults*." ER:5706-07 (emphasis added).

As if this were not enough, Haymore further argued Shults was a liar "out there saying things that he shouldn't be saying." ER:5738. Finally, removing all innuendo, he told the jury Shults was the guilty party: "Let me tell you, *the guilty*, they make grandiose promises. They make promises that can't be -- can't keep. They blame others. They invest no money. They don't do the rehab. CRS [and Mr. Shults] had $19,000 to spend on rehabilitation. If they had spent that money, we would not be standing here." ER:5780 (emphasis added).

LiCausi also wasted no time trying to help the government convict Shults. He told the jury, the "deceit" in the transactions "came from that man, Mr. Shults. Mr. Shults did what he did to get the money." ER:5886. In short, Shults "put [the money] in his pocket so that he could go ahead and *cheat people, including us*." ER:5888 (emphasis added).

Ultimately, the divided defendants were conquered. The jury convicted Shults, Haymore, and LiCausi of all the charges against them, and Melkonian of three wire-fraud counts. ER:6220. They received sentences of 90 months, 57

months, 33 months, and 18 months respectively. ER:8973-76, 8979. Haymore and LiCausi moved for new trials, re-raising the prejudicial joinder of defendants issue. ER:6562; 6584. The district court denied their motions.

B. The appeal.

On appeal, severance was the principal issue. The defendants argued, "the district court erred in denying [their] repeated requests to sever their trials. The antagonism (and outright disdain) between defendants was such that they acted as second prosecutors toward each other. The respective camps did everything in their power to cast the other side as guilty. The result was a manifestly unfair trial, replete with inflammatory accusations and substantial evidentiary spillover." AOB:49.

The government's principal answer was that, by failing to renew their severance motion at the close of evidence, the defendants waived their claim such that it could not be reviewed on appeal. GB:41 ("[a] motion to sever 'must be renewed at the close of evidence or it is waived.'") (quoting *United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008)).

The defendants replied that: (1) the claim was properly preserved by the pretrial motions, and (2) if not, the Court should review for plain error. ARB:5-12. To this end, they explained that every other Circuit to consider the issue applies

plain-error review when there is a failure to renew a severance motion. ARB:9 n.3. Finally, the defendants argued that regardless of what standard applied, "the result should be the same – remand for new trials." ARB:17.

The panel disagreed. Following oral argument, it held, "the defendants waived review of the district court's denial of their motion to sever by failing to renew the motion at the close of evidence." App.A at 2. Nor did it review the issue for plain error. Rather, it simply upheld the convictions without considering whether denial of severance undermined the defendants' right to a fair trial.

The defendants filed for rehearing en banc. The court of appeals ordered the government to respond, but then summarily denied rehearing. App.B. This petition follows.

REASON FOR GRANTING THE PETITION

Review is warranted to address the split in the Circuits as to whether the failure to renew a severance motion at the close of evidence precludes appellate review.

Alone among the courts of appeals, the Ninth Circuit holds that the failure to renew a severance motion at the close of evidence forever bars appellate review. The rule is not only unfounded, but it creates a Circuit split: the rest of the country holds that the failure to re-raise severance, at worst, results in plain-error review. Given this split, further review is necessary to bring the Ninth Circuit back in line. Indeed, as discussed below, the Ninth Circuit's "waiver" precedent finds no support in the Federal Rules, and is untethered from the historical purpose of the judicially-created renewal requirement.

This case, moreover, is the proper vehicle to reconcile the law on this issue. Severance was heavily litigated below, both before and after trial. And neither the court of appeals nor the government could identify a case with such extreme

antagonism (and resulting prejudice) between the parties.[5] Yet because of the failure to mechanically renew the severance motion at the close of evidence, the court of appeals did not reach the merits. It is time to examine this outlier precedent, and bring it into alignment with the plain-error rule as well as the rest of the Circuits.

A. The history of the renewal requirement.

The oft-noted principle is that a defendant "waives" his or her right to appeal the denial of a severance motion by failing to renew it at the close of evidence. *See e.g.*, *United States v. Decoud*, 456 F.3d 996, 1008 (9th Cir. 2006) ("We have held that a defendant waives his right to appeal the denial of his severance motion if he does not renew the motion at the close of evidence."). This requirement, however, has no support in the Federal Rules.[6] Instead, it is a judicially-created prerequisite

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[5] *See* Argument Video Oral, available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012685 (last visited October 12, 2018) at 42:20 (Judge Berzon: "Well, can you point to a case similar to this in which there was this much finger-pointing and antagonism and substantive backing up of the government . . . . Is there any example?" After a long pause, the government conceded that it could not provide another example. Judge Berzon stated, "I couldn't quite find one. It seemed fairly extreme to me, frankly. . . ." *Id.* at 43:00.).

[6] Under Federal Rule of Criminal Procedure 12(b)(3)(D), defendants must raise by pretrial motion a request for "severance of . . . defendants under Rule 14" when "the basis for the motion is then reasonably available." The rule, however, says nothing about renewing the motion at the close of evidence. Nor does Rule 14,

that traces back to one specific circumstance – when the grounds for severance are not discernable until the evidence has been admitted.

The rule first appeared in *Finnegan v. United States*, 204 F.2d 105, 108 (8th Cir. 1953). There, the defendant moved to dismiss the indictment based on misjoinder. On appeal he changed courses, arguing in favor of severance because "the testimony as to the several distinct offenses charged was such as to hamper and confound the defendant in his defense." *Id.* at 109.

The Eighth Circuit focused on the shift, explaining, "[a] mere inspection or examination of the indictment would not we think, disclose that such might reasonably be expected to result. If, however, the defendant felt that the testimony was such as to prejudice him in this regard, he should have renewed his motion either at the close of the government's evidence or at the close of the entire case. We have held that it may properly be interposed at the close of all the evidence." *Id.* In other words, because the pretrial severance motion about the *indictment* did not disclose the potential for prejudicial *testimony*, the defendant needed to raise that specific claim to the district court once it arose. *See id.*

By 1962, the Ninth Circuit adopted the same commonsense proposition; severance grounds *appearing only during trial* must be raised at the close of

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which governs relief from prejudicial joinder.

evidence. *See Williamson v. United States*, 310 F.2d 192, 197 (9th Cir. 1962). Specifically, in *Williamson* – citing *Finnegan* as its lone authority – the Court noted, "[w]here prejudice from joinder *appears in the course of trial,* it has been held that the request for severance must be renewed at the close of the evidence or it will be treated as waived." *Id.* (emphasis added).

While the precise language used to describe this rule changed over time – more recent cases often (and without discussion) omit the introductory "appears in the course of trial" clause – the underlying rationale remains the same. If the pretrial motion fails to encompass a basis for severance that emerges only later during trial, that ground must be raised at the close of evidence when the district court is in a position to rule. Indeed, there is no other rationale for the rule. And like all procedural rules, it must be applied in light of its specific purpose and the reasons for which it exists.

B. The Ninth Circuit's application of the renewal requirement is divorced from its purpose.

Plainly, those reasons do not apply in this case. The defendants raised by pretrial motions the exact grounds for severance that they pursued on appeal. Indeed, the pretrial severance filings specifically argued, "[t]he parties defenses will be so antagonistic and inconsistent that CRS will become a second prosecutor to [UC], and [UC] will become a second prosecutor to CRS." ER:406. The "[UC]

and the CRS Defendants will engage in mutually antagonistic and inconsistent defenses to the point that if the jury believes one party, the other party will necessarily be convicted." ER:420. Accordingly, because no new grounds appeared only at trial, under *Williamson*, *Finnegan*, and commonsense, there was no requirement to renew the motion at the close of evidence and thus no waiver.

For this reason alone – and to reconnect the renewal requirement to its historical roots – further review is warranted. But there is more. Even if severance was *never* raised below, that should not preclude appellate review.

C. The Ninth Circuit's waiver finding conflicts with Rule 52(b) and the weight of authority.

On this issue, the court of appeals failed to grasp the distinction between "waiver" and "forfeiture." As this Court has made clear, "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted).

Here, there was no intentional relinquishment. For instance, the situation was different in kind from other scenarios – such as a guilty plea or bench trial – in which the defendant is advised of his or her rights and then chooses relinquishment. Instead, the defendants' failure to renew their severance request resulted from trial counsels' unfortunate oversight (not a tactical decision). And that is precisely the

purview of plain-error review: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

Indeed, in this specific severance context, cases from the other Circuits applying plain-error review are legion:

- *United States v. Thomann*, 609 F.2d 560, 564 (1st Cir. 1979) ("Since defense counsel failed to move for severance at trial, we look to see if the court's failure to sever sua sponte was plain error.").
- *United States v. Joyner*, 201 F.3d 61, 74-75 (2d Cir. 2000) ("[Appellant's] claim is reviewable only for plain error because he failed to move for severance prior to trial.").
- *United States v. Quintero*, 38 F.3d 1317, 1339 (3d Cir. 1994) ("Because Gonzalez did not object to . . . the failure to sever, we review the district court's action for plain error.").
- *Fields v. United States*, 370 F.2d 836, 838 (4th Cir. 1967) ("the failure of appellant's counsel to request a severance would not foreclose our noticing and correcting plain error in the record.").

- *United States v. Reagan*, 725 F.3d 471, 491 (5th Cir. 2013) ("Where a defendant fails to move to sever, we review for plain error only whether the district court should have nevertheless severed the case.").
- *United States v. Deitz*, 577 F.3d 672, 687 (6th Cir. 2009) ("we have also applied Rule 52(b)'s plain-error review to new suppression arguments raised for the first time on appeal").
- *United States v. Gio*, 7 F.3d 1279, 1285 (7th Cir. 1993) ("Where a defendant has waived the severance issue by neglecting to file a pretrial motion and failing to show cause for his oversight, we review for plain error.").
- *United States v. Sanchez-Garcia*, 685 F.3d 745, 754 (8th Cir. 2012) (the defendant "did not move to sever before or during trial, so we review the district court's conduct of a joint trial for plain error.").
- *United States v. Barrett*, 496 F.3d 1079, 1097 (10th Cir. 2007) ("Barrett did not assert any misjoinder issues below. Thus, the arguments he now presents regarding misjoinder are subject to review only for plain error.").
- *United States v. Hill*, 643 F.3d 807, 832 (11th Cir. 2011) ("We will not hold that the district court abused its discretion in failing to grant a severance on a ground that was never brought to its attention. The best that [the defendant] is entitled to is plain error review").

- *United States v. Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997) ("Where, as here, a defendant fails to move for severance of a charge at the trial level, we will review only for 'plain error.'").

Thus, the Ninth Circuit's refusal to review the severance issue for plain error was unjustified. Not only does it conflict with the other courts of appeals' precedent, it cannot be squared with Rule 52(b) or *Olano*, 507 U.S. at 733 ("[t]he appellate court must consider the error, putative or real, in deciding whether the judgment below should be overturned"). And it is a strange rule indeed that leaves a litigant who raises an issue but forgets to re-raise it in a *worse* position than one who never raises the issue at all.

Accordingly, to bring the Circuits into accord, and strike down the errant, misunderstood renewal requirement, the Court should grant this petition.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: November 15, 2018

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APPENDIX A

FILED

APR 06 2018

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CRAIG MARTIN SHULTS, JOSEPH HAYMORE, PAUL LICAUSI, SYLVIA MELKONIAN, AKA Sylvia Ibarra, Defendants-Appellants.	Nos. 14-50515, 14-50536, 14-50545 & 15-50540 D.C. No. 8:12-cr-00090-AG-1 8:12-cr-00090-AG-2 8:12-cr-00090-AG-3 8:12-cr-00090-AG-6 MEMORANDUM*

Appeals from the United States District Court
for the Central District of California
Andrew J. Guilford, District Judge, Presiding

Argued and Submitted December 4, 2017
Pasadena, California

Before: TASHIMA and BERZON, Circuit Judges, and KENNELLY,** District Judge.

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

** The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

Craig Shults, Joseph Haymore, Paul Licausi, and Sylvia Melkonian appeal their convictions for wire fraud under 18 U.S.C. § 1343. Shults and Haymore also appeal their sentences. The convictions involved a scheme to sell investors distressed residential properties without disclosing known issues with the title and physical quality of the homes.

The defendants raise six issues on appeal. First, all defendants claim the trial court erroneously denied their motion to sever their joint trial. Second, Haymore and Licausi argue the trial court wrongly admitted two exhibits. Third, Haymore, Licausi, and Melkonian contend their convictions were supported by insufficient evidence. Fourth, all defendants argue the prosecution engaged in misconduct. Fifth, Shults challenges the role enhancement the trial court applied to his sentence. Sixth, Haymore argues the district court erroneously calculated the loss amount and restitution order when determining the sentence to impose.

First, the defendants waived review of the district court's denial of their motion to sever by failing to renew the motion at the close of evidence. A severance motion must be renewed at the close of evidence or it is waived, unless the movant "can show either that he diligently pursued severance or that renewing the motion would have been an unnecessary formality." *United States v. Decoud*,

456 F.3d 996, 1008 (9th Cir. 2006) (citation omitted). Neither exception applies. When the trial court denied a pretrial motion to sever, it stated that its ruling was accompanied by "a very, very, strong statement of that being without prejudice to the presentation of additional facts along the way." The defendants allege that, as the trial progressed, additional facts supporting severance emerged—yet they did not renew the motion when those facts were introduced. Thus the renewal of the motion at the close of evidence would not have been an unnecessary formality.[1]

Second, we uphold the trial court's admission of Exhibits 173 and 175-A. "We review a district court's finding that evidence is supported by a proper foundation for an abuse of discretion." *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000). Federal Rule of Evidence 901(a) requires that the proponent "make only a prima facie showing of authenticity so that a reasonable juror could find in favor of authenticity." *United States v. Chu Kong Yin*, 935 F.2d 990, 996 (9th Cir. 1991) (internal quotation marks and citation omitted). At issue is the admission of Exhibit 173, an e-mail from Haymore to Shults with an attached PowerPoint, and Exhibit 175-A, an e-mail from Licausi to Shults with an attached

[1] To the extent the defendants challenge the denial of the timely pretrial motion to sever, the district court did not abuse its discretion in refusing severance at the time it was requested without prejudice to the issue being renewed at trial. *See United States v. Kaplan*, 554 F.2d 958, 966 (9th Cir. 1977).

real estate agreement. The foundation for both exhibits was provided by Norman Southerby, to whom Shults forwarded both e-mails, who authenticated each exhibit through the "testimony of a witness with knowledge." Fed. R. Evid. 901(b)(1). The exhibits were also adequately authenticated by supporting circumstantial evidence. *See* Fed. R. Evid. 901(b)(4). First, Justin Hannah testified that he introduced Shults and Haymore around the time the e-mails were exchanged. Next, Manuel Ramirez, an associate of Shults, testified that Shults was e-mailed a PowerPoint presentation and that Shults discussed with Haymore and Licausi how the PowerPoint presentation would be used. Finally, Cory Cooper, an employee at Haymore's company, testified that the PowerPoint attached to Shults's e-mail to Haymore included contents that were also included in other PowerPoints compiled by Haymore's company. Moreover, the e-mails bore the e-mail addresses used by Haymore, Licausi, and Shults. *See United States v. Fluker*, 698 F.3d 988, 999 (7th Cir. 2012) (use of the defendant's e-mail address was circumstantial evidence that the proffered e-mail from the defendant was authentic).

Once a party has introduced enough evidence to allow a reasonable juror to find that an exhibit is what it is claimed to be—as the recipient of an e-mail may do, based upon knowledge through receipt of the item—further arguments about the reliability of the exhibit go to the weight the jury should give it, not its

admissibility. Given Southerby's testimony and the supporting circumstantial evidence, the trial court did not abuse its discretion by admitting the exhibits. Finally, we have considered the defendants' Confrontation Clause and Best Evidence Rule arguments and conclude they lack merit.

Third, we affirm the convictions of Haymore, Licausi, and Melkonian, each of whom contests the sufficiency of evidence underlying his or her conviction. We review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc). The elements of wire fraud are (1) the existence of a scheme to defraud, (2) the use of wire, radio, or television to further the scheme, and (3) a specific intent to defraud. 18 U.S.C. § 1343; *United States v. Sullivan*, 522 F.3d 967, 974 (9th Cir. 2008).

The Government introduced sufficient evidence to convince a rational trier of fact that Haymore and Licausi engaged in a scheme of fraudulent conduct with specific intent to defraud. This included evidence that Haymore and Licausi continued to provide real estate for Shults to sell after learning of title issues with the properties. The Government also offered evidence showing that Haymore and Licausi, at the onset of the scheme, shared with Shults a PowerPoint and contract

that contained promises, including prompt delivery of title, that were never fulfilled for many buyers. Likewise, the Government presented sufficient evidence to convince a rational trier of fact that Melkonian also had the requisite intent. Melkonian was apprised of the significant title issues with the properties being sold, but continued to aid Shults in the sales of the property long after these issues arose. Finally, the Government also introduced sufficient evidence of the use of the wires for Haymore, Licausi, and Melkonian. Each conviction was supported by sufficient evidence.

Fourth, the prosecution did not engage in misconduct that warrants reversal. We review the record de novo to determine if prosecutorial misconduct occurred, and for plain error to determine whether reversal is warranted where, as here, the defendants did not object contemporaneously to the misconduct. *United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015).

The defendants challenge certain statements as impermissible "vouching," which is misconduct. Vouching occurs when a prosecutor's statement "improperly introduce[s] . . . the prosecutor's experience with similar cases . . . as a means of commenting on the defense's case." *United States v. Wright*, 625 F.3d 583, 611 (9th Cir. 2010). The Court agrees that the prosecutor, when he twice analogized the defendants' cases to conduct in "every fraud case" he had worked on, engaged

in improper vouching. But because the statement was partially invited by the defense's argument, isolated, and of limited severity, the Court concludes that the statements do not warrant reversal. *United States v. Koon*, 34 F.3d 1416, 1445-46 (9th Cir. 1994), *rev'd on other grounds*, 518 U.S. 81 (1996).

The prosecutor's other statements challenged by the defendants do not constitute misconduct. First, the prosecutor's mention of his "next gang case," made while describing the consequences of the defense's line of reasoning in a hypothetical future case, was not misconduct, as the prosecutor did not reference gangs in a way that would encourage the jury to convict the defendants for "reasons wholly irrelevant to [their] own guilt or innocence." *Id.* at 1443 (internal quotation marks and citations omitted). Second, the prosecutor's characterization of the reasonable doubt standard was not misconduct, as it fairly characterized the burden placed upon the jury. Third, the prosecution's objection to the introduction of certain evidence as hearsay was not misconduct. A prosecutor who objects to the defense's exhibit as hearsay, whose objection is ultimately denied, and against whom the exhibit is used in closing has not committed misconduct. Finally, the cumulative effect of the prosecution's conduct does not warrant reversal. Unlike in *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988), in which the

defendant's conviction relied on limited evidence, the defendants' convictions in the present case were premised on ample evidence establishing their guilt.

Fifth, we affirm the district court's application of a four-level role enhancement to Shults's sentence. The Court reviews Shults's first argument, that the trial court misapplied the Sentencing Guidelines, for abuse of discretion. *United States v. Rodriguez-Castro*, 641 F.3d 1189, 1192 (9th Cir. 2011). The trial court did not abuse its discretion by failing to make specific factual findings when determining the proper role enhancement. *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir. 1995) ("The district court need not make specific findings of fact in support of an upward role adjustment.") (citation omitted).

We review Shults's second argument, that the facts do not support his "leader" enhancement, for clear error. *Rodriguez-Castro*, 641 F.3d at 1192. The trial court did not clearly err. Not only did Shults facilitate and lead the seminars at which the investors were deceived, he exercised authority over Melkonian during the fraudulent scheme, which is sufficient to warrant the enhancement. *United States v. Barnes*, 993 F.2d 680, 685 (9th Cir. 1993) (affirming leadership enhancement applied to defendant who exercised authority over one other individual).

Finally, we affirm the district court's calculation of $1.4 million as the amount of loss attributable to Haymore. We apply de novo review to Haymore's first argument, that the trial court wrongly found the amount of loss by a preponderance of evidence, rather than clear and convincing evidence. *United States v. Berger*, 587 F.3d 1038, 1042 (9th Cir. 2009). The trial court did not err by using the preponderance standard to find the amount of loss. The preponderance standard is appropriate to find the facts relating to the extent of a conspiracy or a fraudulent scheme, such as wire fraud. *Id.* at 1048-49.

We review Haymore's second argument, that the trial court miscalculated the amount of loss, for clear error. *United States v. Kimbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005). The trial court "need only make a reasonable estimate," which is "entitled to appropriate deference," as "[t]he sentencing judge is in a unique position to assess the evidence." U.S.S.G. § 2B1.1 cmt. 3(C). The total losses associated with the scheme were approximately $6 million: $4 million in 2009 and, after Haymore departed the scheme, $2 million in 2010. Haymore contends that the trial court clearly erred by using losses incurred in 2009 and 2010 to calculate his amount of loss. We disagree; the trial court did not use losses from 2010. The court based its estimate of loss for Haymore on its estimate for Shults. During Shults's sentencing, the Government repeatedly stated it was attempting to

prove that he was responsible for $4 million in losses—the amount of loss attributable to the 2009 conduct. During Haymore's sentencing, the trial court interrupted his counsel twice to suggest it had based Shults's sentence on $4 million of losses (the 2009 losses), not $6 million (the sum of 2009 and 2010 losses). The trial court ultimately discounted Haymore's losses by $600,000 from its finding for Shults. Thus the loss amount and restitution order were not clearly erroneous.

AFFIRMED.

APPENDIX B

FILED

AUG 31 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CRAIG MARTIN SHULTS, JOSEPH HAYMORE, PAUL LICAUSI, SYLVIA MELKONIAN, AKA Sylvia Ibarra, Defendants-Appellants.	Nos. 14-50515, 14-50536, 14-50545 & 15-50540 D.C. No. 8:12-cr-00090-AG-1 8:12-cr-00090-AG-2 8:12-cr-00090-AG-3 8:12-cr-00090-AG-6 ORDER

Before: TASHIMA and BERZON, Circuit Judges, and KENNELLY,* District Judge.

The panel has voted to deny defendants-appellants' petition for rehearing en banc and appellant Joseph Haymore's petition for rehearing and rehearing en banc.

The full court has been advised of the petitions 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 rehearing and petitions for rehearing en banc are **DENIED.**

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.