

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KULWANT SINGH SANDHU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 7 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KULWANT SINGH SANDHU, AKA Ken
Sandhu,

Defendant-Appellant.

No. 17-10265

D.C. No.

2:15-cr-00231-GEB-1

Eastern District of California,
Sacramento

ORDER

Before: D.W. NELSON, W. FLETCHER, and BYBEE, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for panel rehearing of Defendant-Appellant Kulwant Singh Sandhu (Dkt. 42).

Judge W. Fletcher and Judge Bybee voted to deny the petition for rehearing en banc of Defendant-Appellant Kulwant Singh Sandhu (Dkt. 42). Judge D.W. Nelson recommended denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

Accordingly, the petition for panel rehearing and rehearing en banc is **DENIED.**

Appendix B

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 25 2018

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KULWANT SINGH SANDHU, AKA Ken
Sandhu,

Defendant-Appellant.

No. 17-10265

D.C. No.
2:15-cr-00231-GEB-1

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, Jr., District Judge, Presiding

Argued and Submitted October 10, 2018
San Francisco, California

Before: D.W. NELSON, W. FLETCHER, and BYBEE, Circuit Judges.

Kulwant (“Ken”) Singh Sandhu appeals his jury conviction for two counts of making harassing telephone calls to the Securities and Exchange Commission and the Financial Industry Regulatory Authority in violation of 47 U.S.C.

§ 223(a)(1)(D). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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

“When a party properly objects to a jury instruction, we review de novo whether the instructions given ‘accurately describe[] the elements of the charged crime.’” *United States v. Garcia*, 729 F.3d 1171, 1175 (9th Cir. 2013) (alteration in original) (quoting *United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (en banc)). “[A]n instruction tracking a statute is generally not erroneous” *Id.* at 1177 (citing *Johnson v. United States*, 270 F.2d 721, 725 (9th Cir. 1959)). “A criminal defendant is entitled to jury instructions related to a defense theory so long as there is any foundation in the evidence and the instruction is supported by law.” *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2014) (quoting *United States v. Doe*, 705 F.3d 1134, 1144 (9th Cir. 2013)) (internal quotation marks omitted). We review for abuse of discretion whether the proposed construction has “some foundation in the evidence” and review de novo whether an instruction is “supported by law.” *United States v. Anguiano-Morfin*, 713 F.3d 1208, 1209 (9th Cir. 2013) (quoting *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011) (internal quotation marks omitted)).

In the instant case, the district court gave jury instructions that tracked the language of the statute precisely. The district court’s jury instructions did not omit any required elements of the crime. *Cf. Garcia*, 729 F.3d at 1177. Sandhu’s proposed instructions regarding the First Amendment were not “supported by law” because, as described below, 47 U.S.C. § 223(a)(1)(D) does not criminalize

speech, but only conduct. The district court did not err in failing to give the defense's proposed jury instructions.

This Court reviews the sufficiency of evidence to justify a conviction de novo. *United States v. Kaplan*, 836 F.3d 1199, 1211 (9th Cir. 2016). The inquiry is whether, when the evidence is viewed in the light most favorable to the government, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 1211–12 (quoting *Jackson v. Virginia*, 433 U.S. 307, 319 (1979)) (internal quotation marks omitted).

Under de novo review, we find that, when the evidence is viewed in the light most favorable to the government, there was sufficient evidence to justify Sandhu's conviction based on the sheer number of calls, as well as the ensuing conversations evidencing the intent Sandhu had in making those calls.

We review a challenge to the constitutionality of a statute de novo. *United States v. Ward*, 989 F.2d 1015, 1017 (9th Cir. 1992).

Under de novo review, we find that Sandhu's conviction is not unconstitutional because 47 U.S.C. § 223(a)(1)(D) regulates conduct and does not regulate speech. Any expressive aspects of Sandhu's conduct were “integral to criminal conduct” and thus not protected under the First Amendment. *See, e.g., United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014).

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT
Eastern District of California

UNITED STATES OF AMERICA

v.

KULWANT SINGH SANDHU

JUDGMENT IN A CRIMINAL CASE

Case Number: **2:15CR00231-1**

Defendant's Attorney: Tim Zindel, Mia Crager, Assistant Federal
Defender

THE DEFENDANT:

- ☐ pleaded guilty to count(s) ____ .
☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.
☒ was found guilty on count(s) 1 & 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) ____ .
☐ Count(s) ____ dismissed on the motion of the United States.
☐ Indictment is to be dismissed by District Court on motion of the United States.
☒ Appeal rights given. ☐ Appeal rights waived.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

5/19/2017

Date of Imposition of Judgment



Signature of Judicial Officer

Garland E. Burrell, Jr., Senior U. S. District Judge

Name & Title of Judicial Officer

6/19/2017

Date

DEFENDANT: KULWANT SINGH SANDHU
CASE NUMBER: 2:15CR00231-1

PROBATION

You are hereby sentenced to probation for a term of:
60 months.

MANDATORY CONDITIONS

You must not commit another federal, state or local crime.

You must not unlawfully possess a controlled substance.

You must refrain from any unlawful use of controlled substance. You must submit to one drug test within 15 days of placement on probation and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.
- ☒ You must cooperate in the collection of DNA as directed by the probation officer.
- ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.
- ☐ You must participate in an approved program for domestic violence.
- ☐ You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664.

You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.

If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.

You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: KULWANT SINGH SANDHU
CASE NUMBER: 2:15CR00231-1

STANDARD CONDITIONS OF SUPERVISION

As part of your probation, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the Court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF PROBATION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States probation officer, or any other authorized person under the immediate and personal supervision of the probation officer, based upon reasonable suspicion, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
3. The defendant shall be monitored for a period of 6 months, with location monitoring technology, which may include the use of radio frequency (RF) or Global Positioning System (GPS) devices, at the discretion of the probation officer. The defendant shall abide by all technology requirements and shall pay the costs of location monitoring based upon their ability to pay as directed by the probation officer. In addition to other court-imposed conditions of release, the defendant's movement in the community shall be restricted as follows:

The defendant shall be restricted to his residence at all times except for employment; education; religious services; medical, substance abuse or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved by the probation officer.

4. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
5. The defendant shall consent to the probation officer and/or probation service representative conducting periodic unannounced examinations of (a) any computer, or (b) computer-related device, or (c) equipment that has an internal or external modem which is in the possession or control of the defendant. The defendant consents to retrieval and copying of all data from any such computer, computer-related device, or equipment as well as any internal or external peripherals to ensure compliance with conditions. The defendant consents to removal of such computer, computer-related device, and equipment for purposes of conducting a more thorough inspection and analysis.

The defendant consents to having installed on any computer, computer-related device, and equipment, at the defendant's expense, any hardware or software systems to monitor the use of such computer, computer-related device, and equipment at the direction of the probation officer, and agrees not to tamper with such hardware or software and not install or use any software programs designated to hide, alter, or delete his computer activities. The defendant consents to not installing new hardware without the prior approval of the probation officer.

6. The defendant shall consent to third-party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon him. This includes any activities in which you are acting as a technician, advisor, or consultant with or without any monetary gain or other compensation.
7. As directed by the probation officer, the defendant shall participate in a program of Moral Reconciliation Therapy (MRT).
8. The defendant shall have a single phone with a single phone service provider. The defendant shall disclose the contract with the phone service/cable service/ISP provider to the probation officer. If the defendant has a work or business phone through his employer, the defendant shall disclose that phone number and phone service provider to the probation officer. The defendant shall provide all requested phone records to the probation officer. Upon request, the defendant shall identify any or all called phone numbers appearing in the phone records.
9. The defendant shall participate in a program of job training.
10. The defendant shall have no contact with the law firm Kirkland and Ellis; FINRA; or the U.S. Securities and Exchange Commission, including current and/or former officials or employees of these entities, by phone, email, webform, facsimile, or over the internet. The defendant may not contact these entities or persons via the U.S. Mail, unless preapproved by the probation officer.
11. The defendant shall not block or hide his phone number when making calls.
12. The defendant shall have no contact with any governmental or regulatory agency or authority, public or private, except by U.S. mail or in a manner pre-approved by the probation officer. Any contact that involves complaints about Netflix, the stock market, or the economy shall be accompanied by a notice (a) informing the recipient that Mr. Sandhu is on supervision for the offense of repeated harassing phone calls and (b) providing the case number of this case.

CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200		

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals	\$ _____	\$ _____	

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ The interest requirement is waived for the ☐ fine ☐ restitution
- ☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:
- ☐ If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.
- ☐ If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.