

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

YONG S. CHA,

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 WRIT OF CERTIORARI

TARIK S. ADLAI
LAW OFFICES OF TARIK S. ADLAI
65 No. Raymond Avenue
Suite 320
Pasadena, California 91103
(626) 578-7294

Counsel for Petitioner

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Appendix A

FILED

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 29 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

YONG S. CHA,

Defendant-Appellant.

No. 15-50465

D.C. No.
8:11-cr-00181-JLS-3

AMENDED MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Argued and Submitted October 10, 2018
Pasadena, California

Before: SCHROEDER and NGUYEN, Circuit Judges, and WHELAN, ** District Judge.

Yong S. Cha appeals his conviction after a retrial for one count of making false statements affecting a health care program, in violation of 18 U.S.C.

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

** The Honorable Thomas J. Whelan, United States District Judge for the Southern District of California, sitting by designation.

§ 1035(a)(2). We have jurisdiction pursuant to 28 U.S.C. § 1291. Cha raises five issues on appeal. For the reasons that follow, we affirm.

Cha argues his retrial violated double jeopardy because his conviction in the first trial was based on insufficient evidence. Cha's first trial did not result in a hung jury, but rather a conviction that was later set aside. We assume, without deciding, that our Circuit law in the circumstances of this case permits Cha to challenge the sufficiency of the evidence to support the conviction in the first trial. The district court correctly ruled that the evidence was more than sufficient.

Cha raises two challenges to the district court's jury instruction. He claims it relieved the government of proving every element of the offense because it did not require the jury to find the treatment notes were forged. Cha was charged under 18 U.S.C. § 1035(a)(2), entitled “[f]alse statements relating to health care matters.” Because there is no Ninth Circuit model jury instruction for § 1035, the district court used the model instruction for a violation of 18 U.S.C. § 1001(a)(3), which uses the same language—“false writing or document”—as § 1035(a)(2). Given the similar language and purpose of the two sections, § 1001(a)'s model jury instruction has been used in other cases involving a violation of section 1035. *See United States v. Natale*, 719 F.3d 719 (7th Cir. 2013) (evaluating district court's jury instruction for violation of 18 U.S.C. § 1035). Forgery is not an element of 18

U.S.C. § 1035(a)(2). The district court, therefore, did not err in patterning the jury instruction after the Ninth Circuit’s model jury instruction for 18 U.S.C. § 1001(a).

Cha also contends the jury instruction constructively amended the indictment because the jury was not limited to convicting him for false statements in the treatment notes. Because there was no evidence that Cha “used” or “made” any documents other than the falsified treatment notes, the jury could only have convicted Cha for false statements in the treatment notes. Accordingly, there was no constructive amendment. *See United States v. Hartz*, 485 F.3d 1011, 1019–23 (9th Cir. 2006) (despite jury instruction’s vague reference to “firearm,” finding no constructive amendment where the only firearms introduced into evidence were those referred to in the indictment).

Cha next contends the district court erred in admitting into evidence his proffer statements. A district court’s decision to admit proffer statements is a question of law reviewed de novo. *See United States v. Rebbe*, 314 F.3d 402, 405 (9th Cir. 2002). Cha’s proffer agreement allowed the government to use his proffer statements to “refute or counter . . . any . . . statement or representation offered by or on behalf of” Cha. Because Cha’s attorney made assertions at trial that were inconsistent with Cha’s proffer statements, the district court did not err in admitting those statements into evidence. *Id.* at 407 (where defendant presented a

defense that was inconsistent with proffer statements, district court did not err in admitting proffer statements).

Cha's final argument is that the district court erred in not permitting him to cross-examine Dr. Pak's wife, So-Ja Pak, regarding potential bias. This argument is not supported by the record. Although the district court precluded Cha from relitigating Dr. Pak's competency, it allowed Cha to cross-examine Mrs. Pak regarding potential bias, including the government's dismissal of her husband from the case and the fact she was testifying for the government.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
HONORABLE JOSEPHINE L. STATON, JUDGE PRESIDING

UNITED STATES OF AMERICA,)
)
)
PLAINTIFF,)
)
)
VS.) SACR NO. 11-00181(A)-JLS
)
)
YONG S. CHA,)
)
)
DEFENDANT.)
)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SANTA ANA, CALIFORNIA

MONDAY, APRIL 27, 2015

9:06 A.M.

DEBORAH D. PARKER, CSR 10342
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
411 WEST FOURTH STREET
SUITE 1-053
SANTA ANA, CALIFORNIA 92701
(657) 229-4305
TRANSCRIPTS@DDPARKER.COM

DEBORAH D. PARKER, U.S. COURT REPORTER

1 THIS CASE WITH EACH OTHER, OR ANYONE ELSE, OR ALLOW ANYONE
2 TO DISCUSS IT WITH YOU, UNTIL YOU'RE SITTING IN THAT JURY
3 ROOM AND DELIBERATING WITH EACH OTHER AFTER IT'S BEEN
4 SUBMITTED TO YOU.

5 I'M GOING TO REMAIN ON THE BENCH, SO HAVE A NICE
6 EVENING. TOMORROW MORNING, AGAIN, IF YOU CAN BE HERE ON
7 TIME, WE CAN -- WE CAN PROCEED ON TIME.

8 THANK YOU.

9 (*JURY OUT.*)

10 (*THE FOLLOWING PROCEEDINGS WERE HAD OUTSIDE THE*
11 *PRESENCE OF THE JURY:*)

12 THE COURT: ALL RIGHT. THEN, IT APPEARS THAT WE
13 HAVE -- WHAT DO WE HAVE LEFT NOW?

14 MR. STAPLES: THE GOVERNMENT INTENDS TO CALL
15 SPECIAL AGENT STRAUGHAN ON REBUTTAL TO TESTIFY AS TO MATTERS
16 IN THE PROFFER, DEPENDING ON THE COURT'S RULING ON THAT
17 ISSUE.

18 THE COURT: AND THE REBUTTAL WOULD BE REBUTTAL TO?

19 MR. STAPLES: TESTIMONY THEY -- WELL, IT WOULD BE
20 TESTIMONY ELICITED REGARDING PAYMENT, AND -- PAYMENT
21 STATEMENTS CONCERNING WHAT THE DEFENDANT WAS TOLD BY
22 DR. PAK, CONCERNING WHAT WAS TO BE DONE WITH THE FILES.

23 THE COURT: AND THAT WAS TESTIMONY ELICITED FROM?

24 MR. STAPLES: I'M DRAWING A BLANK OFF THE TOP OF
25 MY HEAD.

1 THE COURT: THE REASON I'M ASKING IS THAT IT WOULD
2 BE REBUTTAL, IF IT WERE ELICITED, PRESUMABLY, IN THE DEFENSE
3 CASE, CORRECT?

4 MR. STAPLES: YES.

5 THE COURT: AND NOT AS CROSS-EXAMINATION IN YOUR
6 CASE-IN-CHIEF, IN WHICH CASE YOU WOULD HAVE PUT HIM ON IN
7 YOUR CASE-IN-CHIEF.

8 SO I NEED TO KNOW THIS IS REBUTTAL TO THE DEFENSE
9 CASE; AND SO, THAT'S WHY I'M ASKING. BECAUSE I THOUGHT YOU
10 WOULD HAVE PUT AGENT STRAUGHAN ON BEFORE RESTING, NOT AFTER
11 RESTING AND IN REBUTTAL.

12 MR. STAPLES: WELL, FOR INSTANCE, WHEN WENDY CHO
13 TESTIFIED THAT THE DEFENDANT WAS ACTING THAT HE DIDN'T
14 BELIEVE ANYTHING WAS WRONG WITH THE FILES OR ANYTHING OTHER
15 THAN PROPERLY TRANSCRIBED, THAT'S CLEARLY NOT WHAT'S IN HIS
16 PROFFER.

17 THE COURT: AS TO THAT SUBJECT THEN, THAT WAS
18 ELICITED ON -- IN THE DEFENSE CASE. I'M NOT SURE WHAT WAS
19 ELICITED IN THE DEFENSE CASE ABOUT THE MONEY. PERHAPS, THAT
20 WAS -- OH, I RECALL THAT WAS THE -- SUPPOSEDLY WAS THE
21 EXPERT WITNESS WHO TESTIFIED --

22 WELL, I'M NOT SURE. ACTUALLY, I WOULD HAVE TO
23 HAVE YOU REMIND ME WHERE THAT WAS IN THE DEFENSE CASE,
24 BECAUSE I KNOW THAT WAS TESTIFIED TO UNDER CROSS-EXAMINATION
25 THAT WAS RAISED.

1 MR. PAEK: IN TERMS OF THE MONEY BY THE EXPERT WHO
2 TESTIFIED ABOUT THE REASONABLENESS OF 30-, OR 40,000, THAT'S
3 THE EXTENT OF IT.

4 I'M NOT SURE WHERE MR. STAPLES IS SAYING THAT IN
5 THE DEFENSE CASE WE ELICITED STATEMENTS ABOUT WHAT DR. PAK
6 TOLD MR. CHA. I DON'T KNOW WHO OR WHAT WITNESS EVER SAID
7 THAT.

8 THE COURT: NOT ABOUT -- I THINK WHAT DR. PAK TOLD
9 MR. CHA ABOUT WHETHER MR. CHA KNEW ANYTHING ABOUT WHETHER
10 THE TRANSCRIPTIONS WERE ACCURATE OR NOT. THAT WAS TESTIMONY
11 THAT WAS ELICITED NOT THROUGH STATEMENTS BY MR. CHA BUT BY
12 WHETHER HE ACTED IN ANY WAY OR SAID ANYTHING IN ANY WAY THAT
13 INDICATED HE KNEW THAT THOSE TRANSCRIPTIONS WERE NOT
14 ACCURATE. THAT WAS ELICITED IN THE TESTIMONY, OR FROM
15 MS. CHO, IN THE DEFENSE CASE.

16 I'M NOT SURE ABOUT THE MONEY. I CAN'T RECALL
17 ANYTHING OTHER THAN WHAT YOU JUST MENTIONED, MR. PAEK.

18 MR. STAPLES: I WOULD SUBMIT -- I MEAN TO BE
19 CANDID WITH THE COURT, IT WAS -- AND I SHOULD HAVE
20 COMMUNICATED THIS TO THE COURT, WE DID NOT CALL HIM IN THE
21 CASE IN CHIEF BECAUSE WE THOUGHT IT WOULD BE MORE EFFICIENT
22 TO WAIT UNTIL THE END OF THE CASE WHERE THE COURT HAD A MORE
23 COMPLETE RECORD.

24 THE COURT: NO ONE COMMUNICATED THAT TO ME, SO I'M
25 TREATING REBUTTAL AS REBUTTAL.

1 MR. STAPLES: UNDERSTOOD.

2 THE COURT: I THOUGHT THAT HE WAS GOING TO BE
3 CALLED BEFORE HE RESTED, AND I THOUGHT THAT WAS WHAT YOU HAD
4 INDICATED EARLIER.

5 MR. STAPLES: I BEAR RESPONSIBILITY FOR THAT, BUT
6 I DO BELIEVE THAT WE SHOULD BE ALLOWED TO, AT LEAST, GET
7 INTO WHAT HE KNEW.

8 THE COURT: THE TRANSCRIPTIONS, I WILL ALLOW; THE
9 MONEY, I WILL NOT ALLOW, BECAUSE I DON'T THINK THAT WAS
10 ADDRESSED IN THE DEFENSE CASE.

11 MR. PAEK: WHAT WILL BE THE SCOPE OF THE TESTIMONY
12 REGARDING THE TRANSCRIPTIONS?

13 THE COURT: WHAT WAS BEING DONE IN THE
14 TRANSCRIPTIONS: WHETHER ANYTHING WAS BEING ADDED, WHETHER
15 THEY WERE ACCURATE OR NOT ACCURATE, THE NATURE OF THE
16 TRANSCRIPTIONS, THE NATURE OF WHAT MS. SENA CHOI WAS ASKED
17 TO DO BY MR. CHA. BECAUSE THE TESTIMONY BY MS. CHO
18 IMPLICATED THAT HE DIDN'T SAY OR DO ANYTHING THAT WOULD
19 INDICATE THAT HE KNEW THAT THOSE TRANSCRIPTIONS WERE
20 FALSIFIED, OR INACCURATE. SO THAT'S THE SCOPE OF WHAT THEY
21 WILL BE ALLOWED TO ADDRESS THROUGH THE PROFFER STATEMENT,
22 BUT NOT ANYTHING AS TO --

23 MR. PAEK: DOES THE NON-STATEMENT, NONACTION BY
24 THE DEFENDANT TRIGGER THAT?

25 THE COURT: YES. BECAUSE YOU WOULDN'T HAVE ASKED

1 THAT QUESTION BUT FOR THE IMPLICATION THAT HE DIDN'T KNOW
2 ANYTHING AND IF YOU HAD, HE WOULD HAVE SAID SOMETHING OR
3 DONE SOMETHING TO REFLECT THAT HE KNEW. THAT WAS THE
4 PURPOSE OF THE QUESTION. IT WOULD NOT HAVE BEEN RELEVANT
5 OTHERWISE.

6 SO, YES, IT DOES.

7 MR. STAPLES: ACTUALLY, YOUR HONOR, GOING BACK TO
8 THE MONEY, I WAS REMINDED WHEN THEY CALLED JOEL STRAUGHAN IN
9 THEIR CASE, THEY ASKED HIM QUESTIONS REGARDING THE MONEY;
10 PARTICULARLY, WHETHER HE HAD SUBPOENAED VARIOUS BANK RECORDS
11 AND ALL THAT.

12 AND IF THE COURT WOULD RECALL --

13 THE COURT: I RECALL THAT.

14 MR. STAPLES: -- I ASKED HIM WITHOUT TELLING THE
15 SOURCE, DID YOU HAVE ANY INFORMATION CORROBORATING THE
16 PAYMENT? THAT WAS IN --

17 THE COURT: I RECALL THAT, AND I FORGOT TO TAKE A
18 NOTE ON THAT.

19 I RECALL YOU ASKED HIM, SPECIFICALLY, IF HE DIDN'T
20 SUBPOENA IT BECAUSE HE HAD ANOTHER SOURCE THAT WOULD
21 CORROBORATE THAT. AND AT THE TIME, I ASSUMED THAT THAT WAS
22 WHEN YOU WERE GOING -- THAT YOU WOULD CALL HIM ON THAT
23 POINT. I HAD FORGOTTEN THAT.

24 ALL RIGHT. I WILL ALLOW YOU TO DO THAT.

25 MR. ADLAI: YOUR HONOR, WE DON'T THINK THAT

1 ACTUALLY REBUTS ANYTHING. WE SIMPLY ASKED WHETHER THEY HAD
2 SUBPOENAED INFORMATION. AND SO, NOW THE GOVERNMENT IS
3 ASKING IF THEY CAN BOOTSTRAP THEIR OWN QUESTIONING OF
4 MR. STRAUGHAN INTO BRINGING IN THE PROFFER, BECAUSE WE
5 DIDN'T ASK MR. STRAUGHAN ABOUT CORROBORATION, OR ANYTHING.
6 WE ASKED, WHAT WAS THE SCOPE AND THE BREADTH OF YOUR
7 INFORMATION?

8 THIS IS PUTTING THE GOVERNMENT TO ITS PROOF.

9 THE COURT: I UNDERSTAND THAT YOUR POINT IS THAT
10 WE'RE SIMPLY POINTING OUT THAT THEY DON'T HAVE EVIDENCE.
11 HOWEVER, YOU'RE POINTING IT OUT IN THE CONTEXT OF DOCUMENTS
12 THAT THEY SHOULD HAVE REQUESTED AND FAILED TO REQUEST
13 REGARDING THE \$30,000, WHICH, AGAIN, THAT IS AN ARGUMENT
14 THAT IMPLIES THAT THEY DON'T HAVE -- THEY DON'T HAVE ANY
15 EVIDENCE AS TO THE \$30,000 BEYOND HER STATEMENT. THEY
16 SHOULDN'T BELIEVE HER STATEMENTS. SHE'S A LIAR. THEY'RE
17 ENTITLED TO PUT ON IN RESPONSE TO THAT ARGUMENT GENERALLY
18 THAT THEY HAD OTHER EVIDENCE.

19 I'M GOING TO ALLOW THEM TO -- I'M GOING TO ALLOW
20 THEM TO DO THIS. AGAIN, THIS IS A LITTLE BIT TECHNICAL,
21 BECAUSE CLEARLY THEY COULD HAVE DONE THIS IN THEIR OPENING
22 CASE, AFTER THE QUESTIONS, IN THE COURT'S VIEW, WERE RAISED
23 THROUGH CROSS-EXAMINATION. BECAUSE CHARACTERIZING THE
24 TESTIMONY OF MRS. PAK AS LYING WHEN IT COMES TO THE \$30,000
25 WOULD HAVE BEEN SUFFICIENT FOR THEM TO DO THAT.

1 SO I THINK THE FACT THAT THAT WAS ALSO IMPLIED IN
2 THE QUESTIONING ABOUT WHETHER THEY ASKED FOR DOCUMENTS TO
3 SUPPORT WHAT MRS. PAK AND MS. CHOI WERE SAYING GOES TO THAT
4 AS WELL, SO I'M GOING TO ALLOW IT ON THAT BASIS.

5 NOW, IN TERMS OF WHERE WE -- HOW MUCH TIME WE HAVE
6 LEFT ON THIS, I SHOULD KNOW NOW NOT TO BE SURPRISED BY
7 WHETHER WE'RE GETTING AHEAD OF OURSELVES OR NOT. SOMETIMES
8 I THINK IT'S GOING TO TAKE LONGER; AND THEN, LO AND BEHOLD,
9 HERE WE ARE.

10 SO WE DO HAVE JURY INSTRUCTIONS THAT WE'LL NEED TO
11 GO OVER. SO WHAT MY INTENTION IS -- WELL, LET'S HEAR A
12 LITTLE BIT ABOUT HOW LONG YOU THINK YOU'LL GO TOMORROW.

13 MR. ADLAI: IF I MIGHT JUST MENTION ONE OTHER
14 POINT WITH REGARD TO THE PROFFER.

15 THE COURT: YOU MAY.

16 MR. ADLAI: AND THAT IS THAT THE GOVERNMENT,
17 ACTUALLY, HAS -- WITH REGARD TO THE PAYMENT ISSUE, MR. CHA
18 MADE A STATEMENT IN JULY OF 2014 TO THE GOVERNMENT AGENT
19 ABOUT HAVING BEEN PAID. WE BELIEVE, THERE'S SOME ERROR IN
20 THE WAY IT WAS INTERPRETED BY THE AGENT. PUTTING THAT
21 ASIDE, THOUGH, THERE IS SOME INDICATION THAT THOSE -- THAT A
22 STATEMENT WAS MADE.

23 THE GOVERNMENT, FROM MY NOTES, DELIBERATELY
24 BYPASSED, USING THAT INFORMATION WHICH HAPPENED IN A
25 NON-PROFFER CONTEXT. AND THEY HAD A SEPARATE SOURCE OF

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
HONORABLE JOSEPHINE L. STATON, JUDGE PRESIDING

UNITED STATES OF AMERICA,)
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PLAINTIFF,)
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VS.) SACR NO. 11-00181(A)-JLS
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YONG S. CHA,)
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)
DEFENDANT.)
)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SANTA ANA, CALIFORNIA

TUESDAY, APRIL 28, 2015

8:36 A.M.

DEBORAH D. PARKER, CSR 10342
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
411 WEST FOURTH STREET
SUITE 1-053
SANTA ANA, CALIFORNIA 92701
(657) 229-4305
TRANSCRIPTS@DDPARKER.COM

DEBORAH D. PARKER, U.S. COURT REPORTER

08:53:24 1 MERE FACT THAT THERE'S A MODIFICATION DOES NOT PROVE
2 SOMETHING IS FALSE. AND WE DID HEAR --

3 THE COURT: HOW DO YOU ADDRESS -- AGAIN, REGARDING
4 THE BELIEVABILITY OF SENA CHOI, THAT'S NOT SOMETHING THAT
08:53:37 5 THE COURT WOULD ADDRESS. AND SO, IF A JURY WERE TO BELIEVE
6 HER, SHE, ESSENTIALLY, MADE UP THE STATEMENTS OUT OF WHOLE
7 CLOTH. SHE DIDN'T GO BACK AND DISCUSS WITH THE DOCTOR. SHE
8 DIDN'T DO ANYTHING OTHER THAN PULL IT OUT OF A HAT, SO TO
9 SPEAK, WHEN SHE WROTE THOSE.

08:54:00 10 MR. ADLAI: ACTUALLY, SHE, HERSELF, SAID THAT HER
11 OWN TESTIMONY WAS UNREASONABLE.

12 THE COURT: YOU MAY BE ABLE TO PERSUADE A JURY, IN
13 OTHER WORDS, THAT THEY SHOULDN'T RELY ON HER TESTIMONY FOR
14 ALL SORTS OF REASONS, BUT I THINK SHE DID TESTIFY IN
08:54:15 15 ACCORDANCE WITH THAT.

16 I WILL TELL YOU WHAT I'M GOING TO DO: I'M GOING
17 TO RESERVE ON THIS UNDER 29(B). I'M NOT GOING TO MAKE A
18 DECISION AT THIS POINT. BUT I THINK I HAVE ALL OF THE
19 INFORMATION IN FRONT OF ME. AND WE ONLY HAVE ONE MORE
08:54:29 20 WITNESS, I BELIEVE, ANYWAY. WE JUST HAVE AGENT STRAUGHAN
21 BEFORE THIS IS SUBMITTED TO THE JURY.

22 MR. ADLAI: THAT'S CORRECT.

23 WITH THAT, I'M ACTUALLY GOING TO MAKE SOMETHING
24 THAT'S VERY DIFFICULT FOR ME TO --

08:54:44 25 WELL, THE FIRST PART IS NOT QUITE SO DIFFICULT. I

08:54:48 1 WOULD LIKE TO SAY WITH REGARD TO THE COURT'S INTENTION TO
2 ADMIT THE PROFFER, AS TO THE PAYMENT ISSUE, THE DEFENSE --
3 THE DEFENSE THEORY IS NOT THAT MR. CHA HAD NOTHING TO DO
4 WITH THESE PATIENT FILES OR THAT HE WASN'T HIRED TO DO AN
08:55:10 5 AUDIT. IT'S THAT MRS. PAK IS FABRICATING THE CLAIM THAT SHE
6 JUST PAID HIM \$30,000, UPFRONT IN CASH FOR THE TASK.
7 NOTHING IN THE PROFFER REALLY DISPUTES THAT.

8 AS TO THE QUESTION OF MS. CHO -- AND HERE'S --
9 HERE'S, FOR ME, THE MORE DIFFICULT PART: FIRST, I'M GOING
08:55:32 10 TO MOVE TO STRIKE THE QUESTION AND THE ANSWER. THE ANSWER,
11 TO THE EXTENT THERE WAS ONE, WAS -- AT FIRST, IT WAS
12 EXTREMELY GARBLED.

13 THE COURT: I'M SORRY. CAN YOU GO BACK AND TELL
14 ME WHAT QUESTIONS AND ANSWERS WE'RE TALKING ABOUT?

08:55:49 15 MR. ADLAI: MY -- I TRIED TO ELICIT FROM MS. CHA
16 (SIC) THAT EDWARD SAID --

17 THE COURT: MS. CHOI?

18 MR. ADLAI: MS. CHOI.

19 THE COURT: OKAY. I WANT TO MAKE SURE OUR RECORD
08:56:01 20 IS CLEAR.

21 MR. ADLAI: THAT MR. CHA DID NOT TELL MS. CHOI TO
22 SAY THAT THE TRANSCRIPTS WERE ACCURATE. THAT WAS MY INITIAL
23 QUESTION. AND I THINK -- IT, EVENTUALLY, MORPHED INTO
24 SOMETHING ABOUT HIS DEMEANOR OR MANNERISMS DURING THE COURSE
08:56:24 25 OF TALKING TO HER. IT WAS THE STATEMENT THAT THE COURT --

08:56:29 1 IT WAS THE QUESTION THAT I ASKED THAT THE COURT SAID IT WAS
2 RELYING ON TO BRING IN REALLY EVERYTHING ELSE ABOUT THE
3 PROFFER. OR TO THE EXTENT THERE WAS ANYTHING ELSE ABOUT THE
4 PROFFER THAT'S COMING IN, IT'S THAT. SO I DON'T HAVE THE
08:56:44 5 EXACT QUESTION IN FRONT OF ME, BUT I THINK IT WAS SOMETHING
6 LIKE: DID HE BEHAVE IN ANY WAY THAT SUGGESTED HE KNEW THE
7 TRANSCRIPTS WEREN'T ACCURATE, OR SOMETHING LIKE THAT?

8 WHATEVER QUESTION I ASKED THAT ENDED UP PROMPTING
9 THE COURT TO INTRODUCE THE PROFFER, THAT'S WHAT I WOULD LIKE
08:57:08 10 TO STRIKE. TO MY RECOLLECTION, I NEVER GOT A CLEAR,
11 COHERENT ANSWER TO THAT QUESTION. I DO KNOW THAT WE WENT
12 AROUND A FEW TIMES TRYING TO GET AN ANSWER. BUT IF THE
13 COURT DENIES A MOTION TO STRIKE, WE'RE GOING TO MOVE FOR --
14 THE DEFENSE IS MOVING FOR MISTRIAL. I'LL SAY THE GROUND IS
08:57:29 15 CLEAR INEFFECTIVE ASSISTANCE OF COUNSEL.

16 I WILL STATE ON THE RECORD THAT I DID NOT REFLECT
17 ON HOW THE REPHRASED QUESTION MIGHT RESULT IN TRIGGERING THE
18 PROFFER. MY INTENDED QUESTION -- MY ORIGINAL QUESTION WAS
19 SIMPLY: *DID MR. CHA TELL SENA CHOI SHE SHOULD SAY THE*
08:57:49 20 *STATEMENTS WERE ACCURATE?*

21 THIS WAS INTENDED TO DIRECTLY CONTRADICT SENA
22 CHOI'S TESTIMONY THAT MR. CHA SUPPOSEDLY TOLD HER, QUOTE:
23 *JUST SAY THE TRANSCRIPTS ARE ACCURATE.* THAT WAS ADMISSIBLE
24 AS IMPEACHMENT. MOREOVER, THE ANTICIPATED ANSWER TO THAT
08:58:04 25 QUESTION WAS, NO. *HE DID NOT SAY IT.*

08:58:07 1 AND SO, YOU KNOW -- A NONASSERTION, THE
2 NONEXISTENCE OF AN ASSERTION DOES NOT PROVE THE FACT OF THE
3 MATTER ASSERTED. IT'S QUITE THE OPPOSITE OF THAT.

4 SO IT WASN'T HEARSAY, AND IT WAS ADMISSIBLE AS
08:58:20 5 IMPEACHMENT. AND ALTHOUGH WE ELICITED A SUSTAINED
6 OBJECTION, I TRIED TO REPHRASE -- I THEN TRIED TO REPHRASE
7 THE QUESTION IN A WAY THAT COULD GET THE ESSENCE OF WHAT I
8 WAS LOOKING FOR.

9 WHEN I REPHRASED THE QUESTION TO COMPLY WITH THE
08:58:36 10 COURT'S RULING, MS. CHO HAD DIFFICULTY UNDERSTANDING WHAT I
11 WAS TRYING TO ASK HER. AS I SAID, AT THAT TIME, I WAS
12 SIMPLY TRYING TO ADMIT THAT MR. CHA DID NOT TELL SENA CHOI
13 TO SAY WHAT SHE CLAIMED HE SAID AND HE DID NOT TELL HER TO
14 SAY THE TRANSCRIPTS WERE ACCURATE.

08:58:56 15 IN REPHRASING THE QUESTION TO COMPLY WITH THE
16 COURT'S RULING ON HEARSAY AND IMPEACHMENT, I DID NOT
17 REFLECT. I DID NOT THINK ABOUT HOW THAT QUESTION MIGHT
18 TRIGGER THE PROFFER. I HAD NO STRATEGIC OR TACTICAL REASON
19 FOR ASKING THE QUESTIONS HOW THEY MIGHT TRIGGER THE PROFFER.
08:59:12 20 AND WHEN THE PROFFER STATEMENTS WERE SO HEAVILY LITIGATED BY
21 ME, NO LESS AND MADE ADMISSIBILITY SO HOTLY CONTESTED, NO
22 REASONABLY COMPETENT COUNSEL WOULD HAVE FAILED TO KEEP HIS
23 EYE ON THE PRIZE. THAT'S VIGILANCE TO AVOID TRIGGERING THE
24 PROFFER. THAT'S ALL THE MORE IMPORTANT IN THIS SITUATION
08:59:33 25 WHERE THE GOVERNMENT'S ONLY ATTEMPT TO INTRODUCE A PROFFER

08:59:36 1 HAD BEEN BECAUSE OF THE OPENING STATEMENT IN CONTEXT, WHICH
2 THIS COURT ACKNOWLEDGED OR PROBABLY AT LEAST APPRECIATED WAS
3 REALLY UNPRECEDENTED.

08:59:49 4 SO THE GOVERNMENT HAD NOT OFFERED IT IN THEIR
5 CASE-IN-CHIEF. THEY ONLY ASKED FOR IT -- ABOUT THE OPENING
6 AND THEY HAD IN EFFECT DEFAULTED ON THEIR ABILITY TO PRINT
7 THE FULL SCOPE OF THE PROFFER IN THEIR CASE-IN-CHIEF. IN
8 THAT SITUATION, REASONABLY COMPETENT COUNSEL WOULD HAVE BEEN
9 ESPECIALLY VIGILANT TO CAPITALIZE ON THE GOVERNMENT'S
09:00:08 10 DEFAULT AND KEEP OUT THE PROFFER. BY ASKING QUESTIONS
11 WITHOUT FOCUSING UPON AND CONSIDERING -- WITHOUT EVEN
12 CONSIDERING THE BIGGER PICTURE, THEY DIDN'T THINK ABOUT HOW
13 THEY IMPACTED THE ADMISSIBILITY OF THE PROFFER.

14 I WAS CLEARLY UNREASONABLE AND UNPROFESSIONAL. I
09:00:25 15 FAILED TO PERFORM AS A REASONABLY COMPETENT COUNSEL -- TRIAL
16 ATTORNEY WOULD HAVE UNDER THE CIRCUMSTANCES. I THINK A
17 MISTRIAL IS THE APPROPRIATE REMEDY. A MOTION FOR NEW TRIAL
18 OR 2255 IS JUST INEVITABLY GOING TO BE WAITING AROUND THE
19 CORNER. I THINK IT'S MORE EFFICIENT TO SIMPLY GRANT A NEW
09:00:44 20 TRIAL, WITH A NEW TRIAL HELD IN MUCH LESS TIME THAN IT WOULD
21 TAKE FOR NEW COUNSEL TO PREPARE A MOTION FOR NEW TRIAL THAN
22 TO LITIGATE A 2255.

23 I SINCERELY DEEPLY APOLOGIZE TO THE COURT, TO
24 CO-COUNSEL, TO MR. CHA AND TO THE GOVERNMENT. THIS WAS
09:01:03 25 ABSOLUTELY NOT MY INTENTION. AND THAT'S EXACTLY WHY IT WAS

09:01:10 1 INEFFECTIVE. AND I WILL SAY TO THE COURT, JUST REMIND THE
2 COURT DOES HAVE A VIABLE ALTERNATIVE AND THE DEFENSE IS
3 ASKING FOR THE COURT TO STRIKE THE OFFENDING QUESTIONS AND
4 THE ANSWERS. AND WE INVITE A STRONG CAUTIONARY INSTRUCTION
09:01:27 5 THAT THE OFFENDING PORTION, WE CAN LOOK THROUGH THE
6 TRANSCRIPT, IDENTIFY IT, EXCISE IT AND INSTRUCT THE JURY
7 THAT THEY SHOULD DISREGARD IT. TO THE EXTENT SHE EVEN
8 ANSWERED THE QUESTION, I WOULD POINT OUT THAT U.S. V.
9 BARROW, 400 F.3D, AT 119, SPECIFICALLY AUTHORIZES --
09:01:44 10 INVITES, ENCOURAGINGS THIS SORT OF RESPONSE.

11 I WILL HIGHLIGHT THAT UNDER THE CIRCUMSTANCES,
12 THIS IS ESPECIALLY APPROPRIATE, BECAUSE THE TESTIMONY WAS
13 ENTIRELY INADVERTENTLY ELICITED. AND THE DEFENSE ALSO
14 AGREES THAT IF THE EVIDENCE IS STRICKEN, THE DEFENSE WILL
09:02:04 15 NOT ARGUE THAT SENA CHOI'S CLAIM OF AN IMPROPER SOLICITATION
16 WAS CONTRADICTED BY WENDY CHO'S STRICKEN TESTIMONY ABOUT
17 MR. CHA'S DEMEANOR DURING THE AUGUST 11, 2011 MEETING.

18 FINALLY, IN THAT CONTEXT, I WOULD JUST LIKE THE
19 COURT TO REVISIT ITS UNDERLYING RULING WITH REGARD TO THE
09:02:28 20 ADMISSIBILITY. THE COURT MAKES CLEAR THAT THE DISTRICT
21 COURT HAS TO CONSIDER CAREFULLY WHAT FACT HAS BEEN IMPLIED,
22 AND HERE THE IMPLIED FACT --

23 THE COURT: DON'T GO BACK TO HAVE ME REVISIT MY
24 PRIOR RULING WHEN WE HAVE A JURY WAITING, WHICH WE DO NOW.

09:02:45 25 MR. ADLAI: OKAY.

09:02:46 1 THE COURT: ALL RIGHT. ANY RESPONSE BY THE
2 GOVERNMENT?

3 MR. STAPLES: NOT REALLY, YOUR HONOR.

4 I MEAN, MISTAKES HAPPEN IN TRIALS. THE FACT THAT
09:02:58 5 EVIDENCE COMES IN INADVERTENTLY HAPPENS IN EVERY TRIAL I'VE
6 EVER DONE. IT DOESN'T EVEN COME CLOSE TO BEING INEFFECTIVE
7 ASSISTANCE OF COUNSEL, BUT I'LL SUBMIT.

8 THE COURT: THE COURT DOES NOT BELIEVE THAT --

9 LET ME START AT THE BEGINNING. I'M DENYING THE
09:03:11 10 MOTION TO STRIKE. I THINK THE ENTIRE TESTIMONY OF MS. CHO
11 REALLY WENT TO SHOW THAT MR. CHA HAD NO KNOWLEDGE OF WHAT
12 MS. CHOI HAD DONE WITH REGARD TO THE TRANSCRIPTS. THE
13 FACT -- NOT JUST THE QUESTION THAT YOU ASKED, BUT THE ENTIRE
14 FACT OF THE MEETING, HOW THE MEETING PROCEEDED, WHETHER OR
09:03:39 15 NOT THEY HAD AN OPPORTUNITY TO LEAVE THE MEETING AND DISCUSS
16 THIS TOGETHER, ALL OF THAT WENT TO THE UNDERLYING QUESTION
17 THAT IS THE SUBJECT OF THE PROFFER, WHICH WAS WHETHER SHE
18 KNEW THAT THOSE TRANSCRIPTS HAD BEEN -- OR TRANSCRIPTIONS
19 HAD BEEN FALSIFIED. SO I DON'T THINK THAT IT ALL RESTED ON
09:04:01 20 THE PARTICULAR QUESTIONS THAT YOU ASKED.

21 SO THAT SAID, I'M DENYING THE MOTION TO STRIKE,
22 BECAUSE I DON'T THINK THERE'S -- OTHER THAN THAT IT OPENED
23 THE DOOR TO THE PROFFER, THERE'S NO BASIS FOR STRIKING, AND
24 I DON'T THINK IT WAS SOLELY WHAT OPENED THE DOOR TO THE
09:04:20 25 PROFFER, ALTHOUGH IT WAS WHAT WAS HIGHLIGHTED YESTERDAY WHEN

09:04:24 1 WE DISCUSSED IT.

2 THERE WAS ANOTHER POINT THAT I WANTED TO MAKE. I
3 THINK THE OTHER POINT IS SIMPLY THIS: THAT THE COURT WOULD
4 HAVE HAD THE DISCRETION TO ALLOW THE GOVERNMENT TO PUT
09:04:45 5 MR. STRAUGHAN ON IN REBUTTAL, SIMPLY BASED ON THE CONFUSION
6 OVER WHEN MR. STRAUGHAN SHOULD TESTIFY. BECAUSE THE COURT
7 HAD INDICATED THAT I DIDN'T THINK OPENING STATEMENT PROVIDED
8 A SUFFICIENT BASIS, AND I WANTED A FULL RECORD AND,
9 ORIGINALLY, MY THOUGHT WAS THAT MEANT CROSS-EXAMINATION OF
09:05:12 10 THE GOVERNMENT'S WITNESSES. HOWEVER, THE GOVERNMENT COULD
11 HAVE MISUNDERSTOOD THAT AND THOUGHT THAT THEY SHOULD WAIT
12 UNTIL THE ENTIRE TRIAL WAS OVER BEFORE PUTTING
13 AGENT STRAUGHAN ON. I DON'T THINK THERE WAS EVER ANY SENSE
14 THAT THEY WEREN'T GOING TO PUT HIM ON. I NEVER HAD THAT
09:05:29 15 SENSE UNTIL, PERHAPS, WHEN THEY RESTED, AND THEN I -- WE DID
16 NOT HAVE THE COMMUNICATION THAT WE SHOULD HAVE, THAT SHOULD
17 HAVE BEEN BROUGHT TO MY ATTENTION. BUT I THINK I WOULD HAVE
18 HAD THE DISCRETION, BASED ON WHAT HAPPENED IN
19 CROSS-EXAMINATION, TO ALLOW AGENT STRAUGHAN TO TESTIFY ABOUT
09:05:43 20 THE PROFFER AT THAT POINT IN TIME. SO IT WAS REALLY MORE OF
21 A TECHNICAL ISSUE. THEREFORE, THAT'S JUST ANOTHER REASON
22 WHY WHAT YOU DID, MR. ADLAI, DID NOT AFFECT REALLY WHETHER
23 THE PROFFER WOULD COME IN OR NOT.
24 AND SO, FOR THOSE REASONS, BOTH MOTIONS ARE DENIED
09:06:05 25 AND -- OR THE -- THIS MOTION IS DENIED; THE MOTION TO

09:06:09 1 STRIKE, THAT IS, AND THE MOTION FOR MISTRIAL.

2 ALL RIGHT.

3 MR. ADLAI: ONE QUESTION OF CLARIFICATION TO
4 CLARIFY THE SCOPE OF WHAT'S COMING IN. WE, AT LEAST, HAVE
09:06:21 5 TWO PARTICULAR POINTS THAT WE WOULD LIKE TO CLARIFY AS TO --

6 THE COURT: ALL RIGHT.

7 MR. ADLAI: ONE IS: THERE'S SOME DISCUSSION ABOUT
8 EMR'S IN THE PROFFER. IT'S OUR POSITION THAT THERE WAS
9 NOTHING THAT WAS ELICITED IN THE TESTIMONY THAT'S GOING
09:06:34 10 TO -- OR IN THE PROFFER THAT CONTRADICTS OR REBUTS ANYTHING
11 THAT WAS BROUGHT OUT IN THE TESTIMONY.

12 THE SECOND QUESTION -- THE SECOND ISSUE IS:
13 THERE'S SOME REFERENCE IN THE PROFFER ABOUT THE DISPOSITION
14 OF THE FUNDS THAT MR. CHA RECEIVED AND THAT, APPARENTLY,
09:06:59 15 SOME OF IT WAS DEPOSITED TO HIS BUSINESS AND SOME OF IT TO
16 HIS PERSONAL ACCOUNT. THAT HASN'T BEEN -- THERE'S NOTHING
17 IN THE TESTIMONY THAT THE DEFENSE ELICITED TO SAY ANYTHING
18 ABOUT THAT SO THAT THERE'S ANYTHING IN THE PROFFER THAT'S
19 GOING TO CONTRADICT OR REBUT. AND I WOULD JUST ADD THAT
09:07:22 20 IT'S RATHER PREJUDICIAL TESTIMONY. IT'S 404(B) -- OR 404,
21 IMPROPER OTHER EVIDENCE FOR NO LEGITIMATE PURPOSE -- SCOPE
22 OF THE PROFFER.

23 THE COURT: I DON'T KNOW ANYTHING ABOUT THE EMR'S.
24 IS THERE ANYTHING RELATING TO THAT THAT THE GOVERNMENT
09:07:42 25 INTENDS TO QUESTION ABOUT?

09:07:47 1 MR. STAPLES: I DO NOT BELIEVE SO, YOUR HONOR.

2 THE COURT: ALL RIGHT. AS TO THE \$30,000, OTHER

3 THAN --

4 WELL, LET ME ASK, FIRST: DID YOU INTEND TO ASK

09:07:55 5 ABOUT THE DISPOSITION OF THE MONEY? WHAT HE SAID ABOUT THE

6 DISPOSITION OF THE MONEY?

7 MR. STAPLES: WE CAN DO WITHOUT IT.

8 THE COURT: ALL RIGHT. THEN, WE DON'T HAVE TO

9 ADDRESS THAT.

09:08:06 10 THANK YOU.

11 WE ARE GOING TO CALL IN THE JURY. WHAT I'M GOING

12 TO DO, AGAIN, AS I INDICATED BEFORE, IS WE'RE GOING TO END

13 UP LETTING THEM GO EARLY TODAY. UNDERSTANDING THAT

14 EVERYBODY KNEW THIS, RIGHT, WE'RE GOING TO HAVE THEM HERE

09:08:22 15 FOR THE TESTIMONY. WE'RE GOING TO LET THEM GO. WE'RE GOING

16 TO GO OVER JURY INSTRUCTIONS. WE'RE GOING TO TELL THEM TO

17 COME BACK TOMORROW MORNING.

18 THE OTHER ALTERNATIVE IS TO LET THEM GO AND HAVE

19 THEM BACK AT 1:30, AND YOU CAN DO CLOSING THEN. BUT THAT'S

09:08:38 20 NOT WHAT I SAID YESTERDAY, SO I'M GOING TO -- I'M GOING TO

21 GIVE YOU THE OPPORTUNITY TO TELL ME WHICH YOU WOULD PREFER,

22 BECAUSE IT LOOKS LIKE WE MAY HAVE THAT TIME.

23 MR. ADLAI: YOUR HONOR, I SHOULD CLARIFY ONE

24 THING: WHEN WE TALKED ABOUT NO MORE EVIDENCE, WE WERE

09:08:50 25 REFERRING TO THE DEFENSE CASE-IN-CHIEF. DEPENDING ON WHAT

09:08:53 1 MR. STRAUGHAN SAYS.

2 THE COURT: YOU MAY HAVE REBUTTAL.

3 MR. ADLAI: WE HAVE SURREBUTTAL.

4 THE COURT: SURREBUTTAL.

09:08:59 5 MR. ADLAI: OR ON --

6 THE COURT: YES, THAT'S WHAT THAT WOULD BE.

7 MR. STAPLES: WE'RE AMENABLE TO HOWEVER THE COURT

8 WANTS TO DO IT.

9 THE COURT: LET'S SEE HOW TIME FRAME GOES. I

09:09:12 10 WON'T TELL THE JURY ANYTHING THEN UNTIL WE GET THERE. AND

11 THEN WE'LL SEE WHAT KIND OF TIME WE HAVE. IT'S BECAUSE WE

12 HAVE TO ACTUALLY GET THE INSTRUCTIONS ALL NOT ONLY JUST

13 DECIDED UPON, BUT YOU'LL HAVE TO PROVIDE SUFFICIENT COPIES

14 OF THEM FOR THE JURY. AND IF YOU WANT TO USE THEM IN

09:09:30 15 CLOSING, IT MAY BE EASIER FOR YOU TO USE THEM AFTERWARDS. I

16 ALWAYS PREFER TO KEEP THE JURY HERE, BUT I DID SAY THAT

17 YESTERDAY, SO WE MIGHT LEAVE IT THAT WAY. ALL RIGHT. I'M

18 GOING TO STEP OFF THE BENCH. WE'LL BRING THEM IN AND WE'LL

19 GET GOING.

09:09:51 20 (PAUSE.)

21 (THE FOLLOWING PROCEEDINGS WERE HAD IN OPEN COURT

22 IN THE PRESENCE OF THE JURY:)

23 THE COURT: GOOD MORNING, LADIES AND GENTLEMEN.

24 THE JURY: GOOD MORNING.

09:15:31 25 THE COURT: THANK YOU FOR YOUR PATIENCE. NEVER

09:19:02 1 A YES.

2 Q WHAT DID HE TELL YOU?

3 MR. PAEK: I WILL OBJECT, YOUR HONOR.

4 THIS IS BEYOND THE SCOPE OF THE COURT'S

09:19:07 5 DIRECTIONS.

6 THE COURT: WHO ARE YOU REFERENCING WHEN YOU SAY

7 "HIM"?

8 ARE YOU REFERENCING --

9 MR. STAPLES: THE DEFENDANT.

09:19:14 10 THE COURT: OVERRULED.

11 BY MR. STAPLES:

12 Q LET ME JUST REPHRASE IT SO IT'S CLEAR: DID YOU ASK THE

13 DEFENDANT FOR A COPY OF THE INVOICE?

14 A YES.

09:19:21 15 Q WHAT DID THE DEFENDANT TELL YOU?

16 A HE SAID HE COULD NOT PROVIDE ONE. THE COMPUTER HAD A

17 VIRUS. IT WAS WIPED AND HE WAS NO LONGER IN POSSESSION OF

18 THAT COMPUTER.

19 Q NOW, DID THE DEFENDANT ALSO MAKE STATEMENTS TO YOU

09:19:36 20 DURING THAT INTERVIEW ABOUT THE TRANSCRIPTION OF THE FILES?

21 A YES.

22 Q DID HE TELL YOU THAT HE RECEIVED THE FILES FROM

23 DR. PAK?

24 A HE DID.

09:19:47 25 Q DID HE TELL YOU HE REVIEWED THE FILES?

09:21:07 1 HER TO ADD INFORMATION TO THE FILES?

2 A YES.

3 Q DID HE MAKE ANY STATEMENTS ABOUT WHETHER HE BELIEVED

4 THAT ANY OF THE PATIENTS IN THE FILES ACTUALLY RECEIVED THE

09:21:22 5 PHYSICAL THERAPY?

6 MR. PAEK: I'M GOING TO OBJECT, YOUR HONOR. THIS

7 IS BEYOND THE SCOPE OF THE COURT'S RULING.

8 THE COURT: OVERRULED.

9 THE WITNESS: HE DID NOT THINK THE TYPED PROGRESS

09:21:34 10 NOTES -- YOU KNOW, THAT THE PATIENTS RECEIVED THE EXACT TYPE

11 OF PHYSICAL THERAPY THAT WERE DESCRIBED IN THE NOTES.

12 BY MR. STAPLES:

13 Q OKAY. AND DID HE TELL YOU HE THOUGHT IT WAS WRONG TO

14 DO THAT?

09:21:49 15 MR. PAEK: ONCE AGAIN, I'M GOING TO OBJECT. SAME:

16 BEYOND THE SCOPE.

17 THE COURT: OVERRULED.

18 THE WITNESS: HE TOLD US THAT HE KNEW THE PROCESS

19 OF CREATING THE TYPED NOTES WAS WRONG.

09:22:00 20 MR. STAPLES: THANK YOU. NOTHING FURTHER.

21 MR. PAEK: COULD I JUST HAVE A MOMENT, YOUR HONOR?

22 THE COURT: YES.

23 (PAUSE.)

24 THE COURT: YOU MAY INQUIRE.

09:23:33 25 MR. PAEK: THANK YOU, YOUR HONOR.

Appendix D

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 29 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

YONG S. CHA, AKA Edward Cha,

Defendant-Appellant.

No. 15-50465

D.C. No.
8:11-cr-00181-JLS-3

Central District of California,
Santa Ana

ORDER

Before: SCHROEDER and NGUYEN, Circuit Judges, and WHELAN,* District Judge.

The memorandum disposition filed October 26, 2018 (Docket Entry No. 75), and appearing at 741 F. App'x 410, is revised and replaced by an amended memorandum disposition concurrently filed with this Order.

With these amendments, the panel has voted to deny the petition for rehearing. Judge Nguyen voted to deny the petition for rehearing en banc, and Judge Schroeder and Judge Whelan have so recommended. The full court was advised of the petition 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 petitions for rehearing and rehearing en banc are DENIED. No further

* The Honorable Thomas J. Whelan, United States District Judge for the Southern District of California, sitting by designation.

petitions for rehearing or rehearing en banc may be filed in response to the amended memorandum disposition.

Appendix E

RELEVANT CONSTITUTIONAL PROVISIONS AND RULES

U.S. Const., Amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense.

FED. R. CRIM. P. 11(f)

(f) ADMISSIBILITY OR INADMISSIBILITY OF A PLEA, PLEA DISCUSSIONS, AND RELATED STATEMENTS. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

FED. R. EVID. 410

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

* * *

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.