No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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JOHN PATRICK VESCUSO,

Applicant-Appellant,

- v -

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

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**APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR WRIT OF CERTIORARI**

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PARTIES

Applicant John Patrick Vescuso was the Appellant-Defendant in the proceedings in the United States Court of Appeals for the Ninth Circuit. The United States of America was the Appellee-Plaintiff in the Ninth Circuit proceedings.

APPLICATION FOR EXTENSION OF TIME

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Under Supreme Court Rule 13.5, Applicant John Patrick Vescuso respectfully requests that the time to file his Petition for a Writ of Certiorari in this matter be extended for thirty-one days, until February 17, 2019. In support of this application, Mr. Vescuso states:

1. Mr. Vescuso was convicted under 18 U.S.C. §371 of conspiring to violate 18 U.S.C. §641, prohibiting theft of government property. On appeal, the United States Court of Appeals for the Ninth Circuit acknowledged that the district court erred several times during Mr. Vescuso's trial, but found those errors were harmless and affirmed Mr. Vescuso's conviction. The court did, however, remand for further proceedings with respect to the district court's forfeiture order.

2. In a petition for a writ of certiorari, Mr. Vescuso anticipates raising two questions with respect to the Ninth Circuit's harmless error holdings.

3. The first involves whether the Ninth Circuit's holding that the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), error in this case was harmless. As mentioned, Mr. Vescuso was convicted of conspiracy under 18 U.S.C. §371, which provides a maximum sentence of five years unless "the offense, the commission of which is the object of the conspiracy, is a misdemeanor only," in which case "the punishment . . . shall not exceed the maximum punishment provided for such misdemeanor." The object of the alleged conspiracy in this case, 18 U.S.C. §641, can be a

misdemeanor or a felony depending on whether the value of the property involved exceeded $1,000. The indictment did not charge that the object of the conspiracy was to commit theft of property valued at more than $1,000. Accordingly, Mr. Vescuso asserted at sentencing that his maximum permissible sentence is one year, which is the maximum for a §641 misdemeanor. *See* Excerpts of Record (ER), Vol. 4, at 887-88 (filed in Ninth Cir. No. 16-50441, docket #24); Appellant's Opening Brief at 59-60 (Docket #23). The district court nonetheless imposed thirty-three months custody.

In its opinion in this case, the Ninth Circuit held the error was harmless, citing *United States v. Hunt*, 656 F.3d 906, 913 (9th Cir. 2011). *See United States v. Vescuso*, 783 Fed. App'x 666, 669 (9th Cir. 2019) (attached in appendix). *Hunt* sets out a harmless error analysis for a defendant who pleaded guilty (and the Ninth Circuit in that case held *Apprendi* error was not harmless). 656 F.3d at 912-16. Mr. Vescuso's claim, on the other hand, is focused on the punishment that was authorized based on what was charged in the indictment, not based on the evidence that was adduced during a guilty plea or at trial, thus *Hunt* does not provide the appropriate lens to assess his claim. Instead, *United States v. Cotton*, 535 U.S. 625 (2002), does.

In *Cotton*, the defendant raised an indictment-focused *Apprendi* claim, like Mr. Vescuso does. But, unlike Mr. Vescuso, Cotton did not first raise his claim until his case was on appeal, thus this Court applied plain error review. *See id.* 627-28, 631. The Court held that the error in that case was plain, but declined to address the third prong of plain error review – whether the error "affected [the defendant's] substantial rights" – because it held that relief should be denied under the fourth, "public reputation of judicial proceedings" prong of plain error review. *See id.* at 632-33 ("we need not resolve . . . [the third prong of plain-error review], because even assuming respondents'

substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings").

At least three circuit courts have since decided the issue left open in *Cotton*, and held that *Apprendi* error affects a defendant's substantial rights. *See United States v. Robinson*, 390 F.3d 833, 837-38 (4th Cir. 2004) (stating that "[t]he government does not take a position with respect to *Olano*'s third prong, assertedly because the Court in *Cotton* declined to address this prong," but "we have already determined, in their earlier appeals, that the Appellants satisfy the third prong of the *Olano* plain error analysis"); *United States v. Mazzio*, 48 Fed. App'x 120, 128 n.8 (6th Cir. 2002) (stating that "Mazzio would likely pass the third prong of the test" based on *United States v. Page*, (6th Cir. 2000)); *United States v. Mozee*, 405 F.3d 1082, 1091-92 (10th Cir. 2005). That means that such an error cannot be considered harmless, because the yardstick for harmlessness and the third prong of plain error review are the same, only the burden shifts, with the government bearing the burden in the harmless error context. *See United States v. Olano*, 507 U.S. 725, 735 (1993).

In light of the case law discussed above, the *Apprendi* error related to the indictment in this case cannot be considered harmless. This substantial issue will be a focus of Mr. Vescuso's *certiorari* petition.

4. A second issue that will likely be raised in Mr. Vescuso's *certiorari* petition is whether, in assessing if an error is harmless, a court may consider steps the defendant could have taken, but did not take, to ameliorate the harm from the district court's error. In its opinion in this case, the Ninth Circuit concluded that the key trial error that Mr. Vescuso raised on appeal – the district court's preclusion of evidence that the government's cooperating witness, Cecil Garr, was repeatedly pressured by agents to "pin the blame" on Mr. Vescuso, and later did so in exchange for generous

sentencing benefits – was harmless because Mr. Vescuso could have done things to ameliorate the harm from that error. *See Vescuso*, 783 Fed. App'x at 668 (attached in appendix). This holding conflicts with *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (holding that the "correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt"), and *Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988) (holding that preclusion of evidence on cross-examination was not harmless because witness's testimony was "central, indeed crucial, to the prosecution's case"). At this point, Mr. Vescuso's counsel is not aware of any circuit court that has looked to a defendant's failure to ameliorate the harm from a district court's error when assessing whether an error was harmless, in the confrontation clause context or in any other context. Of course, there is a great deal of harmless error case law, and further research may reveal case law that directly conflicts with the Ninth Circuit. If so, that will add a stronger circuit-split component to this issue. Considering these circumstances, this is also a substantial issue.

5. The Ninth Circuit panel opinion in Mr. Vescuso's case, which is attached in the appendix, was filed on August 2, 2019. Mr. Vescuso timely filed a petition for panel rehearing or rehearing *en banc*, which was denied on October 18, 2019. *See* 10/18/19 Order (attached in appendix). Accordingly, absent an extension of time Mr. Vescuso's petition for a writ of certiorari is due on January 16, 2020. *See* S. Ct. Rule 13.3.

6. Mr. Vescuso is filing this application more than ten days before that date. *See* S. Ct. Rule 13.5.

7. This Court has jurisdiction under 28 U.S.C. §1254(1).

8. Mr. Vescuso is seeking a thirty-one day extension because other commitments have made it impossible for his court-appointed counsel, Todd W. Burns, to prepare an adequate petition for a writ of certiorari on Mr. Vescuso's behalf by the January 16, 2020 deadline. An overview of Mr. Burns's recent and pending professional obligations is set out below.

9. On December 3, 2019, Mr. Burns filed a petition for a writ of certiorari related to *Hays v. Tews*, Ninth Cir. No. 15-56593 (Supreme Court number pending), in which the question presented involves a complicated issue on which there is a 10-2 circuit court split.

During the week of December 2, 2019, Mr. Burns is on-call for taking appointed district court cases in the Central District of California, and during the first two days of that (on-going) duty week he was appointed to three new cases. The early stages of an appointment involve a substantial amount of work that cannot be deferred (*e.g.*, meeting with client, handling bond issues, determining investigatory steps that must be taken immediately, initial court appearances).

On December 13, 2019, Mr. Burns has certificates of appealability due in the Ninth Circuit with respect to the related cases of *Tran v. United States*, Ninth Cir. No. 19-56302, and *Chong v. United States*, Ninth Cir. No. 19-56303.

On December 20, 2019, Mr. Burns has a reply brief due in *United States v. Carrasco*, Ninth Cir. No. 18-50417.

On January 13, 2020, Mr. Burns has supplemental briefing due in the Southern District of California with respect to pretrial motions and a four-day evidentiary hearing in *United States v. Newland, et al.*, S.D. Cal. No. 17-cr-0623. Given that this case involves nine defendants, seeking an extension of that deadline is extremely cumbersome and would throw off scheduling for several other defendants and counsel.

On January 27, 2020, Mr. Burns has an opening brief due in *United States v. Cesar Gomez*, Ninth Cir. No. 19-50313.

On January 28, 2020, Mr. Burns has a trial scheduled to begin in *United States v. Le*, C.D. Cal. No. 19-cr-0174.

10. Mr. Vescuso and his counsel believe this case presents important issues warranting a carefully-prepared petition and that the Ninth Circuit's holdings in this case are contrary to this Court's precedent and opinions from other circuit courts.

11. Counsel for Mr. Vescuso believes that a thirty-one day extension will be sufficient to allow him to prepare a petition for filing in this Court.

12. Counsel for Mr. Vescuso has not sought the position of counsel for Respondent with respect to this application because the matter will be handled for Respondent by the Solicitor General's Office and the matter has not yet been referred to that Office. Thus Counsel for Mr. Vescuso does not have a point of contact with respect to seeking Respondent's position on this application.

13. For the foregoing reasons, Mr. Vescuso respectfully requests that the time to file a petition for a writ of certiorari in this matter be extended thirty-one days, until February 17, 2020.

Respectfully submitted,

/s/ Todd W. Burns

Date: December 5, 2019

TODD W. BURNS
Counsel for Applicant John Vescuso

APPENDIX

2019 WL 3526394
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
John Patrick **VESCUSO**, Defendant-Appellant.

No. 16-50441
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Argued and Submitted April
10, 2019 Pasadena, California
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FILED August 2, 2019

Attorneys and Law Firms

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Todd William Burns, Attorney, Burns & Cohan, Attorneys at Law, San Diego, CA, for Defendant-Appellant

Appeal from the United States District Court for the Southern District of California, Thomas J. Whelan, District Judge, Presiding, D.C. No. 3:14-cr-02863-W-2

Before: RAWLINSON and MURGUIA, Circuit Judges, and RAKOFF, * District Judge.

MEMORANDUM **

***1** **John** **Vescuso** appeals his conviction and sentence for conspiracy to commit theft of government property for his role in a conspiracy to remove and sell scrap metal from Camp Pendleton Marine Corps Base. After a jury trial, Vescuso was convicted of a single count of conspiracy under 18 U.S.C. § 371 and sentenced to 33 months in prison, restitution of $555,640, and forfeiture of $555,640.

1. Vescuso raises a series of challenges to limitations the district court placed on his ability to impeach witnesses and introduce specific testimony at trial.

First, Vescuso challenges restrictions the district court placed on his ability to impeach Cecil Garr, a co-defendant and cooperating witness, about a prior felony conviction. The conviction was more than 15 years-old and did not involve a crime of dishonesty. The district court did not abuse its discretion in limiting Vescuso's ability to impeach Garr, either directly or indirectly, based on this conviction. *See United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999).

Second, Vescuso challenges limitations on his ability to cross-examine Garr based on Garr's plea negotiations, which we review for abuse of discretion. *United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007). As a whole, Vescuso was able to put before the jury that Garr had pled guilty and agreed to cooperate; and, in exchange for that guilty plea, Garr had received benefits—a lower loss amount, a lower amount of restitution, dismissal of one criminal count, and the hope of a favorable sentencing outcome in exchange for his testimony. Because Vescuso was able to impeach Garr with the general contours of the benefits conferred through his plea agreement, we cannot say the district court abused its discretion in limiting impeachment based on specific details of those benefits. *Larson*, 495 F.3d at 1101.

Third, Vescuso challenges the district court's decision to exclude Vescuso's proposed sentencing expert, which we review for abuse of discretion. *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000). Because Vescuso was able to introduce the general contours of Garr's cooperation agreement, the district court did not abuse its discretion in excluding the expert's testimony, which the court determined would waste time and would be cumulative. *See United States v. Johnson*, 297 F.3d 845, 862 (9th Cir. 2002).

Fourth, Vescuso challenges limitations the district court placed on his use of a videotaped interrogation of Garr by federal investigators. Specifically, Vescuso sought to introduce videotaped statements by the investigators that a reasonable jury could have interpreted as the agents strongly pressuring Garr to implicate Vescuso. Although the district court clearly erred in excluding those statements on hearsay grounds (since they were not being offered for their truth), Vescuso could have conveyed their import by more pointed cross-examination of Garr and by playing for the jury Garr's

videotaped responses to the agents' questioning. Although Vescuso's counsel may have misunderstood the scope of the district court's ruling, the district court only excluded the agents' statements, and Vescuso was not prevented from using the video to confront Garr with Garr's own videotaped statements. Thus, even though the district court's exclusion of the agents' statements was error, the error was harmless. *United States v. Torres*, 794 F.3d 1053, 1063 (9th Cir. 2015).

***2** Fifth, Vescuso challenges the district court's limitation on Vescuso's impeachment of Sylvia O'Brien. Vescuso sought to impeach O'Brien by playing a recorded telephone conversation she had with Garr. Vescuso sought to introduce the audio of O'Brien's call with Garr, during *O'Brien's testimony*, because Garr's statements, according to Vescuso, were lies. The district court suggested counsel could ask O'Brien about Garr's answers, but *Garr's* statements could not be played to impeach *O'Brien*. The district court did not abuse its discretion in limiting impeachment in this way. *Larson*, 495 F.3d at 1101.

2. Vescuso next challenges the district court's decision, over Vescuso's objection, to give an "other acts" limiting instruction to the jury. We review the district court's formulation of jury instructions for abuse of discretion. *United States v. Lloyd*, 807 F.3d 1128, 1165 (9th Cir. 2015). Given that evidence of Vescuso's dealings with Garr prior to April 2010—conduct that was allegedly illegal but uncharged—was introduced at trial, the district court did not abuse its discretion in giving the "other acts" instruction. *See Lloyd*, 807 F.3d at 1167; *Comment*, Ninth Circuit Model Jury Instruction 2.11 (noting giving instruction, similar to Model Instruction 4.3, may be appropriate *sua sponte*).

3. Vescuso next challenges the district court's denial of his motion for a new trial based on newly discovered evidence—evidence suggesting that Garr received a bribe from one of his superiors at the base. We review that denial for an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009). The new evidence here would not likely have resulted in an acquittal. *See United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005). The district court did not err in denying the motion or counsel's request for additional CJA funds.

4. Finally, Vescuso raises a series of challenges to his sentence, the restitution imposed, and the forfeiture judgment entered against him.

First, we conclude that any *Apprendi* error that occurred was harmless. *See United States v. Hunt*, 656 F.3d 906, 913 (9th Cir. 2011). Second, 18 U.S.C. § 3663A imposes a mandatory restitution amount equal to the loss suffered by the government. This provision controls the amount of restitution imposed on Vescuso, regardless of the restitution imposed on Garr.

However, we agree with Vescuso that, based on the record before the district court, the imposition of a forfeiture judgment for the entirety of the loss suffered by the government, absent a showing that Vescuso actually acquired the entirety of that amount, was likely incorrect in light of *Honeycutt v. United States*, —— U.S. ——, 137 S. Ct. 1626, 1632, 198 L.Ed.2d 73 (2017). We therefore remand to the district court to determine the amount of money Vescuso "himself actually acquired as the result of the crime," *id.* at 1635, and to amend the forfeiture judgment, if necessary.

AFFIRMED in part; REVERSED and REMANDED in part.

All Citations

--- Fed.Appx. ----, 2019 WL 3526394

Footnotes

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

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

FILED

OCT 18 2019

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. JOHN PATRICK VESCUSO, Defendant-Appellant.	No. 16-50441 D.C. No. 3:14-cr-02863-W-2 Southern District of California, San Diego ORDER

Before: RAWLINSON and MURGUIA, Circuit Judges, and RAKOFF,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Rawlinson and Murguia voted to deny the petition for rehearing en banc, and Judge Rakoff recommended denying the petition for rehearing en banc.

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

The petition for panel rehearing and the petition for rehearing en banc are DENIED (Doc. 72).

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.