No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BYRON DREDD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner's acquittals on two counts – conspiracy against civil rights, 18 U.S.C. section 241 and providing false statements, 18 U.S.C. section 1519 – in petitioner's first criminal trial should have been admitted into evidence in petitioner's retrial for providing false statements, 18 U.S.C. section 1001. The acquitted counts were directly relevant to the case since the acquitted conduct covered the same occurrences in the second trial.

2. Whether petitioner's right to present a defense was violated when he was prevented from testifying about the substance of his contacts, which referenced religion, with his sergeant. This was material to the defense since the government used these communications to show that petitioner conspired with the sergeant. This error helped the government gain a conviction.

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OPINION BELOW

The Ninth Circuit Court of Appeals filed its Opinion on October 27, 2020. It upheld the District Court's proceedings. A copy of the opinion is included in the Appendix as Exhibit A. In its Opinion the Ninth Circuit Court of Appeal found that (1) prior acquittals were not admissible in a subsequent trial and (2) that exclusion of the communications between petitioner and his sergeant were not relevant and properly excluded. A petition for rehearing en banc was timely filed and denied on December 4, 2020. A copy of the denial order is included in the Appendix as Exhibit B.

JURISDICTION

The Opinion of the Court of Appeals from which Mr. Dredd (Petitioner) appeals was filed on October 27, 2020 and the denial of the rehearing was filed on December 4, 2020. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES/CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of Federal Rules

of Evidence 803 and 807 relating to hearsay; Rule 610 relating to religious beliefs; and Rules 401 and 403 relating to relevant evidence.

Also involved is petitioner's constitutional right to present a defense.

STATEMENT OF THE CASE

On October 16, 2015, a three-count indictment was filed charging petitioner with conspiracy against civil rights, 18 U.S.C. § 241 (Count 1); falsification of records, 18 U.S.C. § 1519 (Count 2); and providing false statements, 18 U.S.C. § 1001 (Count 3). (ER 1269-1275)[1] Petitioner proceeded to a jury trial and was found not guilty on Counts 1 and 2. The jury could not reach a verdict on Count 3.

After the government decided to retry Count 3, petitioner moved to dismiss the charge on double jeopardy and collateral estoppel grounds. (ER 1197-1264) The motion was denied and the decision was upheld on appeal by the Ninth Circuit. (ER 1143-1149, 1150-1155) Proceedings in the trial court resumed. Petitioner was then retried on Count 3 and found guilty. (ER 85-87, 163-168, 1141-1142) Petitioner was sentenced to a year in

[1] ER refers to the Excerpts of Record and RT refers to the Reporters Transcript filed in the Ninth Circuit.

federal prison.

Petitioner timely appealed and on October 27, 2020, this court upheld the conviction. A Petition For Rehearing and Suggestion For Rehearing En Banc was filed and denied on December 4, 2020.

STATEMENT OF FACTS

Petitioner, a Los Angeles Deputy Sheriff, was convicted of making false statements to the FBI in violation of 18 U.S.C. section 1001. The conviction stemmed from a 2011 incident that petitioner observed involving several other deputies who assaulted a visitor to the jail, Gabriel Carrillo, and brought false charges against him. According to the government, Petitioner observed the incident through a metal grated window from his work area and allegedly reported that Carrillo had only been handcuffed on one hand, used the cuffs as a weapon, punched another deputy in the chest, and tried to escape the break room where this occurred. After Carrillo filed a claim with the Sheriff's Department, the FBI began an investigation, and interviewed petitioner on July 17, 2012. Petitioner repeated his account with additional detail and stated that Carrillo was the aggressor. It was this interview that formed the basis for the

prosecution.

Prior to the retrial, petitioner moved to admit into evidence his previous acquittals for falsifying records and civil rights conspiracy since they were directly related and integrated into the second trial. The court disallowed the request, relying on the 70 year old case of United States v. Nordgren, *181 F.2d 718, 721 (9th Cir. 1950)*

Petitioner was also prevented from testifying as to the contents of numerous communications petitioner had with his sergeant (Gonzalez) prior to, contemporaneous with, and after the July 17 interview. The government's case revolved around these communications as evidenced by witnesses who testified about these contacts. Further, five years of elaborate charts and records of these communications were presented to the jury. The trial court erroneously excluded the communications, ruling that it would have raised religious evidence, as petitioner proffered that he was discussing religion with the sergeant.

These arguments were rejected by the Ninth Circuit Court of Appeals, yet they present novel and important issues which this court should address.

REASONS FOR GRANTING THE PETITION AND ISSUING THE WRIT

The petition should be granted to determine whether the judgment of the United States Court of Appeals for the Ninth Circuit, which ruled that the District Court acted correctly when it decided that the acquittals in a trial could not be used in a subsequent trial - even though they were directly relevant to the issues in the second trial - was proper. The court ruled that the acquittals were not admissible, relying on United States v. Nordgren, 181 F.2d 718,721 (9th Cir. 1950) a 70 year old case. Exclusion of this evidence violated petitioner's right to due process and a fair trial. Petitioner contends the acquittals were admissible and the decision was wrong. Review should be granted, particularly since the government was permitted to admit 404(b) evidence relating to the exact acquitted conduct. It is also noteworthy that there is a split of authority in the law. As noted below some state courts allow acquittal evidence, yet federal courts seem to vary. Some deny it, but the Supreme Court acknowledged in Dowling v. United States, 439 U.S. 342 (1990) (discussed more thoroughly below) that the Third Circuit permitted it.

The Court of Appeals also erroneously ruled that Petitioner could not testify about the substance of his

meetings, texts, and telephone conversations that he had with his sergeant. This evidence went to a material part of petitioner's defense since the government introduced the communications to show that petitioner and the sergeant were conspiring to produce a false narrative as to what petitioner observed and wrote in his use of force report. The District Court ruled that because petitioner and the sergeant discussed religion that the evidence was inadmissible. The Ninth Circuit agreed. This ruling was wrong. Because the lower court rulings deprived petitioner of his right to a defense. Review should be granted.

Acquittals

In a pretrial motion, the government moved to exclude evidence or argument of petitioner's acquittals in his first trial. (ER 1072-1140) The government argued that the acquittals (1) were not a finding of any fact, but merely an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt, (2) were hearsay and (3) were not relevant. The government also argued such evidence would be confusing, misleading, did not decide the knowledge of the falsity of the

statements made to the FBI, and did not determine an ultimate issue in the present case. The government further argued that evidence of the acquitted conduct, (but not the acquittal itself), could be introduced pursuant to Federal Rule of Evidence 404(b) during its case in chief, since it was not character evidence and would be offered for other purposes. (ER 856-865, 1072-1140)

In response, petitioner argued that since 404(b) evidence was to be admitted, the jury should be instructed on the acquittals since they directly related to Exhibit 2, petitioner's incident report. (ER 904-927) The court ruled that the jury was not to be informed of the acquittals, but that 404(b) evidence was admissible. (ER 101-102)

The Ninth Circuit has not ruled on the issue of the admission of acquittals in almost seven decades, as shown by the trial court and government's reliance on Nordgren v. United States, supra. In a written order the District court cited to Nordgren and to an unpublished Nevada District Court order in United States v. Askren (2017) WL 239742, which ruled on a Motion in Limine. Nordgren involved a fishing dispute where the evidence of the dates were in dispute and thus the acquittals should have been allowed.

Askren cited to cases from the First, Third, Tenth,

Eleventh, and D.C. Circuits, (ER 101-102) which cases relied on hearsay, relevancy, and prejudicial grounds. Askren noted that acquittals are hearsay, unlike convictions which may be admitted under Rule 803 (22) for some purposes, and used for impeachment under Rule 609, while acquittals are not covered by an exception to the rule against admissions of hearsay. Askren cited to United States v. Irvin, 787 F.2d 1506, 1515-1517 (11th Cir. 1986); United States v. Bisanti, 414 F.3d 168,172-173 (1st Cir. 2005); United States v. Gricco, 277 F. 3d 339, 353 (3d Cir. 2002); United States v. De La Rosa, 171 F.3d 215, 219-220 (5th Cir. 1999); United States v. Sutton, 732 F. 2d 1483, 1492 (10th Cir. 1984); United States v. Thomas, 114 F. 3d 228, 250 (D.C. Cir. 1997); and United States V. Viserto, 596 F.2d 531, 537 (2d. Cir 1979)

Some federal courts have determined acquittals to be irrelevant. United States v. Kerley, 643 F.2d 299, 300-301. United States v. Irvin, 787 F. 2d 1506 at p. 1517. Other courts have found acquittals to be prejudicial, confusing and misleading under Rule 403. United States v. Kerley 643 F.2d 299 at pp. 300-301; United States v. Irvin, 787 F.2d 1506 at p. 1517.

However, because acquittals can qualify under Rule

807, the admission of acquittals deserves a fresh and enlightened look, in order that highly relevant information might be admitted. Askren relied on Federal Rule of Evidence 803 which addresses exceptions to the hearsay rule. Askren stated that acquittals were not included in the exceptions to the hearsay rule.

However, Rule 807 is a general catchall exception wherein acquittals definitely can be included. Rule 807 states that under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804: (1) the statement is supported by sufficient guarantees of trustworthiness after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

This court needs to review whether acquittals can be brought into evidence under Rule 807, even though not articulated in Rule 803.

It is also noteworthy that some state courts have allowed prior acquittals into evidence. People v. Mullens (2004) 119 Cal. App. 4th 648; People v. Griffin (1967) 60 Cal. 2d 458.

Further, in Dowling v. United States, supra, the issue arose as to the admissibility, under Rule 404(b), of a subsequent robbery of which appellant had been acquitted. The issue was whether the collateral estoppel doctrine had been violated. The Appellate Court found it had not been, but emphasized that while the District Court permitted the introduction of the testimony, it twice instructed the jury about Dowling's acquittal. The Third Circuit noted that "it is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign had concluded he did not commit." United States v. Dowling, 855 F.2d 114 (3d Cir. 1988); see also United States v. Keller, 624 F.2d 1154, 1159 (3d. Cir. 1980); Wingate v. Wainwright, 464 F.2d 209, 215. (5th Cir. 1972)

In this case, the government's theory of deception and lies by petitioner was predicated upon the very conduct for which he was acquitted. This argument of deceitfulness went to the heart of the government's theories in the prosecution of petitioner that petitioner conspired with

Sergeant Gonzalez. That was the sole purpose of introducing five years of charts pertaining to calls between petitioner and Gonzalez. This evidence created a false perception about the true content of the calls. And, petitioner was acquitted of this exact alleged conspiracy conduct in his first trial.

Petitioner was also acquitted in his first trial of the falsification of records. However, petitioner never physically touched Carrillo or was even in the same room at the time that Carrillo was hurt. The incident transpired quickly and petitioner never observed how the confrontation originated with Carrillo. All observations made by petitioner were through a grated opening of a "Money Window" looking into a break room. The observations lasted only seconds.

At a minimum the District Court should have instructed the jury about the prior acquittals for the same conduct alleged in the second trial, just like in Dowling, where the jury was given instructions twice. Here, the court could have provided the jury with a tailored jury instruction of the previous acquittals.

The unfairness in a judicial forum to not inform a second jury, in some reasonable fashion, that petitioner

was acquitted of this same alleged conduct deprived petitioner of his due process rights and fundamental right to a fair trial.

Twelve reasonable people had already determined that the government's theory was wrong, yet this crucial evidence was excluded. Not only did this evidence have a tendency to prove a disputed fact, but it was crucial to the defense. The jury was entitled to know that petitioner had been previously exonerated of lying on or falsifying his only use of force report.

For the same reasons, the acquittal on the conspiracy to violate civil rights was also relevant. The first jury found no conspiracy, yet the government's case in the second trial revolved around a conspiracy between Gonzalez and petitioner that was previously determined not to exist. There was never any evidence presented at petitioner's trial that he conspired with any other deputies. If the government was going to seek to admit five years of records, petitioner's explanation of these calls should have been allowed. For all of these reasons, the Petition should be granted to decide this important issue.

Conversations between Petitioner and His Sergeant

Petitioner was denied his constitutional right to put on a defense. The government's theory of the case was that petitioner lied to the FBI during his July 17, 2012 meeting when he stated that (1) Carrillo swung at a deputy, pushed past him and tried to escape; (2) Carrillo punched a deputy in the chest; and (3) Carrillo punched a deputy with his right arm. (RT 1/15/19 p.m., 150-151). The government's narrative was that petitioner conspired with Gonzalez and others to paint a false picture of what occurred on February 26, 2011, and that petitioner and Gonzalez discussed the case developments and prepared petitioner's testimony for the FBI interview. A key portion of the government's case was that petitioner and Gonzalez were in ongoing communications with each other and coordinated petitioner's FBI testimony. To make this point, the government relied heavily on extensive phone and text records between petitioner and Gonzalez. FBI agent Leah Tanner testified she subpoenaed five years of Gonzalez's phone records from At&T, received 10,000 pages of records and produced a chart of the communications between petitioner and Gonzalez. These were embodied in Exhibit 23, consisting of 160 pages, and commencing April, 2010.

(ER 515- 568; RT 1/15/19 P.M., 219-222)

By showing the communications between them, the government attempted to draw the inference that petitioner and Gonzalez were in collusion for years, kept in contact about the case and discussed what petitioner would tell the FBI. Agent Tanner's testimony and the records showed that in and around certain key dates, Gonzalez and petitioner would communicate. For example, on August 10, 2011, about four and a half months after the incident, Carrillo filed a claim with the Sheriff's Department, and on August 16th there were two calls between Gonzalez and petitioner. On August 24th there was one call between them. These calls lasted over 15 minutes. On March 27, 2012 Carrillo filed a civil claim against the Sheriff's Department and the deputies, and on that day there was a 32 minute call between Gonzalez and petitioner. (RT 1/16/19 p.m., 222-223)

Agent Dahle testified that he reviewed the calls and charts for accuracy. Exhibit 23 showed 7,492 communications between petitioner and Gonzalez from April 2010 through May, 2015. This consisted of 3,031 phone calls and 4,461 text messages. In 2012 there were 1,678 communications. (RT 1/16/19, p.m. 493-496) During July 2012 there were 199 contacts - 36 phone calls and 163 texts. Exhibit 23-B

showed the phone calls totaled approximately 380 minutes. (RT 1/16/19 p.m., 496-497) One call lasted 20 minutes and another 26 minutes. (RT 1/16/19 p.m., 497) Four text messages were exchanged between July 17 and 18, 2012. On July 17, the date of the FBI interview, there were four text messages, and the day after the interview there were three phone calls. One was 26 minutes, one over 5 minutes and another over 20 minutes.

Agent Dahle noted that the indictment became public on December 9, 2013 and that four other deputies - Zunggeemoge, Luviano, Ayala and Womack - were arrested. Gonzalez was not arrested that day, but his house was searched. There were two communications that day – one for 9 seconds and another for 9 minutes and 34 seconds – and three the following day. (RT 1/16/19 p.m., 497-499)

Agent Dahle testified petitioner's FBI statement contradicted Carrillo's version of events and corroborated the other officers' accounts. (RT 1/16/19 p.m., 500-501)

Even though the government vigorously pushed to introduce five years of the AT&T records to show that petitioner and Gonzalez were coordinating petitioner's conduct, the government opposed and the court would not allow petitioner to explain the substance of the places

they went and conversations between them because the testimony was going to relate to church, religion and bible studies.

During this crucial questioning of petitioner on direct examination, the following occurred:

> Q. ...Did your relationship with Gonzalez change around that time?
> A. I'm sorry, say the time again, ma'am?
> Q. July 2012.
> A. Yes, Ma'am.
> Q. Okay. How did it change at that time?
> A. Um, he became aware that I was relieved of duty. So he called on me to see if I was – if I was okay, and how I was – how I was coping with it.
> Q. So he reached out to you?
> A. Yes, ma'am.
> Q. Okay. And how – how did that overture, did that end up changing the relationship in some way?
> A. Yes, ma'am. Um, he started calling me frequently to make sure that I was okay. There was another deputy who didn't deal with the situation as well, so he was fearful that I might deal with the situation the same way because he knew that I was passionate and he didn't want me to, um, get overly depressed or sad –
> Q. Okay.
> A. – over it.
> Q. That's all right. And how did it change your relationship?
> A. We got – we, um, actually got closer because he saw that I had – that I was staying strong, so he asked what my source of strength was and I told him.
>
> Ms. Dragalin: Objection, relevance, 403.
>
> The Court: We are going beyond what is appropriate Ms. Marion.
>
> Q. So rather than saying what he said, okay? Let's just stick to, um, how the relationship changed.

A. Yes, ma'am.
Q. Okay. So did you start hanging out more or did you start talking more?
A. We started having Bible studies because the gospel is where I got my strength.

Ms. Dragalin: Objection, relevance, 403.

The Court: Sustained.

Ms. Marino: Can we approach, please?

(At the bench.)

Ms. Dragalin: Your Honor, religious beliefs are excluded as a type of evidence to come in, and we don't think this line of questioning has anything to do with what this case is about.

Ms. Marino: The government has introduced extensive phone records.

The Court: It doesn't matter what they did together. Al it matters is they spent time together.

Ms. Marino: Doesn't matter what they talked about in thousands and thousands of phone conversations?

The Court: No. Only generally. And religion is not a proper place here.

Ms. Marino: That's what they talked about. So the jury will never know what they talked about.

Ms. Dragalin: It's not relevant.

The Court: You want the jury to know the other things that are also relevant in my view?

Ms. Marino: Your Honor, all I'm saying is that if the jury does –

The Court: They had long discussions about personal matters. If you can keep religion out of it, I'll let you do a little bit more, but this is – all that matters is the amount of time. It doesn't – that content of their conversations is not relevant.

Ms. Marino: If I tell – if I ask him that and, you know, the jury believes that they talked about personal matters, the jury will believe that they were talking about the Carrillo incident.

Ms. Dragalin: Ask him if he talked about the Carrillo incident, and if the answer is no, then the jury knows what they need to know.

The Court: Actually, this would be my job.

> Ms. Dragalin: Sorry. That was just the government's position. I apologize, Your Honor.
> The Court: Slight suggestion. You want to do that, otherwise you are going to stop.
> Ms. Marino: Can I at least ask him the places they went together?
> The Court: Not if it includes churches, no, or Bible studies, no. That doesn't matter. No, you can't. Talk about the amount of time and then you can ask Ms. Dragalin's question.
> Ms. Marino: Okay. (RT 1/17/19 a.m., 596-599)(emphasis added)

The trial court prejudicially erred in not allowing petitioner to explain the places they went to and what he and Gonzalez talked about, during the "thousands and thousands of phone conversations." (RT 1/17/19 a.m., 597) This ruling went to the heart of petitioner's defense and constituted reversible error.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed R. Evid. 401. The court relied on Fed. R. Evid. 403.

The excluded evidence was central to petitioner's defense, yet it was not allowed. Petitioner's testimony would have provided an explanation for the thousands of communications between him and Gonzalez and was central to petitioner's right to present a defense. See, e.g. Chambers v. Mississippi, 410 U.S. 284 (1973); Chia v. Cambra, 360

F.3d 997, 1003-08 (9th Cir. 2004).

Here, every factor weighed in favor of admission of this crucial evidence. Petitioner's explanation of these key conversations was not cumulative since no other similar evidence was admitted on this point; the evidence was highly probative on the central issue of what the conversations between petitioner and Gonzalez were about; the evidence constituted a major part of the defense; and the evidence would have easily been evaluated by the jury. Importantly, the government's case was substantially structured around the communications with elaborate testimony and charts showing the alleged collusion. Further, petitioner is religious and called his pastor to testify at trial to his veracity.

The Constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." United States v. Stever, 603 F.3d 747,755 (9th Cir. 2010) This right includes "the right to present the defendant's version of the facts," Washington v. Texas, 388 U.S. 14, 19, (1967), and to "put before a jury evidence that might influence the determination of guilt," Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987); see also Chambers v. Mississippi, supra, at p.

294 ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."). The Ninth Circuit has acknowledged that this right is not "absolute," Alcala v. Woodford, 334 F.3d 862, 877 (9th Cir.2003), since the "adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments," Taylor v. Illinois, 484 U.S. 400, 410–411, (1988). However, "'when evidence is excluded on the basis of an improper application of the evidentiary rules,' " the danger of a due process violation is particularly great, since "'the exclusion [of the evidence] is unsupported by any legitimate ... justification.' " Stever, 603 F.3d at 755 (brackets omitted) (quoting United States v. Lopez-Alvarez, 970 F.2d 583, 588 (9th Cir.1992)).

Here, the district court improperly applied the Federal Rules of Evidence. The excluded evidence was highly relevant to an issue central to petitioner's defense, and would have explained the true contents of these calls. The ruling based on irrelevancy was an improper ground upon which to exclude the meetings and conversations. These communications were directly relevant to explain to the

jury the context of the communications. As defense counsel argued, the jury was going to be left with no explanation of the "thousands and thousands of phone conversations." (RT 1/17/19 a.m., 597)

To the extent the government was relying on Rule 610, when it argued that religious beliefs should be excluded from evidence, this was erroneous. That rule provides: "Evidence of a witness's religious beliefs or opinion is not admissible to attack or support the witness's credibility." Here, the evidence was not used to attack or support credibility, but rather to present an explanation and a defense. This evidence went directly to the content of the calls, and had nothing to do with credibility issues. Thus, Rule 610 was not applicable. (RT 1/17/19 a.m., 597)

Courts have found violations of the constitutional right to present a defense where the district court incorrectly excluded evidence that was necessary for the defendant to refute a critical element of the prosecution's case. In United States v. Pineda-Doval, 614 F.3d 1019, 1033 (2010) the court held that it was constitutional error to exclude evidence of particular Border Patrol policies where the "only real factual dispute ... was whether [the

defendant's] driving caused the ten charged deaths," *id.* at 1032. Evidence of the policies "went to the question of whether [the agent's] conduct constituted a superseding cause of the accident," *id.*, and exclusion of the evidence "effectively denied the defendant the only argument that he had," *id.* at 1033.I

In Stever, supra, it was held that it was constitutional error to exclude "the sole evidence" tending to show that a drug trafficking organization may have trespassed on the defendant's land, where "a major part of the attempted defense" was that the defendant was not involved in growing the marijuana discovered on his land. 603 F.3d at 757 (internal quotations marks omitted).

Here, as in Stever, the communications (1) were a main piece of evidence; (2) were related to the defendant's main defense; and (3) were a critical element of the government's case.

The jury was instructed that (1) petitioner must have made a false statement, (2) within the jurisdiction of the FBI, (3) petitioner acted willfully – deliberately and with knowledge that the statement was untrue and that his conduct was unlawful, and (4) the statement was material to the activities or discussions of the FBI. (RT 1/18/19 a.m.,

762) The excluded evidence went directly to attacking the first and third elements of the offense – an explanation for the truth or falsity of the statements. That is, the excluded evidence not only damaged the credibility of petitioner, but would have eviscerated and fortified the government's case.

Therefore, the exclusion of the content of the phone conversations and meetings amounted to a deprivation of petitioner's due process right to present a defense. See United States v. Ramirez, 714 F.3d 1134, 1139 (9th Cir. 2013) ("To be sure, the Constitution protects a criminal defendant's right to argue a point that goes to the heart of his defense.").

When the right to present a defense occurs, a court must reverse the guilty verdict unless the error was harmless beyond a reasonable doubt." United States v. Leal-Del Carmen, 697 F.3d 964, 975 (9th Cir. 2012). Therefore relief should be granted.

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CONCLUSION

Based on the above, the petition should be granted.

DATED: March 1, 2021

Respectfully submitted:

/S/ Andrew Flier

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Andrew Flier

Levine, Flier and Flier

EXHIBIT A

NOT FOR PUBLICATION

FILED

OCT 27 2020

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. BYRON DREDD, Defendant-Appellant.	No. 19-50220 D.C. No. 2:15-cr-00569-DSF-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted October 14, 2020
Pasadena, California

Before: GOULD and LEE, Circuit Judges, and KORMAN,** District Judge.

Defendant-Appellant Byron Dredd is a former deputy with the Los Angeles Sheriff's Department ("LASD"). In 2019, Dredd was convicted following a jury trial for making false statements to the FBI in violation of 18 U.S.C. § 1001.

The conviction stemmed from a 2011 incident Dredd observed involving

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

** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

several other LASD deputies who assaulted a visitor to the jail, Gabriel Carrillo, and brought false charges against him. Dredd wrote an incident report stating that Carrillo had only been handcuffed on one hand, used the cuffs as a weapon, punched another deputy in the chest, and tried to escape the breakroom. In August 2011, Carrillo filed a claim with the Sheriff's Department, and the FBI began investigating his account of the incident. The FBI interviewed Dredd on July 17, 2012, during which Dredd repeated his account—that Carrillo was the aggressor—in more detail. In 2019, a jury found Dredd guilty of making false statements in the 2012 FBI interview. As reflected in the verdict form, the jury found that all three of Dredd's statements about the Carrillo incident charged in the indictment were materially false.

On appeal, Dredd argues that the district court erred by admitting or excluding specific evidence, which he claims violated his constitutional right to present a defense. Dredd also argues that the government constructively amended the indictment and that his 12-month sentence was not procedurally and substantively reasonable. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review Dredd's evidentiary claims for abuse of discretion. *United States v. Thornhill*, 940 F.3d 1114, 1117 (9th Cir. 2019). We will find an abuse of discretion "only when [left with] a definite and firm conviction that the district

court committed a clear error of judgment." *Id.*

First, Dredd argues that the district court erred by limiting Dredd's testimony about the substance of his many communications with Sergeant Gonzalez after the government introduced evidence of the number of contacts between them. We disagree. The district court permitted Dredd to testify to whether the conversations with Gonzalez were about the 2011 Carrillo incident, and any marginal relevance of the specific content of the communications was substantially outweighed by unfair prejudice under Federal Rule of Evidence 403. *See United States v. Joetzki*, 952 F.2d 1090, 1094 (9th Cir. 1991). Second, the district could did not abuse its discretion by excluding evidence of Dredd's prior acquittals on different counts. The exclusion is justified by our decision in *Nordgren v. United States*, 181 F.2d 718, 721 (9th Cir. 1950), which has not been explicitly or impliedly overruled and is consistent with our sister circuits. *See, e.g.*, *Jacobson v. Mott*, 623 F.3d 537, 542 (8th Cir. 2010).

Dredd's other evidentiary claims, including his constitutional claim, are unavailing. The five-year phone records were admissible to prove Dredd had a motive to lie to protect Gonzalez, and trial courts have "wide discretion" to admit even "highly prejudicial" motive evidence. *United States v. Parker*, 549 F.2d 1217, 1222 (9th Cir. 1977). The trial court likewise has latitude to exclude cumulative character witnesses. *United States v. Scholl*, 166 F.3d 964, 972 (9th

Cir. 1999). The other deputies' incident reports were admissible as evidence that Dredd was a knowing participant in the cover-up because the lies Dredd told to the FBI matched the lies in his colleagues' reports. The sentences of those deputies were properly excluded because providing jurors sentencing information of any kind may "invite[] them to ponder matters that are not within their province, distract[] them from their fact-finding responsibilities, and create[] a strong possibility of confusion." *Shannon v. United States*, 512 U.S. 573, 579 (1994). Because Dredd has not shown that the district court erroneously excluded evidence, he cannot establish a constitutional violation. *See United States v. Waters*, 627 F.3d 345, 354 (9th Cir. 2010).

Dredd next claims that the government constructively amended the indictment. We review constructive amendment claims *de novo*. *United States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017). "A constructive amendment 'occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them.'" *United States v. Soto-Barraza*, 947 F.3d 1111, 1118 (9th Cir. 2020) (citation omitted). Dredd's claim fails as a threshold matter because he compares the indictment to the government's arguments *pre-trial*, rather than the evidence introduced *at trial*. *See id.* at 1119. Even with the right comparison, the evidence presented, jury instructions, and verdict form were all consistent with the count

charged. *See id.* at 1118.

Finally, Dredd argues that the district court's 12-month sentence was not procedurally and substantively reasonable because the court engaged in double-counting. We review the district court's application of the Sentencing Guidelines for abuse of discretion, and the ultimate sentence for reasonableness. *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006). The district court did not engage in impermissible double-counting by merely assessing the nature and circumstances of the offense with reference to Dredd's lies at trial. A district court is "*not* prohibited from considering the extent to which the Guidelines did not sufficiently account for the nature and circumstances of [the defendant's] offense . . . even though the Guidelines account for these factors either implicitly or explicitly, to some extent." *United States v. Christensen*, 732 F.3d 1094, 1101 (9th Cir. 2013) (emphasis in original).

AFFIRMED.[1]

[1] Before this case was submitted, Appellant filed two motions: a motion to strike a photograph from Appellees' answering brief and a motion to transmit physical exhibits. The motion to strike is **DENIED.** The motion to transmit physical exhibits is **DENIED** because reviewing the exhibits is not necessary to resolve the appeal under Circuit Rule 27-14.

EXHIBIT B

FILED

DEC 4 2020

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. BYRON DREDD, Defendant-Appellant.	No. 19-50220 D.C. No. 2:15-cr-00569-DSF-1 Central District of California, Los Angeles ORDER

Before: GOULD and LEE, Circuit Judges, and KORMAN,* District Judge.

Appellant's Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.