Appendix A

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NOT FOR PUBLICATION

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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. GEORGE B. LARSEN, Defendant-Appellant.	No. 18-10320 D.C. No. 2:15-cr-00190-GEB-5 MEMORANDUM*

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

Submitted March 2, 2020**
San Francisco, California

Before: SILER,*** WARDLAW, and M. SMITH, Circuit Judges.

George Larsen appeals his conviction and sentence for (1) five counts of bank fraud under 18 U.S.C. § 1344(1), and (2) one count of conspiracy under 18 U.S.C. § 371 to falsely make lending association writings and to commit bank

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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 panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

fraud. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The district court did not err in its jury instructions by omitting a knowledge of unlawfulness requirement for bank fraud, or a knowledge of falsehood requirement for falsely making lending association writings, nor were its conspiracy instructions deficient on either of these grounds. We review for plain error because Larsen did not object to the relevant instructions at trial. *See United States v. Campbell*, 42 F.3d 1199, 1204 (9th Cir. 1994) (limiting review of the jury instructions to plain error where the defendant did not object to the jury instructions in accordance with Fed. R. Crim. P. 30, even though the defendant did submit alternate instructions).

The district court's instructions for bank fraud were consistent with the language of the statute, which specifies a knowing, not a willful, intent requirement. *See* 18 U.S.C. § 1344 ("Whoever *knowingly* executes, ...") (emphasis added); *Shaw v. United States*, 137 S. Ct. 462, 468 (2016) (explaining that knowledge is the required *mens rea* for bank fraud); *see also United States v. Lunn*, 860 F.3d 574, 579–80 (7th Cir. 2017) (upholding jury instructions materially similar to those given here). *United States v. Cloud*, 872 F.2d 846 (9th Cir. 1989), is not to the contrary. *See id.* at 852 n.6 (stating that "[t]o act with the 'intent to defraud' means to act willfully, and with the specific intent to deceive or cheat"). Although *Bryan v. United States*, 524 U.S. 184, 191–92 (1998), interpreted

statutory use of the term "willfully" to require intent to violate the law, the bank fraud statute does not use the term "willfully," and our own colloquial use of the term in *Cloud* preceded *Bryan*'s interpretation.[1]

The instructions were also consistent with Ninth Circuit Model Criminal Jury Instructions for bank fraud and intent to defraud. *See* Ninth Circuit Manual of Model Criminal Jury Instructions §§ 5.7, 5.12, 8.125. Accordingly, the district court did not err in its bank fraud instructions. *Cf. United States v. Shipsey*, 363 F.3d 962, 967 (9th Cir. 2004) ("There can be little doubt that the court correctly defined intent," where the court's instruction, defining "intent to defraud" as "an intent to deceive or cheat," came "directly from Ninth Circuit Model Criminal Jury Instructions.").

There is no model instruction for falsely making lending association writings, but the district court's instructions followed the language of the statute. *See* 18 U.S.C. § 493. It was not plain error for the district court not to add a *mens rea* instruction going beyond the language of the statute. The statutory language at issue ("falsely makes, forges, counterfeits, . . .") does not raise the same concerns regarding punishment of innocent conduct as in *Staples v. United States*, 511 U.S.

[1] Our post-*Bryan* decisions notably have not used the term "willfully" to describe the *mens rea* for bank fraud. *See Loughrin v. United States*, 573 U.S. 351, 357 (2014); *United States v. Grasso*, 724 F.3d 1077, 1089–90 (9th Cir. 2013); *United States v. Rizk*, 660 F.3d 1125, 1135 (9th Cir. 2011); *United States v. McNeil*, 320 F.3d 1034, 1037 (9th Cir. 2003).

600 (1994), or *Liparota v. United States*, 471 U.S. 419 (1985). *See Staples*, 511 U.S. at 614–15 (possession of certain unregistered firearms); *Liparota*, 471 U.S. at 426 (possession of unauthorized food stamps).

Because the district court did not plainly err with respect to the jury instructions for bank fraud or for falsely making lending association writings, its conspiracy instruction was not infected by any error. Furthermore, Larsen's single conspiracy count was based on two offenses, bank fraud and falsely making lending association writings. The district court used a special verdict form where the jury indicated that it convicted Larsen of the conspiracy count based on both conspiracy to commit bank fraud and conspiracy to falsely make lending association writings. Accordingly, even if the district court erred in its instruction to the jury regarding falsely making lending association writings, it did not prejudice Larsen or affect the outcome of the district court proceedings.

The prosecutor did not commit misconduct during rebuttal by asserting that the government need not prove that Larsen knew his conduct was unlawful. As Larsen did not object, a plain error standard of review applies. *See United States v. Alcantara-Castillo*, 788 F.3d 1186, 1190–91 (9th Cir. 2015). If a prosecutor misstates the law in closing arguments, the prosecutor commits misconduct. *See United States v. Flores*, 802 F.3d 1028, 1034–37 (9th Cir. 2015). Here, the prosecutor did not misstate the law. The prosecutor's statement was consistent with

the district court's jury instructions. Therefore, the government did not commit prosecutorial misconduct.

The district court did not err by declining to adopt Larsen's proposed good faith instruction. This issue is reviewed de novo. *See United States v. Castagana*, 604 F.3d 1160, 1163 n.2 (9th Cir. 2010). Larsen proposed that the court instruct the jury that it "may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud." This instruction is not necessary when a court has adequately instructed the jury with respect to the charge's specific intent. *See United States v. Hickey*, 580 F.3d 922, 931 (9th Cir. 2009). Here, the district court correctly instructed the jury that bank fraud requires "intent to defraud," and that "[a]n intent to defraud is an intent to deceive or cheat." Therefore, Larsen's proposed good faith instruction was unnecessary. *See Shipsey*, 363 F.3d at 967 (in case involving mail and wire fraud, holding that "the court correctly instructed the jury on the definition of intent, i.e., an intent to deceive or cheat"); *id.* at 968 ("Where the instruction actually given was legally sufficient, a defendant cannot successfully contend that declining to use his specific formulation was an abuse of discretion.").

We reject Larsen's argument that the district court committed procedural error by failing to recognize its discretion to disagree with the sentencing

Guidelines. When an individual raises a policy disagreement with the Guidelines, a district court commits procedural error if it fails to acknowledge its *Kimbrough* discretion to vary from the Guidelines accordingly. *United States v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011) (citing *Kimbrough v. United States*, 552 U.S. 85, 109–10 (2007)). However, the district court need not in fact vary from the Guidelines if it does not in fact have a policy disagreement with them. *Id.* Here, the district court acknowledged its discretion to disagree with the Guideline range but did not find any reason to vary from the Guidelines in this case. At the sentencing hearing, the district court stated: "A judge has discretion to disagree with the advisory guideline range. I haven't been provided with information that justifies the exercise of my discretion as Mr. Larsen has requested[.]" Therefore, this argument fails.

The district court's sentence was not substantively unreasonable. If a district court imposes a within-Guidelines range sentence, we may reverse only if the district court's decision not to impose a lower sentence was "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Treadwell*, 593 F.3d 990, 1011 (9th Cir. 2010). Here, the district court considered the parties' arguments and the 18 U.S.C. § 3553(a) factors and imposed a total imprisonment term at the low end of the Guidelines range. The record reflects a rational and meaningful consideration of the factors enumerated in

§ 3553(a) and there is no indication that the low end of the Guidelines sentence was illogical.

AFFIRMED.

Appendix A

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

Signature **Date**

*(use "*s/[typed name]*" to sign electronically-filed documents)*

COST TAXABLE	**REQUESTED** *(each column must be completed)*			
DOCUMENTS / FEE PAID	No. of Copies	Pages per Copy	Cost per Page	TOTAL COST
Excerpts of Record*			$	$
Principal Brief(s) *(Opening Brief; Answering Brief; 1st, 2nd , and/or 3rd Brief on Cross-Appeal; Intervenor Brief)*			$	$
Reply Brief / Cross-Appeal Reply Brief			$	$
Supplemental Brief(s)			$	$
Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				$
			TOTAL:	$

***Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:*
No. of Copies: 4; Pages per Copy: 500; Cost per Page: $.10 (or actual cost IF less than $.10);
TOTAL: 4 x 500 x $.10 = $200.

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Appendix B

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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. GEORGE B. LARSEN, Defendant-Appellant.	No. 18-10320 D.C. No. 2:15-cr-00190-GEB-5 Eastern District of California, Sacramento ORDER

Before: SILER,* WARDLAW, and M. SMITH, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judges Wardlaw and M. Smith have voted to deny the petition for rehearing en banc, and Judge Siler so recommends. The full court has been 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 petition for panel rehearing and rehearing en banc is therefore **DENIED**.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 12 2020

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GEORGE B. LARSEN,

Defendant - Appellant.

No. 18-10320

D.C. No. 2:15-cr-00190-GEB-5
U.S. District Court for Eastern California, Sacramento

MANDATE

The judgment of this Court, entered April 17, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7