
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SAYDA POWERY ORELLANA AND MANUEL SALAS, PETITIONERS,

vs.

UNITED STATES, RESPONDENT.

JOINT MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioners, through counsel, ask leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel were appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

May 12, 2021

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

May 12, 2021

s/ David A. Schlesinger
DAVID A. SCHLESINGER
Attorney at Law

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IN THE

SUPREME COURT OF THE UNITED STATES

SAYDA POWERY ORELLANA AND MANUEL SALAS, PETITIONERS,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether agreement to a set of joint jury instructions as directed by a court order is a waiver completely precluding review of instructional errors or only a forfeiture allowing review for plain error.

B. Whether and when a court of appeals can ignore a party's "waiver of a waiver" and sua sponte enforce the waiver.

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JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Sayda Powery Orellana and Manuel Salas petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in their case.

I.
OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit, which is also reported as *United States v. Orellana*, 833 Fed. Appx. 98 (9th Cir. 2020) (unpublished), is included in the appendix as Appendix 1. An order denying a timely petition for rehearing en banc is included in the appendix as Appendix 2.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 2, 2020, *see* App. A001-09, and a timely petition for rehearing en banc was denied on January 4, 2021, *see* App. A010.

The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISION INVOLVED

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> **(b) Plain Error.** A plain error that affects substantial rights must be considered even though it was not brought to the court's attention.

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

Petitioners Sayda Powery Orellana and Manuel Salas, married but since divorced, were charged with conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846; conspiracy to launder monetary instruments and actual money laundering, in violation of 18 U.S.C. § 1956; and making false

statements within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001.[1] App. A121-22. Prior to trial, the government filed a document titled, "Joint Proposed Jury instructions." App. A012. The document stated that the government and defendants, "by and through" their counsel, "hereby submit their Joint Proposed Jury Instructions in the above-captioned case." App. A012-13. It bore government counsel's electronic signature and defense counsel's electronic signatures "by email authorization." App. A013-14. The district court before which Petitioners were tried requires such joint jury instructions as part of its standard trial procedure order. *See* United States Courts, C.D. Cal., *Judges' Procedures and Schedules*, Honorable Cormac J. Carney, Judge's Procedures, http://www.cacd.uscourts.gov/honorable-cormac-j-carney, ¶ 12 (last visited May 11, 2021).

A jury found Petitioners guilty of all counts after a weeklong trial. App. A122. Petitioners both appealed after being sentenced. App. A122. The issues raised in the appeals, which were consolidated, included plain error challenges to several jury instructions that had been included in the joint proposed jury instructions and been given by the district court.[2] First, Petitioner Orellana argued that the aiding and abetting instructions, which applied only to her, *see* A055-58, were deficient because they failed to make clear the requirement that Petitioner Orellana had knowledge of the underlying crime sufficiently in advance of the crime's completion. *See* App. A064-69.

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[1] Only Petitioner Orellana was charged in the substantive money laundering counts.

[2] There were also several other issues raised, but those are not germane to this petition.

Second, Petitioner Salas, joined by Petitioner Orellana, argued there was insufficient evidence to support a willful blindness instruction. *See* App. A069-70, A077-86. Third, Petitioner Salas argued the elements instruction for his 18 U.S.C. § 1001 charge was impermissibly confusing in naming two different agencies which could have been impacted by the false statements. *See* App. A086-88.[3]

There had been no objection to these instructions in the district court, but neither had there been any affirmative adoption of them beyond their inclusion in the joint proposed jury instructions. The only discussion of the instructions during jury instruction conferences was about a clarification of the aiding and abetting instructions to make clear they applied only to Petitioner Orellana, *see* App. A030-34, correction of pronouns in the 18 U.S.C. § 1001 instructions, *see* App. A034, and a modification of the 18 U.S.C. § 1001 instructions to identify the specific false statements, *see* App. A037.

In response to the challenge to the aiding and abetting instructions, the government argued there was a waiver precluding even plain error review because of the defense attorneys' agreement to the joint proposed jury instructions. *See* App. A103-04. The government did not make this waiver argument in response to the other jury instruction challenges. For those challenges, it argued only that review was limited to review for plain error and addressed the merits under that standard of review. *See* App. A091-101. It also made an alternative argument addressing the merits of the challenge to the aiding and abetting instruction. *See* App. A104-07.

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[3] Each defendant had a separate 18 U.S.C. § 1001 charge, and this argument did not apply to Petitioner Orellana's charge.

Petitioner Orellana argued in her reply brief that simply acquiescing in joint proposed jury instructions was not a waiver that precluded even plain error review. *See* App. A110-11. She also cited further authority in a supplemental authority letter filed after the oral argument. *See* App. A112-13. Petitioner Salas did not address waiver since the government had not asserted it in response to his instructional challenges.

A Ninth Circuit panel decided the case in a memorandum disposition. *See* App. A001-09. The panel did not address the merits of the challenges to the instructions, but held approval of the joint proposed jury instructions meant the challenges were waived. And the panel found waiver not only of the challenge to the aiding and abetting instruction, for which the government had made the waiver argument. It also found waiver of the challenges to the willful blindness and 18 U.S.C. § 1001 instructions, for which the government had not made a waiver argument.

> Nor is Orellana's and Salas's challenge to the joint proposed jury instructions persuasive. "A defendant's right to challenge a jury instruction is waived if the defendant considered the controlling law and 'in spite of being aware of the applicable law, proposed or accepted a flawed instruction.'" *United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998) (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)). Because Orellana's and Salas's defense counsel approved the jointly proposed jury instructions, their argument is waived. *See Perez*, 116 F.3d at 845 n.7 ("We have long held that jury instructions may be waived by a defendant's attorney.").

App. A005.

Petitioners thereafter filed a petition for rehearing en banc, seeking rehearing on two grounds. *See* App. A114-34. First, the petition pointed out a severe intracircuit split in the Ninth Circuit's treatment of an agreement to

joint jury instructions, with some cases holding this constitutes a waiver that completely precludes review of error in the instructions but other cases holding it is just a forfeiture that simply limits review to plain error review. *See* App. A126-29 (collecting conflicting cases). Second, the petition argued that relying on waiver of the challenges to the willful blindness and 18 U.S.C. § 1001 instructions conflicted with Ninth Circuit cases holding a party can "waive the waiver" and the court will not find waiver if it is not raised by the opposing party. *See* App. A130-33. The petition for rehearing was denied, without comment, despite these conflicts. *See* App. A010-11.

IV.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve two splits in the circuits. First, the circuits are divided over whether agreement to a set of joint jury instructions is a waiver completely precluding review of instructional error or just a forfeiture allowing review for plain error. Second, the circuits are divided over whether and when to enforce a waiver sua sponte when it is not asserted by a party.

Both of these issues are important, moreover. The treatment of joint jury instructions is important because (a) many district courts require joint jury instructions in an effort to streamline the trial process, (b) treating agreement to joint jury instructions as a waiver completely precluding review will make wise and cautious attorneys resist agreeing to joint jury instructions, and (c) attorneys and their clients have a right to know how agreeing to joint jury

instructions will affect review of errors they overlook. The question of whether and when a court should sua sponte enforce a waiver not asserted by a party is important because (a) sua sponte raising a waiver is inconsistent with the role of courts as adjudicators of issues presented by the parties, not inquisitors into issues on their own, and (b) sua sponte raising a waiver implicates separation of powers concerns when it is the government that chooses not to assert a waiver.

Finally, it is Petitioners' positions on these issues that are the better views. Treating joint jury instructions as just a forfeiture is the better view because (a) a negligent oversight in joint jury instructions does not satisfy this Court's definition of waiver as an intentional relinquishment or abandonment of a known right, (b) the government is equally or more at fault when it is a joint jury instruction that is erroneous, and (c) treating joint jury instructions as just a forfeiture will make attorneys more willing to agree to joint jury instructions. Precluding courts of appeals from raising waiver sua sponte is the better view because it is more consistent with the limited role of the courts and gives respect to the separation of powers.

A. THE COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT IN THE CIRCUITS OVER WHETHER AGREEMENT TO A SET OF JOINT JURY INSTRUCTIONS IS A WAIVER COMPLETELY PRECLUDING REVIEW OF INSTRUCTIONAL ERROR OR JUST A FORFEITURE ALLOWING REVIEW FOR PLAIN ERROR.

This Court discussed the distinction between "waiver" and "forfeiture"

in *United States v. Olano*, 507 U.S. 725 (1993). It began by explaining: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The Court also explained how the distinction affects the availability of plain error review under Rule 52(b) of the Federal Rules of Criminal Procedure. The first requirement of Rule 52(b) is that there be an "error." *Olano*, 507 U.S. at 732. And a deviation from a legal rule is "error" "unless the rule has been waived." *Id.* at 732-33. But "[m]ere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Id.* at 733.

Plain error review under Rule 52(b) thus is available when there has been only a forfeiture, but is not available when there has been a waiver. As applied to the question presented here, plain error review of an erroneous instruction agreed to in joint jury instructions is available if agreement to joint jury instructions is a mere forfeiture, but is not available if agreement to joint jury instructions is a waiver.

1. <u>There Is a Split in the Circuits over Whether Agreement to an Erroneous Instruction in Joint Jury Instructions Is a Complete Waiver Precluding All Review or a Forfeiture Allowing Limited Review for Plain Error.</u>

There are both intracircuit and intercircuit conflicts on the question of whether agreement to joint jury instructions is a complete waiver or a mere

forfeiture. There is a severe intracircuit conflict just in the Ninth Circuit, which the Ninth Circuit has refused to correct. In three published opinions, and additional unpublished opinions, the Ninth Circuit has said agreement to an erroneous instruction in joint jury instructions or by stipulation is a mere forfeiture. *See Erickson Products v. Kast*, 921 F.3d 822, 832 n.7 (9th Cir. 2018); *United States v. Lindsey*, 634 F.3d 541, 555 (9th Cir. 2011); *United States v. Hugs*, 384 F.3d 762, 766-67 (9th Cir. 2004). *See also United States v. Muhammad*, 740 Fed. Appx. 887, 889 (9th Cir. 2018) (unpublished); *United States v. Rincon*, 654 Fed. Appx. 867, 868 (9th Cir. 2016) (unpublished). But in another published opinion and other unpublished opinions, the court has said agreement to an erroneous instruction in joint jury instructions is a waiver. *See United States v. Cain*, 130 F.3d 381, 383 (9th Cir. 1997). *See also United States v. Morton*, 776 Fed. Appx. 395, 399 (9th Cir. 2019) (unpublished), *cert. denied*, 140 S. Ct. 882 (2020); *United States v. Turner*, 754 Fed. Appx. 664 (9th Cir. 2019) (unpublished); *United States v. Redmond*, 748 Fed. Appx. 760, 762 (9th Cir. 2018) (unpublished), *cert. denied*, 140 S. Ct. 150 (2019); *United States v. Paniry*, 711 Fed. Appx. 387, 391 (9th Cir. 2017) (unpublished). The panel in the present case chose the latter view, but with no acknowledgment of the conflict – in either the panel opinion or the denial of Petitioners' petition for rehearing en banc.

And there is not just this intracircuit split which the Ninth Circuit refuses to resolve. There is also an intercircuit split. The Eighth Circuit holds that agreement to joint jury instructions is a complete waiver of any errors in the jury instructions. *See United States vs. Wortham*, 990 F.3d 586, 589 (8th Cir. 2021); *United States v. Jackson*, 913 F.3d 789, 793 (8th Cir. 2019);

United States v. Tillman, 765 F.3d 831, 836 (8th Cir. 2014). The Tenth Circuit and Eleventh Circuit have taken the same position. *See United States v. Hollie*, 817 Fed. Appx. 880, 885 (11th Cir. 2020) (unpublished), *petition for cert. pending*, No. 20-6460 (filed Nov. 23, 2020); *United States v. Arciniega-Zetin*, 755 Fed. Appx. 835, 839-40 (10th Cir. 2019) (unpublished); *United States v. Lafleur*, 728 Fed. Appx. 983, 986 (11th Cir. 2018) (unpublished), *cert. denied*, 139 S. Ct. 1365 (2019); *United States v. McCoy*, 614 Fed. Appx. 964, 967 (10th Cir. 2015) (unpublished).

The Third Circuit has been more hesitant, but seems to have ultimately come to this position as well. In the earlier opinion of *Virgin Islands v. Rosa*, 399 F.3d 283 (3d Cir. 2005), the court held that even "repeated acquiescence" to an instruction was insufficient to constitute a waiver, because "[t]here is no indication that [the defendant's attorney] knew of or considered the controlling law." *Id.* at 293. But in a later published opinion, and several unpublished opinions following the published opinion, the court held a joint request for jury instructions was a complete waiver, though without acknowledging its prior opinion in *Rosa*. *See United States v. Ozcelik*, 527 F.3d 88, 97 n.6 (3d Cir. 2008) ("Because Ozcelik made a joint request in favor of the very instructions he now challenges, he waived his right to raise these instructional issues on appeal under the invited error doctrine."). *See also United States v. Brooks*, 734 Fed. Appx. 120, 124 (3d Cir. 2018) (unpublished) (citing *Ozcelik*); *United States v. Nwokedi*, 710 Fed. Appx. 91, 94 (3d Cir. 2017) (unpublished) (citing *Ozcelik*); *United States v. Calloway*, 571 Fed. Appx. 131, 135 (3d Cir. 2014) (unpublished) (citing *Ozcelik*). This view has become sufficiently established that the court stated recently, albeit in a civil case, that

"we have long held that when a party jointly recommends a jury instruction, it cannot later complain about that very instruction." *Robinson v. First State Community Action Agency*, 920 F.3d 182, 189 (3d Cir.), *cert. denied*, 140 S. Ct. 464 (2019).

The Fifth Circuit, Sixth Circuit, and Seventh Circuit have taken a different view, however. The Seventh Circuit has held that agreement to joint jury instructions is not a waiver, at least where the defendant did not intentionally relinquish his right to seek an additional instruction. *See United States v. Longstreet*, 567 F.3d 911, 921 n.2 (7th Cir. 2009). The Fifth Circuit, while not having to apply the rule, has cited the Seventh Circuit opinion, the Third Circuit opinion in *Rosa*, and a Ninth Circuit opinion for the proposition that agreement to jury instructions "constitutes a forfeiture, reviewed for plain error, rather than a waiver." *United States v. Broadnax*, 601 F.3d 336, 347 (5th Cir. 2010) (citing *Longstreet*, 567 F.3d at 921; *Rosa*, 399 F.3d at 291-93; and *United States v. Perez*, 116 F.3d 840, 845-46 (9th Cir. 1997) (en banc)).

Finally, the Sixth Circuit has held in multiple cases that agreement to joint jury instructions is not a waiver, or what it and some other courts have labeled "invited error." In *United States v. Barrow*, 118 F.3d 482 (6th Cir. 1997), the court reasoned:

> We conclude that the doctrine of invited error does not foreclose our review in this case. Most importantly, assuming that error occurred, the government was at [sic] much at fault for inviting the error as the defendant since the parties stipulated to the same instructions.

Id. at 491. The court reasoned similarly in *United States v. Savoires*, 430 F.3d 376 (6th Cir. 2005):

> Nor does the fact that Savoires himself submitted the

> defective jury instruction (jointly with the government) preclude us from granting relief. "Invited error . . . does not foreclose relief when the interests of justice demand otherwise." *United States v. Barrow*, 118 F.3d 482, 491 (6th Cir. 1997). And where "the government is as much as [sic] fault for inviting the error as the defendant" and "the defendant . . . is claiming that his constitutional rights have been violated," the interests of justice are not served by a strict application of the waiver doctrine.

Savoires, 430 F.3d at 381. The court then repeated this reasoning just last year in *United States v. Howard*, 947 F.3d 936 (6th Cir. 2020). *See id.* at 945 (quoting *Barrow* and *United States v. Latham*, 358 Fed. Appx. 661, 664-65 (6th Cir. 2009) (unpublished), and citing *Savoires*).

In sum, there is a severe split in the circuits on the question of whether agreement to joint jury instructions is a waiver completely precluding review or just a forfeiture allowing limited review for plain error. Three circuits clearly hold it is a waiver. The Ninth Circuit – and to some extent the Third Circuit – have conflicting case law going different ways in different cases. The Fifth, Seventh, and Sixth Circuits view agreement to joint jury instructions as just a forfeiture that still allows limited review for plain error.

2. The Question Is an Important Question Which this Court Should Resolve.

The question is also an important question for which the conflict should be resolved. This is because there are many courts that *require* parties to submit joint jury instructions. One example is the district court in this very case. It has a general order that provides as follows:

> The parties MUST submit JOINT jury instructions. In

> order to produce these joint instructions, the parties SHALL MEET AND CONFER sufficiently in advance of the required submission date. The instructions should be submitted in the order in which the parties wish to have the instructions read. This order should reflect a single organized sequence agreed to by all of the parties. The court INSISTS upon receiving lucid and accurate instructions setting forth the elements of each party's claims and defenses. The instructions should be tailored to the facts of each case.

United States Courts, C.D. Cal., *Judges' Procedures and Schedules*, Honorable Cormac J. Carney, Judge's Procedures, http://www.cacd.uscourts.gov/honorable-cormac-j-carney, ¶ 12 (last visited May 11, 2021) (emphasis in original).

This district court is not alone, moreover. Approximately half of the judges in the same district – the Central District of California – have similar orders. *See* United States Courts, C.D. Cal., *Judges' Procedures and Schedules*, http://www.cacd.uscourts.gov/judges-schedules-procedures (last visited May 11, 2021) (providing links to judges' procedures, approximately half of which require joint jury instructions in some form). Other judges in other districts also have similar orders. *See, e.g.*, United States Courts, E.D.N.Y., *Judges' Info*, https://www.nyed.uscourts.gov/judges-info (last visited May 11, 2021) (providing links to judges' procedures, three of whom – Judges Gujarati, Komitee, and Ross – require parties to "endeavor to agree upon the requests to charge, to the extent possible," or "confer in good faith and attempt to resolve any disagreements"); United States Courts, E.D. Pa., *Judges' Info*, https://www.paed.uscourts.gov/judges-info/district-court-judges (last visited May 11, 2021) (providing links to judges' procedures, three of whom – Judges Gallagher, Wolson, and Younge – require joint jury

instructions). The joint jury instructions in the numerous opinions cited *supra* pp. 9-12 were likely the result of similar orders.

Such procedural orders have the laudatory goal of streamlining trials, and that makes it desirable for attorneys to cooperate in producing joint jury instructions. But attorneys will be strongly discouraged from agreeing to joint jury instructions – indeed, a cautious attorney will never agree to them – if they transform a potential forfeiture that simply limits review to plain error review into a waiver that absolutely precludes review. All but the most arrogant trial attorneys should recognize they might overlook instructional issues from time to time, especially in the heat of trial and grind of trial preparation. If an erroneous instruction the attorney overlooks remains reviewable for plain error when there is not an agreement to joint jury instructions, but becomes completely unreviewable when there is an agreement to joint jury instructions, a wise attorney will never agree to joint jury instructions.

There are also concerns of fairness and notice. As to notice, attorneys who agree to sign joint jury instructions – and their clients – have a right to know what they are giving up. It is one thing for an attorney's mistakes and oversights about instructions to limit his client to plain error review on appeal. It is another thing for those mistakes and oversights to absolutely preclude review. An attorney should know if signing joint jury instructions will have this additional impact.

As to fairness, attorneys who try to be cooperative and streamline the trial process by signing on to joint jury instructions should not be penalized for being cooperative. It is one thing to penalize the attorney – actually, the

attorney's client – for negligently missing an issue, by limiting review to plain error review. It is another thing to further penalize the attorney and his client by absolutely precluding review when the attorney happened to also be cooperative in the process. This completely reverses the incentives from what they ought to be.

3. This Case Is an Excellent Vehicle for Resolving the Question.

The present case is an excellent vehicle for resolving the question. First, the agreement to the joint jury instructions is the only basis for finding waiver or forfeiture of the instructional challenges here. There was not some additional discussion in which defense counsel reiterated their agreement or provided further assurance to the court that there was no error. There is also no other evidence of the "intentional relinquishment or abandonment of a known right," *Olano*, 507 U.S. at 733, which waiver requires. *Cf. United States v. Perez*, 116 F.3d at 845 (distinguishing cases in which government and/or court offered proper instructional language and defense counsel affirmatively rejected it). The question is presented in its cleanest form – does agreeing to joint jury instructions by itself constitute a waiver, which absolutely precludes review, rather than a forfeiture, which only limits review to plain error review?

Second, this case presents the scenario of the increasingly common procedure discussed above, namely, joint jury instructions that are required by the district court. This is not a case in which defense attorneys volunteered joint jury instructions on their own, or even just agreed to them when

suggested by the prosecutor. It is a case where *the court required* joint jury instructions. It is thus not a case where there is a more "elusive," *Virgin Islands v. Rosa*, 399 F.3d at 291, distinction or line to be drawn.

4. Treating the Mere Agreement to Joint Jury Instructions as Just a Forfeiture that Still Allows Limited Review for Plain Error Is the Better View.

The view of the circuits treating agreement to joint jury instructions as just a forfeiture that still allows limited review for plain error is the better view. For one thing, it is more fair. As the Sixth Circuit has noted in its opinions, the government is equally at fault when the error is reflected in jointly submitted jury instructions. *See supra* pp. 12-13. Indeed, the government is more at fault if it drafted and filed the instructions, as was the case here, *see supra* p. 3.

Treating joint jury instructions as just a forfeiture is also more consistent with this Court's definition of waiver in *Olano*. That definition requires an "intentional relinquishment or abandonment of a known right." *Id.*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. at 464). A negligent mistake in overlooking an instructional issue is not such an intentional relinquishment or abandonment of a known right. And nothing about signing joint jury instructions transforms a negligent error into an intentional one.

Several courts of appeals have recognized there must be something more than negligent oversight. Perhaps the most extensive discussion is found in the Ninth Circuit's *Perez* case, in which the Ninth Circuit cut back on its formerly harsh "invited error" rule. The court noted it had previously "focused

solely on whether the defendant induced or caused the error," but recognized that, after *Olano*, it "must also consider whether the defendant intentionally relinquished or abandoned a known right." *Perez*, 116 F.3d at 845. It then gave examples of when such an intentional relinquishment could be found. First, it would occur when "the record reflects that the defendant was aware of the omitted element and yet relinquished his right to have it submitted to the jury." *Id.* Second, it would occur when the defendant "considered submitting the . . . element to the jury, but then, for some tactical or other reason, rejected the idea." *Id.*

The Third Circuit, citing cases from the Second Circuit, reasoned similarly in *Rosa*. It held an explicit agreement or stipulation constitutes a waiver "if the defendant was aware of the right." *Id.*, 399 F.3d at 291 (citing *United States v. Malpeso*, 126 F.3d 92, 95 (2d Cir. 1997)). It held there is also a waiver "where the defendant 'consciously refrains from objecting as a tactical matter.'" *Rosa*, 399 F.3d at 291 (quoting *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995)). In a more recent case, the court emphasized: "To be a waiver, the failure to assert a right must be *intentional*, and the right relinquished must be *known*. Anything less is mere forfeiture." *United States v. Brito*, 979 F.3d 185, 189 (3d Cir. 2020) (emphasis in original).

Simply agreeing to joint jury instructions that are erroneous, without something more, is, in the words of the more recent Third Circuit case, "[a]nything less." It does not show an *intentional* relinquishment of a *known* right, i.e., intentional acceptance of an instruction known to be erroneous. It is equally consistent – indeed, more consistent – with a negligent failure to recognize and be aware of the error in an instruction. And that is especially

true when the instructions are prepared and filed by the prosecutor and simply reviewed and signed by the defense attorneys.

B. THE COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT IN THE CIRCUITS OVER WHETHER AND WHEN AN APPELLATE COURT CAN IGNORE A PARTY'S "WAIVER OF A WAIVER" AND SUA SPONTE ENFORCE A WAIVER.

Another question is presented by the government's decision not to argue waiver on two of the three instructional errors the court of appeals declined to consider. Such a decision not to assert a waiver is sometimes labeled "waiving the waiver." *E.g., United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th Cir. 2002). Courts sometimes overlook such "waivers of the waiver" and raise the waiver sua sponte – as the Ninth Circuit panel here did – but the circuits are divided on whether and when this is permissible.

1. The Circuits Are Split on the Standard for Overlooking a "Waiver of Waiver."

The circuits are split on whether and when an appellate court can overlook a "waiver of waiver" and sua sponte raise the waiver. The Second Circuit, while allowing sua sponte enforcement of a waiver in some circumstances, sets a very high, "manifest injustice" standard. As articulated and applied in *United States v. Doe*, 239 F.3d 473 (2d Cir. 2001):

> The government, however, has not argued Doe's

> waiver before our Court, and it is well established that as a general matter "an argument not raised on appeal is deemed abandoned," and that "we will not ordinarily consider such an argument unless manifest injustice otherwise would result."

Id. at 475 (quoting *United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994)).

The Ninth Circuit – in its published opinions, if not in its memorandum opinion in the present case – has suggested an even stronger standard; indeed, an absolute bar. It has stated that "this court *will not* address waiver if not raised by the opposing party." *United States v. Doe*, 53 F.3d 1081, 1082 (9th Cir. 1995) (quoting *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995)) (emphasis added). *See also Garcia-Lopez*, 309 F.3d at 1123 (quoting *Doe*). And the court has rejected a suggestion this is a discretionary rule.

> The dissent would have us raise the issue of waiver sua sponte and suggests that we have "discretion" not to reach defendants' qualified immunity claim. (Citation omitted.) But "[t]his court will not address waiver if not raised by the opposing party." *United States v. Doe*, 53 F.3d 1081, 1082-83 (9th Cir. 1995) (quoting *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995)). Even if we had such discretion, we believe the more prudent course is to resolve the case on the basis of the issues actually briefed and argued by the parties.
>
> When a party waives waiver, we proceed directly to the merits.

Norwood v. Vance, 591 F.3d 1062, 1068 (9th Cir. 2010). *See also United States v. Sainz*, 933 F.3d 1080, 1083 (9th Cir. 2019) ("[W]e have concluded that, on appeal, courts should not raise waiver *sua sponte*."); *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958, 965 (9th Cir. 2011) ("Fleischer's failure to argue that A.V.E.L.A. waived this argument *requires* us to reach its merits." (Emphasis added.)). *But see United States v. Macias*, 789 F.3d 1011, 1017 n.3

(9th Cir. 2015) (describing "waiver of waiver" doctrine as "discretionary").[4]

Other circuits have rejected an absolute bar and set a far lower threshold. The Seventh Circuit treats enforcement of an unasserted waiver as purely discretionary, stating that "[an] appellate court has the discretion to overlook the government's failure to argue harmless error." *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995) (citing *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991)). "Although the government has not relied on the defendants' waivers, we are not precluded from affirming on that basis." *Schmidt*, 47 F.3d at 190. "Normally, we would enforce the government's waiver, but we are not obligated to do so." *United States v. Flores*, 929 F.3d 443, 450 (7th Cir.), *cert. denied*, 140 S. Ct. 504 (2019). This falls far short of the demanding standard set by the Second Circuit and the absolute bar suggested by most of the Ninth Circuit's published opinions. *Accord United States v. Garcia-Lopez*, 309 F.3d at 1123 (citing *Schmidt* with "but see" signal).

The Seventh Circuit is not alone in adopting a lower threshold, moreover. The Fourth Circuit has followed the Seventh Circuit. *See United States v. Stanley*, No. 97-4940, 1999 U.S. App. LEXIS 6330, at *3 n.2 (4th Cir. April 8, 1999) (unpublished) (citing *Schmidt*); *United States v. Kitchens*, No. 98-4182, 1998 U.S. App. LEXIS 23729, at *2 (4th Cir. Sept. 23, 1998) (unpublished) (citing *Schmidt*). The Federal Circuit also has suggested a

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[4] The *Macias* opinion, which is an outlier, creates an intracircuit conflict. That alone might not warrant this Court's review, but there is also the *intercircuit* conflict discussed here, and that does warrant the Court's review. There is also the question of what standard guides any discretion that may exist.

purely discretionary standard, simply "exercis[ing] our discretion" to not enforce a waiver. *AFGE Local 3599 v. EEOC*, 920 F.3d 794, 799 n.2 (Fed. Cir. 2018).

In sum, some circuits set a demanding standard that either absolutely bars sua sponte enforcing unasserted waivers or requires "manifest injustice," while others treat the decision as almost purely discretionary. There is a split which needs to be resolved.

2. The Question Is Important, and the Stricter View Is the Better One.

The question is also important. How often the government chooses to waive the waiver is unclear, but it presumably makes the choice with thought and deliberation. For a court to override such deliberation does more than merely relieve the government of its waiver. It substitutes the judgment of the judicial branch for that of the executive branch. This raises grave separation of powers concerns.

The concerns have been well articulated by both this Court and courts of appeals. This Court explained in *Greenlaw v. United States*, 554 U.S. 237 (2008):

> [Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us.

Id. at 244 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (R. Arnold, J., concurring in denial of reh'g en banc)).

The Ninth Circuit reasoned similarly in *Sainz*, in reliance on *Greenlaw* and other opinions:

> Here, the United States was represented by an Assistant United States Attorney, who undoubtedly was familiar with the record and Sainz's waiver of his right to file a [18 U.S.C.] § 3582(c)(2) motion, a term the government negotiated for as part of the post-conviction cooperation agreement. There could be many reasons why the government did not raise the issue of waiver in the district court even though it had bargained for the waiver. (Footnote omitted.) "But as a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Greenlaw*, 554 U.S. at 244 (quoting *Castro v. United States*, 540 U.S. 375, 386, 124 S. Ct. 786, 157 L. Ed. 2d 778 (2003)) (internal quotation marks omitted) (Scalia, J., concurring in part and concurring in judgment). "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246, 112 S. Ct. 1867, 119 L. Ed. 2d 34 (1992), *superseded by statute on other grounds*, (Scalia, J., concurring).

Sainz, 933 F.3d at 1087.

There could also be non-strategic policy reasons for such a decision. As the Tenth Circuit explained in *United States v. Calderon*, 428 F.3d 928 (10th Cir. 2005):

> Among other reasons . . . , the government might conclude that justice would be better served by allowing a criminal defendant to appeal a wrongful sentence, even when the plea agreement included an appeal waiver and the case falls outside the narrow exceptions [recognized in other case law].

Id. at 931. *See also Sainz*, 933 F.3d at 1087 n.3 (quoting statement in

defendant's opening brief that government's decision not to assert waiver in case at bar was consistent with government's approach in litigation of other similar motions in district).

These policy concerns not only point out the importance of the question, but also point out why the stricter view taken by the Second Circuit – and, at least in most of its published opinions, the Ninth Circuit – is the better view. At least in the absence of manifest injustice, it should be the party's decision whether to enforce a waiver, not the courts' decision. And that is especially true when the party is another branch of government, the executive, that is charged with "tak[ing] care that the laws be faithfully executed," U.S. Const. art. II, § 3.

3. This Case Is an Excellent Vehicle for Resolving the Question.

Petitioners' case is an excellent vehicle for resolving this question, just as it is for resolving the first question presented. First, Petitioners' case squarely presents the question because the government did not even suggest there was a waiver of the two instructional errors other than the aiding and abetting instructional error. Second, the assertion of waiver of one of the instructional error claims but not the other instructional error claims suggests the government made a thoughtful decision that implicates the policy concerns discussed above. These circumstances make Petitioners' case a particularly worthy vehicle for resolving this second question presented.

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

May 12, 2021

s/ Carlton F. Gunn
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Attorney at Law

May 12, 2021

s/ David A. Schlesinger
DAVID A. SCHLESINGER
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A P P E N D I X 1

NOT FOR PUBLICATION

FILED

NOV 2 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. SAYDA POWERY ORELLANA, AKA Adina Ponce, AKA Adina Salas, AKA Saida Salas, AKA Sayda Ivonne Salas, AKA Adina Zaida, Defendant-Appellant.	No. 19-50140 D.C. No. 8:17-cr-00010-CJC-2 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL PORRAS SALAS, AKA Manuel Sala-Porras, AKA Manny Salas, Defendant-Appellant.	No. 19-50141 D.C. No. 8:17-cr-00010-CJC-1

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted October 16, 2020

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

Pasadena, California

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

Sayda Orellana and Manuel Salas appeal from the district court's judgment and sentence following a trial, where the jury convicted them on eight counts pertaining to a conspiracy to commit drug trafficking and money laundering. As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. Orellana and Salas argue that the district court erred when it permitted expert testimony from co-case agent Jose Gonzalez, a criminal investigator with the Internal Revenue Service. We review for abuse of discretion the district court's decision whether to exclude expert testimony. *United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997) (en banc). "A district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts." *Id.* (citation omitted). Although "matters of law" are generally inappropriate subjects for expert testimony, *see, e.g.*, *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992), there may be "instances in rare, highly complex and technical matters where a trial judge, utilizing limited and controlled mechanisms, and as a matter of trial management,

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

permits some testimony seemingly at variance with the general rule," *Flores v. Arizona*, 516 F.3d 1140, 1166 (9th Cir. 2008), *rev'd on other grounds*, *Horne v. Flores*, 557 U.S. 433 (2009) (citation omitted).

The district court did not abuse its discretion when it permitted Agent Gonzalez's testimony, because it determined that the applicable criminal law was complex, and that Gonzalez's testimony would be helpful to the juryAs a "dual-purpose witness," Gonzalez did not opine on whether the defendants engaged in money laundering, but generally explained concepts related to money laundering and provided illustrative examples. What is more, the court instructed the jury "to apply the law as I give it to you," that Gonzalez's opinion testimony "should be judged like any other testimony," and that the jury was free to "accept . . . none of it." Accordingly, Gonzalez's testimony did not invade the province of the court to determine the applicable law and to instruct the jury as to that law. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) ("[I]nstructing the jury as to the applicable law is the distinct and exclusive province of the court.") (internal citations and quotation marks omitted).

2. Orellana and Salas argue that the district court abused its discretion when it denied Salas's motion for a mistrial. We review the denial of a motion for a mistrial for abuse of discretion. *United States v. Lemus*, 847 F.3d 1016, 1024 (9th Cir. 2016). "A cautionary instruction from the judge is generally sufficient to cure

any prejudice from the introduction of inadmissible evidence, and 'is the preferred alternative to declaring mistrial when a witness makes inappropriate or prejudicial remarks; mistrial is appropriate only where there has been so much prejudice that an instruction is unlikely to cure it.'" *Id.* (quoting *United States v. Escalante*, 637 F.2d 1197, 1202–03 (9th Cir. 1980)). A decision to not declare a mistrial will be reversed only if "the improper comment, viewed in the context of the entire trial, more likely than not materially affected the verdict." *Id.*

During the government's presentation of evidence regarding Salas's false statements charge, the government's witness, Thomas Skinner, an agent within the Office of Internal Affairs of Customs and Border Protection, referred to "another investigation" in which he had interviewed Salas. The court ordered the phrase "relating to another investigation" stricken from his testimony. After the government's direct examination of Skinner, Salas moved for a mistrial based on Skinner's reference to "another investigation" and the court's repetition of the reference when striking the testimony. The court denied the motion but offered to provide an additional limiting instruction. Salas did not request such an instruction.

Because: (1) the reference to "another investigation" appears innocent and devoid of any detail associating Salas with criminality; (2) the district court struck the reference from Skinner's answer immediately after Salas moved to strike; and (3) the court instructed the jury that "[i]n reaching your verdict, you may consider only

the testimony . . . in evidence" and that "any testimony that I have excluded, stricken, or instructed you to disregard is not evidence," the court did not abuse its discretion in denying Salas's motion.

3. Nor is Orellana's and Salas's challenge to the jointly proposed jury instructions persuasive. "A defendant's right to challenge a jury instruction is waived if the defendant considered the controlling law and 'in spite of being aware of the applicable law, proposed or accepted a flawed instruction.'" *United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998) (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)). Because Orellana's and Salas's defense counsel approved the jointly proposed jury instructions, their argument is waived. *See Perez*, 116 F.3d at 845 n.7 ("We have long held that jury instructions may be waived by a defendant's attorney.").

4. We also reject Orellana's and Salas's argument that the government committed prejudicial misconduct during its rebuttal argument. We review for plain error because no objection was raised at trial. *United States v. Begay*, 673 F.3d 1038, 1046 (9th Cir. 2011) (en banc). To establish plain error, defendants must show that "(1) there was an error, (2) the error is clear or obvious, (3) the error affected [their] substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Johnson*, 963 F.3d 847, 850 (9th Cir. 2020).

Even if the government's rebuttal argument misstated the law, the error was not clear or obvious, but was "subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)). The government's statement to the jury that it should not "speculate" about cooperating witness Jose Soberano's sentence cannot be said to obviously mean that the jury should not consider the extent to which or whether his testimony may have been influenced by the prospect of favorable consideration from the government. A reasonable observer could understand the government's statement to mean that the jury should not assume Soberano would receive any *particular* sentence. This interpretation is reasonable in view of the government's immediately subsequent statement—that no promises were made to Soberano with respect to his sentence—as well as its reference to the court's instruction that the jury must evaluate Soberano's testimony with caution.

Nor could it be said that the government's statement "affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734 (citations omitted). In determining the prejudicial effect of the statement, this Court "consider[s] the misstatement in context." *Begay*, 673 F.3d at 1046. The district court correctly instructed the jury how to evaluate Soberano's credibility and made clear that the jury could properly consider a witness's bias and that statements of counsel are not evidence and may not be considered in reaching a verdict. The government similarly

urged the jury to heed the court's instruction regarding Soberano's testimony. We cannot conclude that the government's alleged misstatement was plain error. *See Begay*, 673 F.3d at 1046–47.

5. Orellana and Salas also argue that the cumulative prejudicial effect of the issues they raise on appeal warrant reversal. We disagree, as we are not persuaded that the district court committed any error, let alone multiple errors that warrant reversal. *Cf. United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) ("[A]lthough no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.") (citation omitted).

6. Finally, we reject Orellana's and Salas's claim that the district court erred in applying a two-level "organizer" sentencing enhancement under § 3B1.1 of the Sentencing Guidelines. We review the district court's identification of the correct legal standard *de novo*, its application of the Guidelines to the facts for abuse of discretion, and its factual findings for clear error. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc).

The Sentencing Guidelines allow for a two-level "organizer" enhancement "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity" involving fewer than five "participants," provided that the criminal activity was not "extensive." U.S. Sentencing Guidelines Manual § 3B1.1(c) (U.S.

Sentencing Comm'n 1993). In order to impose the enhancement, there must be a "showing that the defendant had control over other[]" participants or "organiz[ed] other[] [participants] for the purpose of carrying out" the charged crimes. *United States v. Whitney*, 673 F.3d 965, 975 (9th Cir. 2012) (internal quotation marks and citations omitted). A single incident of persons acting under a defendant's direction is sufficient evidence to support a two-level role enhancement. *See, e.g.*, *United States v. Beltran*, 165 F.3d 1266, 1271 (9th Cir. 1999).

The record is clear that both Orellana and Salas exercised substantial control over Soberano and that they were not "co-equal" conspirators in their criminal enterprise. *Cf. United States v. Holden*, 908 F.3d 395, 402–03 (9th Cir. 2018). Orellana directed Soberano where to leave his trailer so that it could be loaded with drugs and notified Soberano once the trailer was loaded, determined where in the truck the drugs would be placed, directed Soberano how to deposit the drug proceeds into specific accounts, and instructed him to structure the deposits by making deposits into difference accounts at different banks. Likewise, Salas directed Soberano to deposit drug proceeds in a particular bank account, had over 100 telephone contacts with him regarding drug transportation and money laundering, and coached Soberano when he sought to stop transporting drugs. The district court did not err in applying a two-level "organizer" sentencing enhancement as to either Orellana or Salas under § 3B1.1.

AFFIRMED.

A P P E N D I X 2

FILED

JAN 4 2021

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. SAYDA POWERY ORELLANA, AKA Adina Ponce, AKA Adina Salas, AKA Saida Salas, AKA Sayda Ivonne Salas, AKA Adina Zaida, Defendant-Appellant.	No. 19-50140 D.C. No. 8:17-cr-00010-CJC-2 Central District of California, Santa Ana ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL PORRAS SALAS, AKA Manuel Sala-Porras, AKA Manny Salas, Defendant-Appellant.	No. 19-50141 D.C. No. 8:17-cr-00010-CJC-1

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

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

The panel has voted to deny the petition for panel rehearing. Judges Murguia and Lee voted to deny the petition for rehearing en banc, and Judge Korman 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.

A P P E N D I X 3

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MANUEL PORRAS SALAS and SAYDA IVONNE SALAS, Defendants.	No. SA CR 17-10(A)-CJC JOINT PROPOSED JURY INSTRUCTIONS Trial Date: December 4, 2018 Trial Time: 9:00 a.m.

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorneys Joseph T. McNally and Aron Ketchel, and defendants Manuel Porras Salas and Sayda Ivonne Salas, by and through counsel of record Diane Bass and Brian Gurwitz, hereby submit their Joint Proposed Jury Instructions in the

above-captioned case. The parties respectfully reserve the right to supplement these jury instructions as needed.

Unless otherwise noted, the parties have used the most recent version (as of March 2017) of the Jury Instructions found on the Ninth Circuit's website at: http://www3.ce9.uscourts.gov/web/sdocuments.nsf/crim.

Dated: November 18, 2018

Respectfully submitted,

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/s/
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UNITED STATES OF AMERICA

Dated: November 18, 2018

/s/ by email authorization
DIANE BASS
Attorney for Defendant
MANUEL PORRAS SALAS

Dated: November 18, 2018

/s/ by email authorization
BRIAN GURWITZ
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SAYDA IVONNE SALAS

COURT'S INSTRUCTION NO. _____

PROPOSED INSTRUCTION NO. 47

Defendant Sayda Salas may be found guilty of the crime of conducting a financial transaction to promote unlawful activity as charged in Counts Three through Five, even if the defendant Sayda Salas personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To "aid and abet" means intentionally to help someone else commit a crime. To prove a defendant guilty of Counts Three through Five by aiding and abetting, the government must prove each of the following beyond a reasonable doubt:

First, someone else committed the crime of laundering of money charged in Counts Three through Five of the First Superseding Indictment;

Second, defendant Sayda Salas aided, counseled, commanded, induced or procured that person with respect to at least one element of the crime of conducting a financial transaction to promote unlawful activity as charged in Counts Three through Five;

Third, the defendant acted with the intent to facilitate the crime of conducting a financial transaction to promote unlawful activity as charged in Counts Three through Five; and

Fourth, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that

the defendant acted with the knowledge and intention of helping that person commit the crime of conducting a financial transaction to promote unlawful activity as charged in Counts Three through Five.

A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

Ninth Circuit Model Criminal Jury Instructions, 5.1 (2018 ed.) [Aiding and Abetting]

COURT'S INSTRUCTION NO. _____

PROPOSED INSTRUCTION NO. 49

Defendant Sayda Salas may be found guilty of the crime of laundering money as charged in Count Six, even if the defendant Sayda Salas personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To "aid and abet" means intentionally to help someone else commit a crime. To prove a defendant guilty of Count Six by aiding and abetting, the government must prove each of the following beyond a reasonable doubt:

First, someone else committed the crime of laundering of money charged in Count Six of the First Superseding Indictment;

Second, defendant Sayda Salas aided, counseled, commanded, induced or procured that person with respect to at least one element of the crime of laundering of money charged in Count Six;

Third, the defendant acted with the intent to facilitate the crime of laundering money charged in Count Six; and

Fourth, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the crime of laundering money charged in Count Six.

A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime.

The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.

Ninth Circuit Model Criminal Jury Instructions, 5.1 (2018 ed.) [Aiding and Abetting]

COURT'S INSTRUCTION NO. _____

JOINT PROPOSED INSTRUCTION NO. 50

For purposes of Section 1956(a)(1)(B) of Title 18 of the United States Code as described in Count Two and Count Six, in determining whether a defendant knew that the property represented the proceeds of some form of unlawful activity, you may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

1. was aware of a high probability that the proceeds were from some form of unlawful activity, and

2. deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that the property represented the proceeds from activity that was not unlawful, or if you find that the defendant was simply negligent, careless, or foolish.

Ninth Circuit Model Criminal Jury Instructions, 5.8 (2018 ed.) [Deliberate Ignorance]; United States v. Santos, 553 U.S. 507, 521 (2008) (in money laundering prosecutions, "the government will be entitled to a willful blindness instruction if the professional money launderer, aware of a high probability that the laundered funds were profits, deliberately avoids learning the truth about them...")

COURT'S INSTRUCTION NO. _____

PROPOSED INSTRUCTION NO. 52

Defendant Manuel Salas is charged in Count Eight of the First Superseding Indictment with knowingly and willfully making a false statement in a matter within the jurisdiction of a governmental agency or department in violation of Section 1001 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, defendant Manuel Salas made a false statement;

Second, the statement was made in a matter within the jurisdiction of the Drug Enforcement Administration and Customs and Border Protection;

Third, defendant Manuel Salas acted willfully; that is, the defendant acted deliberately and with knowledge both that the statement was untrue and that his or her conduct was unlawful; and

Fourth, the statement was material to the activities or decisions of the Drug Enforcement Administration and Customs and Border Protection; that is, it had a natural tendency to influence, or was capable of influencing, the agency's decisions or activities.

Ninth Circuit Model Criminal Jury Instructions, 8.73 (2018 ed.) [False Statement to Government Agency]

A P P E N D I X 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA, Plaintiff, vs. MANUEL PORRAS SALAS and SAYDA IVONNE SALAS, Defendants.	**CERTIFIED TRANSCRIPT** Case No. 8:17-cr-00010-CJC

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PRETRIAL CONFERENCE

MONDAY, NOVEMBER 26, 2018

9:58 A.M.

LOS ANGELES, CALIFORNIA

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morning. So I'll file an amended list for the Court this afternoon.

THE COURT: All right. Would you put Manuel Salas, Jr., on that list too.

10:07AM MR. McNALLY: I will, Your Honor.

THE COURT: Great. All right.

Verdict form. I just -- it looked good. I just saw two, what I believe are, typographical errors. On the Question (b), you have "500 kilograms." Isn't it supposed to

10:07AM be "grams"?

MR. McNALLY: It is, Your Honor.

THE COURT: So that would be in Question 9(b). I'll change it to "kilograms."

And on 10(b), it will be "grams," not "kilograms";

10:07AM right? That deals with the verdict.

Jury instructions. More questions, but I think I did catch a couple typos. I just want to go over, make sure that I have it right here. Okay.

I noticed in the joint set you submitted to me, that

10:08AM you had the model instruction dealing with a witness who's going to give opinions as well as facts. I believe, Mr. McNally, that was a -- based on a decision involving Judge Selna, wasn't it?

MR. McNALLY: Correct. *Vera* -- the *Vera* case, yes.

10:08AM THE COURT: Yeah.

Who is the witness who's going to be testifying both as an expert and as a percipient or factual witness?

MR. McNALLY: It's Jose Gonzalez. And I think I included the instruction out of an abundance of caution. He is an IRS special agent, and he's going to testify to two things. One, you know, the bank summary charts that he created on the flow of the money in the case, which is, I think, just percipient witness testimony. He's also going to testify as to patterns that he looked for, structuring -- which is one of the allegations in the Indictment -- and things that, I think, are based on his training and experience as an IRS agent.

In my view, I don't think that that's expert testimony in that sense. It's him looking at the records and basically explaining his analysis based on his training and experience. But I, you know, defer to the Court on that.

THE COURT: I'd rather be more cautious than sorry.

MR. McNALLY: Sure.

THE COURT: Sometimes the Circuit can be a little unforgiving.

MR. McNALLY: Sure.

THE COURT: So why don't we -- so can I go ahead and put his name in specifically for trial preparation? And as you know, I have to give this instruction both before he testifies and then at the end of the case.

MR. McNALLY: Correct.

THE COURT: So is it G-o-n-z-a-l-e-s or -z?

MR. McNALLY: -e-s.

THE COURT: -e-s.

MR. KETCHEL: It's -z, Joe.

10:10AM MR. McNALLY: I'm sorry, it is -z. I've been corrected.

THE COURT: Okay. I probably could have checked my witness list. I imagine he's on there. Yeah. Okay. So that answers that question.

10:10AM And he'll be the only one who would fall into this category; correct?

MR. McNALLY: Correct, Your Honor.

THE COURT: All right. So I'll modify the instruction accordingly.

10:10AM And then I noticed you added, also, an instruction on 404(b) evidence. And what is the 404(b) evidence and who is it?

MR. McNALLY: I don't believe there will be any 404(b) evidence coming in.

10:11AM THE COURT: So I can delete that?

MR. McNALLY: That will not be necessary.

THE COURT: Okay. Then the next change or -- no, excuse me, this is a question: Joint Proposed Instruction Number 35, "You have heard evidence that witness" -- "state

10:11AM basis for impeachment," that usually deals with criminal

convictions or some clear, undisputed act of dishonesty. And what witness does this instruction apply to?

MR. McNALLY: I think we'll have to see how the testimony comes in, but I think the defense will probably want it for the government's cooperating witness to the extent that he makes any inconsistent statements. There's a separate instruction that deals with cooperators as the Court knows, but this instruction is a little different, obviously. But I'd imagine that, you know, Mr. Gurwitz or Ms. Bass would want it for that purpose.

10:11AM

10:12AM

THE COURT: And I understand that. Let me just get the benefits instruction. What instruction is that, that you have?

MR. McNALLY: It's the next instruction. It's on Page 34, Instruction Number 30. I'm sorry -- yeah, it's not the next one, it's Instruction Number 30, Page 34, Your Honor.

10:13AM

THE COURT: Okay. Right. So that's actually a separate issue. That's another reason or another basis for looking at his testimony with suspicion. And the prior conviction deals with -- since he was convicted of a felony, he arguably may not be as reliable as other witnesses.

10:13AM

So I assume the defense wants that instruction.

MS. BASS: Yes, please, Your Honor.

THE COURT: And what did -- or what was Mr. Soberano convicted of?

10:14AM

MR. McNALLY: Possession of controlled substances with intent to distribute.

THE COURT: Okay.

MR. McNALLY: And I think that we can talk about it when you give the final instructions. The basis for impeachment could be a couple of things. Of course, it could be his prior conviction. It may also be -- if they're able to elicit some sort of inconsistent statement, I think they'd be entitled to the instruction on both grounds. And I'd also add that, if the defendants testify inconsistent with their statements to the government, we'd be entitled to the instruction as it relates to their statements as well. So I think that I'd recommend that we'd probably come back to that after the evidence closes and see what the different bases for impeachment would be.

THE COURT: If I'm understanding you right, Mr. McNally, I agree, we can table that for trial preparation. We don't have to worry about it. But that instruction that you're talking about deals with prior convictions or prior acts of clear dishonesty that are not contested whereas what you're suggesting talks about whether their trial testimony is accurate or prior inconsistent statement. And that is a jury issue you don't give this instruction for.

I can tell you because I was involved in the drafting of it. That's why I know what its purpose was.

MR. McNALLY: We'll defer to the draft. Thank you, Your Honor.

THE COURT: Okay. Just give me a moment because I've started to put these on my own system, and so I -- I'm going back from your set to the set that I have. I just want to make sure that I have it marked.

Okay. The next instruction I want to talk about was -- it would be your Proposed Instruction Number 42. On page 49, line 14:

10:16AM

10:17AM

10:17AM

10:18AM

10:18AM

> "I instruct you that the distribution of controlled substances as alleged in Count Two of the First Superseding Indictment is a felony."

I have two issues with that statement. One, Count Two, I thought was the -- didn't deal with the drugs. That was the money promotion or laundering conspiracy. And, second of all, it was a conspiracy to distribute controlled substances, not distribution of controlled substances.

So shouldn't it be -- I guess the question I have should I instruct that a conspiracy to distribute controlled substances as alleged in Count One of the First Superseding Indictment is a felony?

MR. McNALLY: So I think that what that gets at, Your Honor, is defining the SUA, so the underlying criminal activity that relates to the money. So under the law, it has to be as a felony, as the Court points out. I think what it's

referring to as it's described in the Indictment, so if you take a look at Count Two, the way that it's described in Count Two is the distribution of narcotics is the underlying assets -- or the underlying proceeds that are being laundered. So that's why it refers to that count.

10:18AM

THE COURT: Do you see the confusion? You know, I'm trying to look at this -- the jury, they're going to see Count Two --

MR. McNALLY: I do. And maybe it's hypertechnical, but -- and I'm happy to take another look at it --

10:19AM

THE COURT: See the phrase "knew that the property represented the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form of activity that constitutes a felony.

10:19AM

MR. McNALLY: And I think if you take a look at those Superseding Indictment, the Indictment alleges in Count Two describes what the SUA is. That's what it's getting at. So frankly, even if the jury were to acquit them on the money laundering conspiracy, for example, that count's independent. As long as they're getting drug proceeds from somewhere and depositing it, that's sufficient.

10:20AM

I think that's why we probably refer to Count Two rather than Count One because that's where it's described in the Indictment as it relates to that particular money.

10:20AM

THE COURT: All right.

MR. McNALLY: I mean, the other thing that you can do is you can just strike the Count Two and say:

"I instruct you that the distribution of controlled substances as defined in the First Superseding Indictment is a felony as described."

10:20AM

THE COURT: "Instruct you that the distribution of controlled substances as described in the First Superseding Indictment is a felony."

10:21AM

What's defense counsel's position, Mr. Gurwitz or Ms. Bass?

MS. BASS: I think the simpler the better. But we'll defer to the Court.

THE COURT: I just -- I find the current language

10:21AM

confusing. It confused me. And if it confused me, I'm worried it's going to confuse the jury.

So can we say "The distribution of controlled substances as described in the First Superseding Indictment"?

MR. McNALLY: I think the Court needs to instruct

10:21AM

that it's a felony. But yes, correct.

THE COURT: Is that acceptable to the defense?

MS. BASS: Yes, Your Honor.

THE COURT: All right. So that's what we'll do, "as described in the First Superseding Indictment." Okay. That

10:22AM

deals with that one.

Next question I have for you deals on page 57 -- I guess on page 56, you have Proposed Instruction Number 47.

And I apologize, ma'am, if I'm not pronouncing your name correctly. Is it Sayda?

10:22AM DEFENDANT ORELLANA: "Sayda."

THE COURT: Sayda. And --

MR. McNALLY: It's actually "Sayda," Your Honor.

THE COURT: "Sayda." And I noticed in the motion you had -- hold on. You had said she actually goes by Ms. Orellana.

10:23AM MR. GURWITZ: Yes, Your Honor. She is now married, and that is her married name. She indicated in the arraignment Sayda Powery Orellana. I didn't realize until Mr. McNally submitted the -- she did prefer to go by her married name at trial. So I indicated that to Mr. McNally. Hopefully it won't be too much of a --

THE COURT: Is there any problem with changing all the documents?

What is the caption of the case? Do we have to keep

10:23AM that the same?

MR. McNALLY: The caption of the case is "Manuel Porras Salas" and "Sayda Ivonne Salas." I don't -- I think that if we're going to change that, you just explain that, you know, this is what her name is now, I mean, that she's changed

10:24AM her name. And I think for purposes of the instruction, we can

change it to what -- to her current legal name.

MR. GURWITZ: Yep. And even though the Indictment has her last name as Salas, her -- the court docket actually shows Orellana as her true and correct name. Presumably that's because that's what we indicated at the time of arraignment.

10:24AM

THE COURT: Okay. Then why don't I just change everything to Orellana including the verdict form.

MR. McNALLY: Sure.

THE COURT: Okay. Then I'll do that.

10:24AM

Then back to the instruction on Page 39, the last paragraph there. A little bit of knowledge is a dangerous thing. And I realize you incorporated the language from the jury instruction.

My recollection could be wrong on this one, but I think this is language I added again. And I can tell you my intent at the time was when you had all the people involved in the conspiracy were named defendants, and you wanted to pick who was the aider and abetter and who was the principal. And I don't think that this language applies in this case because you say "defendants." So it's either Mr. Salas or Ms. Orellana. And I don't think Mr. Salas is charged in this count.

10:25AM

10:25AM

So what I propose is either change the wording to "The government is not required to prove whether Defendant Sayda Orellana actually committed the crime or whether she aided and abetted it" or just get rid of it in its entirety.

10:26AM

Because as it's written, I believe it's confusing because Mr. Salas is not charged in that count.

MR. McNALLY: Just one minute, Your Honor.

THE COURT: Sure.

10:27AM MR. McNALLY: I think we need the instruction. And let me just lay out the factual scenario for the Court.

An individual named Jose Soberano, who is caught with loaded narcotics in New Mexico -- I think the evidence at trial will play out that he was taking narcotics on a regular basis to Illinois and Chicago. He receives cash in Illinois. And then he makes the deposits into accounts that the government contends are controlled by the defendants.

And so what that instruction is getting at is that she is commanding Jose Soberano to make those deposits. And that's the theory of aiding and abetting.

So under the law, you can aid and abet somebody who is not charged in the offense. So it doesn't refer to Mr. Salas, it refers to Jose Soberano. And so what she is doing is she's directing him to make those deposits.

10:28AM THE COURT: And I -- it doesn't matter -- I understand what you're saying, and that's obviously not the point I'm trying to make. The literal reading of this instruction is it's -- you compare Ms. Orellana with Mr. Salas, and it doesn't matter which one is the principal and which one is the aider and abetter.

And so what I'm saying is that's why you need to change it to whether -- it doesn't matter whether she actually committed the crime or whether she aided and abetted it. And you need to get rid of the word "defendant." That's what I'm -- that's what I'm having the problem with.

10:29AM

MR. McNALLY: Are you referring to page 57, lines 7 to 9? Or just the instruction as a whole?

THE COURT: No, just lines 7 through 9 on page 57. No, I realize the instruction is important. I'm just saying that last sentence. And I think that last sentence, if I'm correct, is in brackets.

10:29AM

MR. McNALLY: Yeah. I think that's right. I think the easier thing to do is either clean up that last section -- is just clean up that last section and make it more clear.

10:29AM

THE COURT: And so that's -- my proposed language is:

"The government is not required to prove precisely whether Defendant Sayda Orellana actually committed the crime or whether she aided and abetted it."

10:30AM

MR. McNALLY: That's fine with the government.

THE COURT: Is that acceptable to the defense?

MR. GURWITZ: Yes.

THE COURT: Ms. Bass, I assume you share my concern, that the way it's written, it implicates Mr. Salas?

10:30AM

MS. BASS: Yes. I agree, Your Honor.

THE COURT: Okay. Then the next instruction is page 59, Instruction Number 48. And it's just the same problem that we had before. So on lines 1 through 3 on page 59:

10:31AM "I instruct you that the distribution of controlled substances alleged in the First Superseding" --

Shall we say "described," "as described"?

10:31AM MR. McNALLY: That's fine, Your Honor.

THE COURT: -- "in the First Superseding Indictment is a felony."

Okay. Then I think the next change is, again, with the aiding and abetting language, page 61, Instruction 49.

10:32AM I'll just have it track what we said before, that government is not required to prove precisely whether Defendant Sayda Orellana actually committed the crime or whether she aided and abetted it.

Is that acceptable?

10:32AM MR. McNALLY: Yes, Your Honor.

THE COURT: Then it's just a typo on page 63, line 51. We need to get rid of the words, on line 15 "his or" or "that her conduct." And then on page 64, we need to get of the words on line 16 "or her," and just "that his conduct."

10:33AM And that's all I had for the instructions. So I

think we're all on the same page with those.

Then what I'd like to talk to you next about is jury selection. It's been a while since I've had a trial with two of you. And the other two, you've never had a trial. So I thought you would appreciate getting a sense of how jury selection will go.

Melissa, how many people are we going to be calling up to --

THE COURTROOM DEPUTY: 50.

10:33AM THE COURT: 50. So there will be 50 fine citizens that will come to the courtroom. And what I'll do is call one at a time up to the box, and we'll have 14 seats in that box. And then I will start to ask my questions -- I'm sorry. Before I have anybody sit down, I'll ask if they need to be excused 10:34AM for economic hardship or medical necessity.

Economic hardship is going to be tough to show in this case, although I imagine there will be some people who will complain or say that it's going to be very difficult for them to sit on this case because they're not getting paid by 10:34AM their employer. But given it's a relatively short duration compared to many cases, I'm not sure that there will be grounds to excuse them for economic hardship.

But if there's some person who doesn't get paid for jury service, sole supporter, and she or he, if they sit on 10:35AM this case, they won't be able to pay their bills, certainly

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA, Plaintiff, vs. MANUEL PORRAS SALAS and SAYDA IVONNE SALAS, Defendants.	**CERTIFIED TRANSCRIPT** Case No. 8:17-cr-00010-CJC **DAY 4**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

TUESDAY, DECEMBER 11, 2018

8:04 A.M.

LOS ANGELES, CALIFORNIA

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THE COURT: Well, why don't -- when we break after the jury instructions, why don't you get with Mr. Ketchel and Mr. McNally and see if you can coordinate so maybe they have it on their system that they can play it.

04:12PM MS. BASS: Sounds good.

THE COURT: Okay. All right.

What you're going to need is a copy of the draft instructions I put on, I guess, a week ago or more, and I have a few questions about some of the instructions. I did get the

04:12PM modifications to 35 and 36, and they look good. I know you both agreed to it, and I appreciate that.

The questions I have, they're really not that substantive. I don't think we're going to have to have a long debate, but I just wanted to run them through. So if you could

04:13PM just give me five minutes to get that information, unless -- do you need a break, longer break than five minutes?

MR. McNALLY: I need to just run down and get my laptop that has the Court's --

THE COURT: Okay. So we'll pick back up in about

04:13PM ten minutes.

MR. KETCHEL: Your Honor, just for the Court's information with regard to substantive revisions, I think we're going to need similar revisions to the substantive money-laundering counts, Counts Three through Six, because

04:13PM again those are charged in the indictment as particular

transactions. And so we need to include in the jury instruction that they would need to find specific transactions as having been violated -- as being violative of the money-laundering statute.

04:13PM THE COURT: That's going to be tough. I mean, I think we can do it, but we could be here pretty late doing that. But I don't know if you saw, I caught this problem with the verdict form. And I don't know if you've looked at the verdict form, but I -- Melissa I think said she put the draft

04:14PM of it --

MR. KETCHEL: Yeah. I think one option -- and I haven't had a chance to confer with defense counsel yet, but I think one option we could do for the jury instruction is when we talk about the substantive instruction for promotion, for

04:14PM example, we could indicate that defendant has been charged with money laundering for promotion, or however it's worded, as alleged below or as described below, and then just include the same table that was included in the Superseding Indictment in the jury instruction, because that table identifies by count

04:15PM the specific transaction that is alleged.

THE COURT: I don't want to unnecessarily fight you on it, but are you saying that what I did with the verdict form is not sufficient? Do you have the verdict form?

MR. KETCHEL: I do, Your Honor. And I don't know if

04:15PM we've looked at it. Just briefly looking at it, I think it

looks fine. I don't think we would have an objection to that if you want to just --

THE COURT: See, if we're talking about the same document, for each of Counts Three to Five and Six --

04:15PM MR. KETCHEL: Correct.

THE COURT: -- I indicate the date, the deposit, and the bank. And that's about all the information that the indictment says anyway.

MR. KETCHEL: Correct. I just didn't know if the 04:15PM Court also wanted to include in the instruction that it will give to the jury the substantive information that is now included on the verdict form. So...

MR. McNALLY: Or just refer them to the verdict form.

04:15PM THE COURT: Well, I guess let's ask the defense if they have a position on it and how they would like to handle it.

MR. GURWITZ: The way the Court handled it on the verdict form I think is sufficient from my perspective.

04:16PM MS. BASS: I agree, Your Honor.

MR. KETCHEL: I guess my only concern would be if the jury is instructed on the substantive money-laundering counts without any reference to specific allegations, then it may be a little surprising to them when they then get to the 04:16PM verdict form and all of a sudden are looking at particular

dates.

I intend in the summation obviously to refer them to specific transactions tied to specific counts. And similar to what we're proposing for the false statement allegations, it seems like it may make sense to alert the jury in the instructions that there are particular dates and transactions that are being charged here.

THE COURT: Well, how quickly can you move and do this, because we gotta do it this afternoon?

04:17PM MR. McNALLY: We can get it done. I mean, we have a Word version of the indictment. We can get it done in a half hour.

MR. KETCHEL: Hopefully less.

THE COURT: Hopefully less.

04:17PM MR. KETCHEL: We'll go down right now and try to do it. Our computers are also slow, but we'll do our best to get something printed out and confer with defense counsel.

THE COURT: Okay. So then go do that. Make haste. As I understand it, you're just going to go through Counts

04:17PM Three through Six, those counts, and just indicate the deposit, the date, and the bank.

MR. KETCHEL: Correct.

THE COURT: Just basically what the verdict does, and so it's kind of belt and suspenders. You're just going to

04:17PM be duplicating it.

MR. KETCHEL: Correct.

THE COURT: Okay. All right. That makes sense.

So it's about 17 after. Why don't we get back together here at a quarter till. Okay?

04:18PM MR. KETCHEL: Yes, Your Honor.

THE COURT: And you'll have that stuff ready.

MR. KETCHEL: Yes, Your Honor.

THE COURT: Okay.

MS. BASS: Thank you, Your Honor.

04:18PM **(Recess from 4:18 p.m. to 4:58 p.m.)**

THE COURT: All right. Do you have the instructions on the money-laundering counts? Great. Just give me a moment.

(Pause in proceedings.)

THE COURT: And this is acceptable to both sides?

04:58PM MR. GURWITZ: Yes, Your Honor.

THE COURT: Okay. This is good. The only question I have, then -- and this is for Melissa and Danielle, my trusted law clerk -- could you give this to Danielle, because we have the instructions on our system.

04:58PM MS. BASS: I can give her my copy.

THE COURT: No, that's okay.

MR. KETCHEL: I can also go down and e-mail it to Melissa so you don't have to --

THE COURT: That's what I was going to ask, because

04:58PM what I'm planning to do is after our discussion this evening, I

will get on our system a complete set of instructions, and then we'll e-mail those to you tonight. And hopefully they'll be entirely consistent with what we discuss and what we've discussed and agreed on in the past, and you'll be able to say 04:59PM they're good or not good. When you get here in the morning, you can let Melissa know.

MS. BASS: Your Honor --

MR. KETCHEL: Should I go e-mail that now, Your Honor?

04:59PM THE COURT: Yes.

MS. BASS: Your Honor, a quick question. Is the Court going to instruct before closing?

THE COURT: Yes.

Well, Mr. Ketchel, maybe you should wait until we're 04:59PM done, because I don't think it's going to be that long on the other issues. And then you can do that, and then we'll start incorporating some of the other changes. Okay?

MR. KETCHEL: Yes.

THE COURT: All right. What I'm going to -- let's 04:59PM start -- what I've got to do is include in the final instructions the two instructions that I gave during the trial dealing with statements that were made to the government and how they can't be used against the other defendant.

So I'm going to just dupe and revise what I said 05:00PM during trial and include those. Now, with those, then I assume

I don't need the instruction -- why am I having problems finding it? You know, there was an instruction about a statement?

MR. McNALLY: Statement given to the government?

05:00PM THE COURT: No. I think we had a more general instruction. Yes, old Instruction Number 13:

"You have heard testimony that a defendant made a statement. It is for you to decide whether the defendant made the statement and, if so, how much weight to give it. In making those decisions, you should consider all the evidence about the statement, including the circumstances under which the defendant may have made it."

That instruction can be removed because I'm going to confirm the other instructions. Are you with me? I don't want to give inconsistent -- are we in agreement on that? Do you understand what I'm saying?

MR. McNALLY: Yes.

MS. BASS: Yes, Your Honor.

05:01PM THE COURT: Okay. So we'll pull that one.

I will confirm after both sides -- after the government rests, I'll take a break and then confirm on the record that Mr. Salas and Ms. Orellana, after discussing with their counsel their right to testify or not testify, have decided not to testify. But for planning purposes, I assume I

can then use the instruction where a defendant doesn't testify.

MS. BASS: Yes, Your Honor.

MR. GURWITZ: Yes.

THE COURT: Okay.

05:02PM MR. McNALLY: What instruction number is that?

THE COURT: That was Instruction Number 10.

Okay. Then Instruction Number 14 is Jose Soberano was convicted of a felony. Is that --

MR. GURWITZ: Current case, Your Honor.

05:02PM THE COURT: It's what? The current case? So it's going to stay in. All right. I'll get rid of the "if applicable" obviously.

Then the next instruction is Instruction Number 15. Do I need to modify or tweak the language a little bit? "Each

05:03PM of you has been shown a translation of the recording," instead of "Each of you has been given a transcript"?

MR. KETCHEL: This is, I believe, for an English language?

THE COURT: Right.

05:03PM MR. KETCHEL: Yeah.

THE COURT: Or should we just leave it as it is? I'll say, "Each of you has been shown" do you want to say "a transcription"?

MR. McNALLY: Or transcript, whatever the Court

05:03PM prefers.

THE COURT: Why don't I say -- because I think it's a transcription. It's not a translation:

"...shown a transcription of the recording to help you identify speakers, not the transcription. But if you heard something different from what appears in the transcription, what you heard is controlling.

Okay. Moving on.

Now we have -- I think I have to make 16 plural, "You have heard recordings. Each of you has been" -- I guess not -- you have -- how about just get rid of "Each of you has been given" and just say "a transcript" -- we'll say:

"Transcripts of the recordings have been admitted into evidence. The transcripts are an English-language translation of the recordings. Although some of you may know the Spanish language, the transcripts are the evidence, not the foreign language spoken in the recordings. Therefore, you must accept the English translation contained in the transcripts and disregard any different meaning of the non-English words."

Is that acceptable?

MR. McNALLY: Yes.

MS. BASS: Yes, Your Honor.

MR. GURWITZ: That's fine.

MR. KETCHEL: Your Honor, can I ask a question?

THE COURT: Sure.

MR. KETCHEL: Is it the Court's practice to send the transcript of a Spanish-language recording back to the jury?

05:06PM THE COURT: Yes, because they've been introduced and they should be introduced into evidence, so they'll be part of the exhibits.

MR. KETCHEL: Okay. I just -- it strikes me as a little -- I know with respect to playbacks, there's kind of a -- not to put emphasis on one witness's testimony over another. So I just don't know if -- I just haven't dealt with this before. I wasn't sure if it seems a little odd to be giving them basically transcripts of only certain witnesses' testimony. But I'll defer to the Court on that.

05:06PM THE COURT: They're similar, but I think you're commingling concepts. The transcript is an exhibit of an expert saying this is what was said, whereas the readbacks are, you know, of witness testimony.

There is expert opinion -- so even trying to

05:07PM articulate it I'm probably not being clear, but there is the expert opinion, certified court interpreter, who says this is what the recording says or the parties have agreed to. This is what it is. And they need to see that.

But I guess in a way you're right. You're

05:07PM highlighting one portion of a testimony over others, but the

reason is for that testimony, the recording, is you need an expert to do it, whereas the other you're not supposed to have a transcript. It's what's said -- if you follow me.

MR. KETCHEL: Yes, I follow you. And we're happy to defer to the Court's practice on that.

05:08PM

THE COURT: Okay. And actually I was -- I don't want to belabor the point, but where it gets actually complicated is when there's a dispute over the translation. And so each party submits into evidence their respective version. And there's a model instruction on that, and moi drafted that. That's how I know it.

05:08PM

But I understand your point is, yeah, I guess technically you're highlighting a piece of evidence. But I would say, well, you do that with a lot of exhibits, too, and summary charts.

05:08PM

MS. BASS: Yeah, 700 of them. I'm just kidding.

THE COURT: Okay. So 17 is good, I think, as is.

Okay. I'm just going through -- have there been charts and summaries that have not been admitted into evidence but were shown to the jury?

05:09PM

MR. KETCHEL: Yes. The one I can think of is Agent Ethridge's, the demonstrative that I created of his --

THE COURT: Good. So we'll keep that.

MR. KETCHEL: -- evaluation of drugs.

05:09PM

THE COURT: Okay. Well, I don't have that many

more, so we're close.

The -- I'm going to make the changes to the false statements that you gave me, and then I'll also incorporate the ones for the money-laundering counts.

05:10PM What I thought we should do is the old Instruction 29 dealing with conspiracy on drug quantity or the amount of quantity of the drug. Don't you think that should follow the drug conspiracy count?

I think the way it was originally placed was to 05:10PM follow the money-laundering count, and I'd just as soon keep all the drug instructions together.

MR. KETCHEL: Makes sense.

THE COURT: Okay. And then you've seen the verdict form. Is the verdict form okay in the changes I made?

05:11PM MR. McNALLY: Yes.

MS. BASS: Yes, Your Honor.

THE COURT: That's all I have.

Is there anything else that either or any party wants to raise on the instructions?

05:11PM MR. GURWITZ: Not me. Thank you, Your Honor.

MS. BASS: No, Your Honor.

THE COURT: Okay. So the plan, then, is I'll get these finalized tonight. I'll e-mail them to you. They'll be waiting for you when you get here in the morning.

05:11PM And I hope I don't sound defensive of this. I know

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA, Plaintiff, vs. MANUEL PORRAS SALAS and SAYDA IVONNE SALAS, Defendants.	**CERTIFIED TRANSCRIPT** Case No. 8:17-cr-00010-CJC **DAY 5**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

WEDNESDAY, DECEMBER 12, 2018

8:12 A.M.

LOS ANGELES, CALIFORNIA

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A I do not, no.

Q Okay. Thank you.

THE COURT: Anything further, Mr. McNally?

MR. McNALLY: Just one question.

09:16AM MR. GURWITZ: Your Honor, a juror is raising her hand.

THE JUROR: Can we take a short break?

THE COURT: We can.

Why don't we take a short break, ladies and

09:17AM gentlemen. Then we'll pick back up.

THE COURTROOM DEPUTY: All rise.

(Out of the presence of the jury)

THE COURT: Please be seated.

Sir, you can step down. Take a break.

09:17AM I understand there were a couple more changes to the false statements jury instruction, and I'll get those fixed. And then we'll make copies of them. I think they're ready to go.

MS. BASS: Did you make additional changes since

09:18AM yesterday?

THE COURT: Yeah. I think there was -- my understanding is -- I don't have it in front of me, but Danielle, my law clerk, indicated that the ones you sent for the false statements, they had -- because two false statements

09:18AM were alleged for Ms. Orellana, the jury had to agree what the

false statement was.

In the original draft you gave me, it didn't have that.

MR. McNALLY: I think -- we can look at the final. I think it did. So the e-mail that -- the hard copy that I provided yesterday and e-mailed should have basically -- should have been all one change, which is one to narrow or to specify the false statements; and then, two, to include the unanimity instruction. I don't think we did two sets, but we'll take a look at that.

09:18AM 09:19AM

THE COURT: I'll get it. Why don't I go see if I can find it right now.

(Recess from 9:19 a.m. to 9:30 a.m.)

(In the presence of the jury.)

09:30AM

THE COURT: Please be seated, ladies and gentlemen.

Mr. McNally.

MR. McNALLY: I have nothing further for this witness.

THE COURT: Very well.

09:30AM

Mr. Gurwitz?

MR. GURWITZ: None, Your Honor.

THE COURT: Sir, you can step down. You're excused.

Mr. Ketchel, looks like you're going to be calling the next witness?

09:30AM

MR. KETCHEL: That's correct.

DEFENDANT MANUEL SALAS: Yes, Your Honor.

THE COURT: All right.

So then when we pick back up, I'll ask the defense if there's any evidence they want to present, and I assume the answer will be "no." And then I'll ask the government if they have anything further, and they'll say "no."

10:25AM

And then we will -- I would propose we go right into jury instructions. So I want to give you a few minutes to look at these. I can represent to you they should be consistent.

10:25AM

There was a miscommunication with my law clerk and I, and we didn't include all the wording for the false statements. And so when I said, "Well, there's something that had to be added," but we added it this morning. And I believe Melissa gave you what the current version is, and that current version should be in there, too.

10:26AM

But other than that, there's been no other changes to what we e-mailed to you last night. And I think -- my recollection is we really only have made changes to Instructions 24 through 37. Those are the substantive instructions.

10:26AM

The rest of the instructions, I think, have been ones we've agreed to long ago. So if you could just take a moment to go through those instructions with particular focus on what I will call the substantive instructions of the counts on the law and make sure you're comfortable with them.

10:27AM

(Pause in proceedings.)

MR. GURWITZ: Looks good to the defense.

THE COURT: Very well, Mr. Gurwitz.

MR. McNALLY: The jury instructions are fine. And I think we covered what needed to be covered in the stipulation, so I think we're just prepared to go forward.

10:29AM

THE COURT: All right.

MS. BASS: Yes, Your Honor. The instructions are fine.

10:29AM

THE COURT: Great. All right. So I think we know what the game plan is, so we'll go ahead and start closing arguments. The lunch is going to be brought to the jurors at noon. So if you could just look at that clock, we will be taking a break at noon. I don't want to disjoint the government's argument, but we will be stopping at noon.

10:30AM

MS. BASS: Can we take a quick bathroom break right now?

THE COURT: Absolutely.

MR. GURWITZ: Your Honor, can I assume that if -- that if Mr. McNally finishes sometime before noon, I won't have to start my closing until after lunch?

10:30AM

THE COURT: Correct. I mean, if we have, like, 15 or 20 minutes before, I think I would rather you start your closing. But if --

MR. KETCHEL: It's moot, Your Honor. We'll be

10:30AM

A P P E N D I X 5

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MANUEL PORRAS SALAS and SAYDA POWERY ORELLANA, Defendants.	Case No. SA CR 17-00010-CJC JURY INSTRUCTIONS

COURT'S INSTRUCTION NO. 32

Defendant Sayda Orellana may be found guilty of the crime of conducting a financial transaction to promote unlawful activity as charged in Counts Three through Five, even if the defendant Sayda Orellana personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To "aid and abet" means intentionally to help someone else commit a crime. To prove a defendant guilty of Counts Three through Five by aiding and abetting, the government must prove each of the following beyond a reasonable doubt:

First, someone else committed the crime of conducting a financial transaction to promote unlawful activity charged in Counts Three through Five of the First Superseding Indictment;

Second, defendant Sayda Orellana aided, counseled, commanded, induced or procured that person with respect to at least one element of the crime of conducting a financial transaction to promote unlawful activity as charged in Counts Three through Five;

Third, the defendant acted with the intent to facilitate the crime of conducting a financial transaction to promote unlawful activity as charged in Counts Three through Five; and

Fourth, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the crime of conducting a financial transaction to promote unlawful activity as charged in Counts Three through Five.

A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime.

The government is not required to prove precisely whether defendant Sayda Orellana actually committed the crime or whether she aided and abetted it.

COURT'S INSTRUCTION NO. 34

Defendant Sayda Orellana may be found guilty of the crime of laundering money as charged in Count Six, even if the defendant Sayda Orellana personally did not commit the act or acts constituting the crime but aided and abetted in its commission. To "aid and abet" means intentionally to help someone else commit a crime. To prove a defendant guilty of Count Six by aiding and abetting, the government must prove each of the following beyond a reasonable doubt:

First, someone else committed the crime of laundering money charged in Count Six of the First Superseding Indictment;

Second, defendant Sayda Orellana aided, counseled, commanded, induced or procured that person with respect to at least one element of the crime of laundering money charged in Count Six;

Third, the defendant acted with the intent to facilitate the crime of laundering money charged in Count Six; and

Fourth, the defendant acted before the crime was completed.

It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime. The evidence must show beyond a reasonable doubt that

the defendant acted with the knowledge and intention of helping that person commit the crime of laundering money charged in Count Six.

A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime.

The government is not required to prove precisely whether defendant Sayda Orellana actually committed the crime or whether she aided and abetted it.

COURT'S INSTRUCTION NO. 35

For purposes of Section 1956(a)(1)(B) of Title 18 of the United States Code as described in Count Two and Count Six, in determining whether a defendant knew that the property represented the proceeds of some form of unlawful activity, you may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:

(1) was aware of a high probability that the proceeds were from some form of unlawful activity, and

(2) deliberately avoided learning the truth.

You may not find such knowledge, however, if you find that the defendant actually believed that the property represented the proceeds from activity that was not unlawful, or if you find that the defendant was simply negligent, careless, or foolish.

COURT'S INSTRUCTION NO. 37

Defendant Manuel Salas is charged in Count Eight of the First Superseding Indictment with knowingly and willfully making a false statement in a matter within the jurisdiction of a governmental agency or department in violation of Section 1001 of Title 18 of the United States Code. Specifically, the First Superseding Indictment alleges that defendant Manuel Salas falsely stated he could not recall if he spoke to Jose Soberano on the telephone.

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, defendant Manuel Salas made the alleged false statement;

Second, the statement was made in a matter within the jurisdiction of the Drug Enforcement Administration and Customs and Border Protection;

Third, defendant Manuel Salas acted willfully; that is, the defendant acted deliberately and with knowledge both that the statement was untrue and that his conduct was unlawful; and

Fourth, the statement was material to the activities or decisions of the Drug Enforcement Administration and Customs and Border Protection; that is, it had a natural tendency to influence,

or was capable of influencing, either agency's decisions or activities with all of you agreeing on the agency affected.

A P P E N D I X 6

CA NO. 19-50140

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAYDA POWERY ORELLANA, Defendant-Appellant.	D.C. No. 8:17-cr-00010-CJC

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE CORMAC J. CARNEY
United States District Judge

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VI.

ARGUMENT

A. THE DISTRICT COURT ERRED IN ALLOWING THE CASE AGENT TO GIVE EXPERT TESTIMONY ABOUT WHAT CONSTITUTES MONEY LAUNDERING "UNDER THE LAW," BECAUSE EXPERT TESTIMONY ABOUT THE LAW IS IMPROPER.

1. Reviewability and Standard of Review.

As noted *supra* p. 8, the government presented both expert testimony and lay testimony from the IRS case agent. During the expert testimony, the prosecutor asked, "Under the law does a person participating in a money-laundering scheme need to know the specific source of the funds?" ER 64. Defense counsel objected that this called for a legal conclusion, but the court overruled the objection. *See* ER 64. The agent testified, "They just need to know it's criminally derived." ER 65. The agent then went on to give additional opinion testimony about money laundering law, including (1) that the financial transaction has to affect interstate commerce but does not have to go through a financial institution, ER 65; (2) that the money launderer does not need to work solely with illegal funds, ER 66; (3) that paying a coconspirator who helps continue an underlying drug trafficking offense qualifies as promotion money laundering, ER 67; and (4) that "[c]onducting a transaction using nominee accounts or conducting transactions using a business account" is laundering money to conceal funds, ER 68.

C. THERE WAS PLAIN ERROR IN THE AIDING AND ABETTING INSTRUCTIONS BECAUSE THEY FAILED TO REQUIRE ADVANCE KNOWLEDGE OF THE ELEMENTS OF THE CRIME AT A TIME WHEN MS. ORELLANA HAD AN OPPORTUNITY TO WITHDRAW..

1. Reviewability and Standard of Review.

Defense counsel did not object to the aiding and abetting instructions, but they remain reviewable for plain error. This requires that (1) there be an error that was not intentionally relinquished or abandoned; (2) the error be "clear," or "obvious"; (3) the error have affected substantial rights; and (4) the error have seriously affected the fairness, integrity or public reputation of judicial proceedings. *United States v. Ornelas*, 906 F.3d 1138, 1143 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2638 (2019).

2. Aiding and Abetting Requires Advance Knowledge of the Elements of the Crime Sufficiently in Advance of the Crime's Completion for the Defendant to Have an Opportunity to Withdraw.

Several years ago, the Supreme Court expanded upon the well-established aiding and abetting standard, in *Rosemond v. United States*, 572 U.S. 65 (2014). The Court began by recognizing the long-established requirement, first articulated by Judge Learned Hand and subsequently adopted by the Court, that "a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as something that he wishes to bring about' and 'seek by his

action to make it succeed.'" *Rosemond*, 572 U.S. at 76 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949), and *Peoni v. United States*, 100 F.2d 401, 402 (2d Cir. 1938)).

The Court then considered the question of whether the defendant had to intend to facilitate and know every element of the crime or just some elements of the crime. *See Rosemond*, 572 U.S. at 76-81; *see also id.* at 71.[4] To use a common metaphor, the Court split the baby. It first held the defendant did not need to intend to facilitate every element of the crime. As the Court put it:

> What matters for purposes of gauging intent, and so what jury instructions should convey, is that the defendant has chosen, with full knowledge, to participate in the illegal scheme – not that, if all had been left to him, he would have planned the identical crime. . . . The law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding. Either way, he has the same culpability, because either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense.

Id. at 79.

Still, the defendant must have *knowledge* of every element. And that knowledge "must be advance knowledge – or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice." *Id.* at 78. The defendant must also have the knowledge sufficiently in advance that the defendant has an opportunity to act upon it, or in the Supreme Court's words, "realistically walk away." *Id.* at 81 & n.10.

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[4] The offense in *Rosemond* was using a gun in a drug trafficking crime, in violation of 18 U.S.C. § 924(c). *See id.* at 68.

3. The District Court's Aiding and Abetting Instructions Were Error Which Was Clear or Obvious Because They Failed to Require Advance Knowledge.

The district court's aiding and abetting instructions, which were drawn from part of this Court's model instruction,[5] *compare* ER 50-51, 54-55 *with Model Instructions Manual* § 5.1, were deficient under *Rosemond*. The instructions did retain the requirement that the defendant "acted with the intent to facilitate the crime" and did incorporate the Learned Hand caution that "[i]t is not enough that the defendant merely associated with the person committing the crime." ER 50, 54. *Compare Peoni*, 100 F.2d at 402. But they fell short of what *Rosemond* requires in two ways.

First, the instructions did not *require* advance knowledge of all the elements of the crime. They did state that "[a] defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance

[5] That the instructions were drawn from a model instruction "does not preclude a finding of error." *United States v. Mendoza*, 11 F.3d 126, 128 n.2 (9th Cir. 1993). Model jury instructions "are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges," "do not come down from any mountain or rise from the sea," and are "not blessed with any special precedential or binding authority." *McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997) (en banc). This Court has held a number of model instructions inadequate. *See, e.g., United States v. Montoya-Gaxiola*, 796 F.3d 1118, 1122-23 (9th Cir. 2015) (possession of unregistered firearm instruction); *United States v. Garcia*, 729 F.3d 1171, 1175-77 (9th Cir. 2013) (involuntary manslaughter instruction); *United States v. Smith*, 561 F.3d 934, 937-38 (9th Cir. 2009) (assault with a dangerous weapon instruction); *Mendoza*, 11 F.3d at 128-29 & n.2 (18 U.S.C. § 924(c) instruction); *United States v. Hegwood*, 977 F.2d 492, 495-96 (9th Cir. 1992) (mail fraud instruction); *United States v. Terry*, 911 F.2d 272, 280 (9th Cir. 1990) (constructive possession instruction).

knowledge of the crime." ER 51, 55. But they did not state that the defendant acts with intent to facilitate the crime *only* when the defendant actively participates in a criminal venture with advance knowledge of the crime. They did not state, as *Rosemond* does, that the defendant "must" have advance knowledge, *Rosemond*, 572 U.S. at 78, *quoted supra* p. 22.

Second, the district court's instruction completely omitted the requirement in *Rosemond* – and optional language in this Court's model instruction – about the timing of the defendant's advance knowledge. As expressed in *Rosemond*, the knowledge must come when the defendant "can realistically walk away," *id.*, 572 U.S. at 81 n.10, and not when it is "too late for [her] to be reasonably able to act upon it," *id.* at 81. As expressed in the model instruction, the defendant must have acquired knowledge "when [she] still had a realistic opportunity to withdraw from the crime." *Model Instructions Manual* § 5.1. The district court's instruction said nothing at all about this requirement.

In light of *Rosemond*'s express language, this was, first, error, and second, "clear," or "obvious," error. The first two prongs of the plain error standard are therefore satisfied.

4. The Error Affected Ms. Orellana's Substantial Rights and the Fairness, Integrity or Public Reputation of Judicial Proceedings.

The error also affected Ms. Orellana's substantial rights and the fairness, integrity or public reputation of judicial proceedings. There is an effect on substantial rights when there is a "reasonable probability" an erroneous instruction affected the jury's verdict. *United States v. Tydingco*, 909 F.3d 297, 305 (9th Cir.

2018). This is "an intermediate level of proof," which is "more than a mere possibility, but less than a preponderance of the evidence." *Tydingco*, 909 F.3d at 304.

There was a reasonable probability here because there were multiple reasons the jury might not have believed the cooperating witness, Mr. Soberano. First, he had lied at multiple stages of the case. He had lied to law enforcement officers when he was first arrested and multiple times thereafter. He had lied to the prosecutor even after agreeing to cooperate. He had very possibly lied to the jury when he claimed at trial he knew nothing about the millions of dollars of drugs in the truck he was driving in 2004 and claimed he did not think the $60,000 his companion had when they were stopped by police in 2002 or 2003 was dirty money.

Second, Mr. Soberano had a motive to exaggerate the involvement of Ms. Orellana and Mr. Salas. It was they whom Mr. Soberano understood the government to be targeting and seeking to prosecute. And he had good reason not to expose the real drug traffickers, for they were potentially dangerous. Indeed, they may have already threatened his family. *See supra* p. 11 (noting testimony family had been threatened).

There were the telephone and bank records which suggested Ms. Orellana had processed several hundred thousand dollars – though not the millions of dollars the drugs were worth. The records did not establish what Ms. Orellana knew about the money and when she knew it, however . And knowledge – in particular, advance knowledge – is precisely the element on which the district court's instructions were deficient. The jury could have decided either that Ms. Orellana did not realize the money was dirty until after the specific money-

laundering transactions charged in the substantive money laundering counts, or realized too far into the process to do anything about it.

There was also an effect on the fairness, integrity or public reputation of judicial proceedings. There is such an effect when "the jury might have relied on a legally invalid theory." *Tydingco*, 909 F.3d at 306. There is also an effect on the fairness, integrity or public reputation of the proceedings when "the instructions improperly deprived the defendant of [her] right to have a jury determine an essential [mental state] element of the offense [and] the jury was presented with a version of the events under which the requisite mental state was lacking." *United States v. Ornelas*, 906 F.3d at 1146. Here, the instructions did not require the finding of advance knowledge which *Rosemond* requires, and defense counsel expressly suggested, in his closing argument, the possibility of being "simply negligent, careless, or foolish." RT(12/12/18) 151.

In sum, there is more than a "mere possibility" that the jury would have reached a different verdict, *Tydingco*, 909 F.3d at 306. There is more than a mere possibility it might not have believed Mr. Soberano. There is more than a mere possibility it might have had doubts about what Ms. Orellana knew and when she knew it. The third and fourth prongs of the plain error standard are therefore satisfied.

D. IT WAS PLAIN ERROR FOR THE DISTRICT COURT TO GIVE A *JEWELL* INSTRUCTION.

Mr. Salas's opening brief will explain why the district court's committed plain error in giving a *Jewell* instruction. Ms. Orellana joins in that argument,

pursuant to Federal Rule of Appellate Procedure 28(i).

E. THE PROSECUTOR ENGAGED IN MISCONDUCT BY MISSTATING THE LAW WHEN HE ARGUED THAT THE COURT'S INSTRUCTION NOT TO CONSIDER PUNISHMENT MEANT THE JURY COULD NOT CONSIDER THE PUNISHMENT MR. SOBERANO FACED.

1. Reviewability and Standard of Review.

Defense counsel did not object to the prosecutor's rebuttal argument, quoted *supra* p. 12, that the instruction not to consider punishment precluded consideration of the punishment Mr. Soberano faced in evaluating his credibility. The argument nonetheless remains reviewable for plain error. *See United States v. Flores*, 802 F.3d 1028, 1034 (9th Cir. 2015).

2. The Argument the Jury Could Not Consider the Punishment Mr. Soberano Faced Was Prosecutorial Misconduct that Prejudiced Ms. Orellana.

It is misconduct for a prosecutor to misstate the law in closing argument. *Flores*, 802 F.3d at 1034; *United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979). The prosecutor grossly misstated the law here. His argument that the instruction telling the jury it could not consider punishment meant the jury could not consider potential punishment in evaluating Mr. Soberano's credibility was a gross mischaracterization of what that instruction means. It also misstated well-established law on witness credibility.

A P P E N D I X 7

Nos. 19-50140 & 19-50141

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAYDA POWERY ORELLANA, AKA Adina Ponce, AKA Adina Salas, AKA Saida Salas, AKA Sayda Ivonne Salas, AKA Adina Zaida; and MANUEL SALAS, AKA Manuel Sala-Porras, AKA Manny Salas,

Defendants- Appellants.

Appeal from a Final Judgment, Following a Conviction and Sentence, Entered by the United States District Court for the Central District of California (D.C. No. CR-17-00010-CJC) (The Hon. Cormac J. Carney, Presiding)

[INCARCERATED INMATE APPEAL]

APPELLANT MANUEL SALAS'S OPENING BRIEF

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then offered to give the jury a further limiting instruction when it returned from a recess, but Salas's defense counsel noted "you can't unring the bell. And then to re-ring the bell with an instruction, I have to think about it."[6] ER 33. She also added that because the form was dated more than nine years prior, "it made it more prejudicial" when combined with Special Agent Skinner's referencing an earlier investigation involving Salas. ER 33-34.

Defending its denying the mistrial motion, the district court added its opinion that "the jury has no idea what that [earlier] investigation was or what it was about. And on its face, it's pretty innocuous." ER 34-35.

M. Although the Government's Case-in-Chief Focused on Salas's Specific Intent to Commit Money Laundering, the District Court Nevertheless Gave the Jury an Alternative Willful-Blindness Instruction

As the government noted continuously during its closing arguments and later rebuttal, its principal theory was that Salas – despite limited evidence, mostly through Soberano's testimony and a solitary text message involving the two men (see supra at 12-21) – knowingly participated in a money laundering conspiracy. See ER 1148-55, 1166-72, 1178-82, 1245-56, 1264-65. But it nevertheless

[6] Salas's defense counsel did not further request a limiting instruction from the district court, and it therefore did not give one to the jury during the remaining trial proceedings. See ER 1061-1105.

proposed pretrial an alternative willful-blindness instruction, which the district court accepted, and ultimately read to the jury after the parties had rested:

> For purposes of Section 1956(a)(1)(B) of Title 18 of the United States Code as described in Count Two and Count Six, in determining that a defendant knew that the property represented the unlawful activity, you may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant, one, was aware of a high probability that the proceeds were from some form of unlawful activity, and, two, deliberately avoided the truth. You may not find such knowledge, however, if you find that the defendant actually believed that the property represented the proceeds from activity that was not unlawful or if you find that the defendant was simply negligent, careless or foolish.

ER 51 (emphasis added); see also ER 21, 79.[7]

N. The District Court Confusingly Instructs the Jury Regarding § 1001's Materiality Element

Shortly thereafter, the district court instructed the jury regarding the essential elements of § 1001 for count 8, involving Salas. But when it did so regarding materiality, the district court referred to the two agencies that had interviewed Salas – CBP and the DEA – conjunctively and disjunctively:

> Fourth, the statement was material to the activities or decisions of the Drug Enforcement Administration and Customs and Border Protection; that is, it had a natural tendency to influence or was capable of influencing

[7] Neither defense counsel objected to that instruction.

> either agency's decisions or activities with all of you agreeing on the agency affected.

ER 53 (emphasis added).[8]

O. The Jury Convicts Salas and Orellana

Following deliberations during the sixth trial day on December 13, 2018, the jury convicted Salas on all three counts that the first superseding indictment set forth against him. It also convicted Orellana on all six of the counts that she faced. ER 61-63. Additionally, the jury found specially that the distribution conspiracy involved mixtures of controlled substances containing cocaine, heroin, and marijuana that, respectively, weighed at least 51 kilograms, 100 grams, and 100 kilograms. ER 63-65, 82-87.

P. Determining That Salas Had a Putative Managerial or Supervisory Role in the Conspiracy, the District Court Sentences Salas to a 151-Month Custodial Term

For Guidelines calculations purposes, the parties agreed that Salas's base offense level was 34 (see U.S.S.G. § 2D1.1), and would be enhanced by two levels under U.S.S.G. § 2S1.1(b)(2)(B) because it supposedly involved money laundering. See, e.g., ER 91. But they differed regarding Salas's role, with the government's arguing that Salas was at least a managerial-type person within the

[8] Neither defense counsel objected to the instruction.

conclusion. This Court should therefore vacate Salas's sentence and direct the district court on remand to ressentence him with correct Guidelines calculations.

VI. STANDARDS OF REVIEW.

A. Denial of Salas's Mistrial Motion

This Court reviews for an abuse of discretion a district court's denial of a defendant's motion for a mistrial. See, e.g., United States v. Gann, 732 F.2d 714, 725 (9th Cir. 1984). Under that standard, this Court initially determines whether the district court "identified the correct legal rule to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). Even if it did, however, this Court then determines whether the district court's applying that rule to the case's facts was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." See id. at 1262.

B. Improper *Jewell* Instruction

Because Salas's trial counsel did not object to the district court's Jewell instruction, this Court reviews that issue for plain error. See, e.g., United States v. Baron, 94 F.3d 1312, 1316 (9th Cir. 1996), overruled on other grounds by United States v. Heredia, 483 F.3d 913, 920 (9th Cir. 2007) (en banc). Under such a standard, this Court considers whether there has been ". . . (1) error, (2) that is plain, and (3) affects substantial rights." United States v. Vega, 545 F.3d 743, 747

(9th Cir. 2008). Consequently, "[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. (internal quotation marks omitted).

C. Confusing § 1001 Instruction

Salas's trial counsel also did not object to the district court's instruction regarding the materiality element for § 1001, so this Court necessarily reviews that issue for plain error. See Baron, 94 F.3d at 1316.

D. Cumulative Error

This Court reviews properly preserved issues for harmless error when assessing whether cumulative error occurred. See, e.g., United States v. Necoechea, 986 F.2d 1273, 1283 (9th Cir. 1993). Further, as part of the overall inquiry, it reviews for plain error those issues to which it originally had applied to particular standard of review. Id.

E. Sentencing-Related Role Enhancement

For any Guidelines-related issue, this Court reviews for an abuse of discretion how the district court applied a case's facts to a particular provision. United States v. Gasca-Ruiz, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). The district court "necessarily abuse[s] its discretion if it based its ruling on an

district court's granting Salas's mistrial motion. Its failing to do so was illogical and implausible under the circumstances, and therefore should result in reversing Salas's conviction in its entirety.

VIII. THE DISTRICT COURT PLAINLY ERRED BY GIVING THE JURY A JEWELL INSTRUCTION, PARTICULARLY CONSIDERING THAT THE GOVERNMENT PREDICATED ITS CASE-IN-CHIEF AGAINST SALAS FOR MONEY LAUNDERING CONSPIRACY BASED ON HIS PUTATIVE ACTUAL KNOWLEDGE.

Simply put, considering that this Court has long disfavored Jewell instructions (see infra at 41-43), and the government predicated its case-in-chief against Salas for the money-laundering-conspiracy count on his supposed knowledge of Orellana's activities, the district court on its own initiative should have refrained from giving one. And without that requisite scienter, which the government attempted to establish via Soberano's dubious testimony, the government simply could not demonstrate that Salas was willfully blind to the deposits Soberano and Sarmiento made into the various bank accounts at issues.

Thus, under this case's particular factual circumstances, the district court's error was plain; prejudicial to Salas's substantial rights; affected the jury's verdict on count 2; and seriously affected the proceedings' fairness, integrity, or public reputation. This Court should therefore reverse Salas's conviction on count 2.

A. The District Court's Error Was Plain

At least theoretically speaking, the government can satisfy a criminal statute's knowledge element by proving beyond a reasonable doubt that the "defendant was aware of a 'high probability' [of the offense], and that he deliberately avoided learning the truth." Heredia, 483 F.3d at 919 n.6. But this requires the government to demonstrate more than mere recklessness of negligence:

> [D]eliberate ignorance, otherwise known as willful blindness, is categorically different from negligence or recklessness . . . . A willfully blind defendant is one who took *deliberate* actions to avoid confirming suspicions of criminality. A reckless defendant is one who merely knew of a substantial and unjustifiable risk that his conduct was criminal; a negligent defendant is one who should have had similar suspicions but, in fact, did not.

Id. at 918 n.4 (internal citations omitted, emphasis in original). Deliberate ignorance therefore "contains two prongs: (1) a subjective belief that there is a high probability a fact exists; and (2) deliberate actions taken to avoid learning the truth." United States v. Yi, 704 F.3d 800, 804 (9th Cir. 2013).

Moreover, this Court has held that a district court can instruct on this theory only if the jury could find willful-blindness-related facts when it has rejected the government's alternative actual-knowledge case-in-chief:

> Actual knowledge, if course, is inconsistent with willful blindness. The deliberate ignorance instruction only comes into play, therefore, if the jury rejects the government's case as to actual knowledge. In deciding whether to give a willful blindness instruction, the district court must determine whether the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge.

Heredia, 483 F.3d at 922 (emphasis added). Indeed, as this Court's case law illustrates, oftentimes the evidence the government relies on will not support a deliberate ignorance theory because it demonstrates either actual knowledge or something less than willful blindness. See, e.g., United States v. Sanchez-Robles, 927 F.2d 1070, 1075 (9th Cir. 1991) (noting that the smell of marijuana would have shown either actual knowledge or not given any reason for suspicion), overruled on other grounds by Heredia, 483 F.3d at 921-22; United States v. Alvarado, 838 F.2d 311, 315-16 (9th Cir. 1987) (observing that most of the facts that government relied on pointed to actual knowledge, not conscious avoidance); United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096, 1099 (9th Cir. 1985) (noting that directive to bury capacitors "points to actual knowledge, rather than deliberate avoidance"); overruled on other grounds by Heredia, 483 F.3d at 920.

Quite significantly, this Court has held repeated that it is the "comparatively

rare" case where the evidence can supports findings that the defendant lacks actual knowledge, but instead was willfully blind. United States v. McAllister, 747 F.2d 1273, 1275 (9th Cir. 1984). See also Baron, 94 F.3d at 1318 n.3 (holding that the instruction "is rarely appropriate"); Mapelli, 971 F.2d at 286 (concluding that the instruction should be used "sparingly); Alvarado, 838 F.3d at 314 ("The cases in which the facts point to deliberate ignorance are relatively rare."). Although Heredia did not specify that its holdings "should not be read to imply additional limitations on a district court's discretion," id, 483 F.3d at 924 n.16, that does not signify that the district court should give deliberate ignorance instructions routinely.[9]

Further, "[i]t is not enough that the defendant . . . negligently failed to inquire" when there are not unusually suspicious facts. United States v. Kelm, 827 F.2d 1319, 1324 (9th Cir. 1987). As Judge Kleinfeld observed in a concurrence in Heredia, "[t]he government has not conscripted the citizenry as investigators." Heredia, 483 F.3d at 928 (Kleinfeld, J., concurring in the

[9] A classic example of a fact pattern supporting a deliberate ignorance instruction concerns the defendant's affirmatively rejecting a proffered opportunity to obtain information. See, e.g., Yi, 704 F.3d at 805 (holding that the instruction was justified because a defendant experienced in real estate transactions "engaged in a deliberate pattern of failing to read documents . . . common to real estate transactions").

judgment). Instead, as this Court held in Baron, "we have repeatedly emphasized that a Jewell instruction should not be given in every case in which a defendant claims a lack of guilty knowledge, but should be given only 'when there is evidence that the defendant has his suspicion aroused, but then . . . deliberately omits making an inquiry in order to avoid having actual knowledge.'" Baron, 94 F.3d 1312, 1317 (quoting United States v. Aguilar, 80 F.3d 329, 331 (9th Cir. 1996) (en banc) (ellipses in original)).

Baron is a quintessential example of insufficient suspicious circumstances. There, a man had asked the defendant to drive a car with an "overpowering" cherry fragrance from Los Angeles to Phoenix, and had given the defendant $200 in cash to purchase a one-way plane ticket to Los Angeles. Baron, 94 F.3d at 1314-15. This Court acknowledged that the circumstances were suspicious, but concluded they were not sufficiently so to support a deliberate ignorance theory. It explained as follows:

> [T]he strong cherry smell in the car, combined with the circumstances under which [the other man] asked Baron to drive the car to Phoenix, arguably suggest that Baron should have suspected that [the other man] might be involved in criminal activities. However, at most the evidence suggests that Baron was negligent or reckless in disregarding the risk that the car contained drugs. As noted above, evidence of negligence or recklessness concerning such a risk is simply insufficient.

Id. at 1318.

* * *

Here, the government's case-in-chief against Salas on count 2 is akin to fact patterns in cases such as Baron, Sanchez-Robles, Alvarado, and Pacific Hide & Fur Depot, Inc. – where the government's supporting evidence demonstrated either actual knowledge or, alternatively, mere negligence at most, but not deliberate ignorance or willful blindness. Indeed, if the jury were to have believed Soberano – the only government eyewitness to Salas's putative role in the money laundering conspiracy – Salas had actual knowledge. But if the jury alternatively rejected Soberano's testimony about Salas, including how he interpreted the only text message suggesting Salas's knowledge of an account that Orellana may used for money laundering purposes (see ER 75-77), he was at most negligent, insufficient scienter to convict a defendant under Jewell and its progeny.

Indeed, beginning and finishing with Soberano, nothing in that cooperating witness's testimony suggested a middle ground that Salas was deliberately ignorant to Soberano's and Orellana's supposed money-laundering-related activities. Besides attesting to Salas's supposed involvement in narcotics distribution – integrally linked here to the cash flow that resulted from it (see supra at 14-15) – Soberano testified specifically that Salas directed him to deposit

cash into a suspect account. ER 75-77.

Further, other evidence that the government adduced in its case-in-chief regarding Salas's supposed scienter for count 2 does not even constitute negligence. For instance, Thomas Parano an employee at the San Miguel Casino in Upland, California, testified that Salas and Orellana gambled together on two instances in December 2012. ER 852-53, 1072, 1081-86.

But that evidence does not illustrate that Salas was deliberately ignorant about the cash's provenance when he and Orellana went to the casino together. Indeed, given the couple's stated income during that time frame (see ER 1008-19), it is not implausible that the aggregate amount that they gambled on those particular dates together was anything more than garden-variety profligate behavior by people who could have managed their finances more propitiously. Nor did the government demonstrate that Salas knew about Orellana's other gambling activities and luxury clothing purchases in 2011-2014, ones that might have suggested to him that the couple had income disproportionate to what they were earning from Salas's CBP position, rental units, and other declared sources. See, e.g., ER 915-919, 1063-1072.

At bottom, then, without Soberano's suspect testimony about Salas's actual knowledge – including deciphering the only text message between the two men

that referenced a bank account – other evidence of record could not support a Jewell instruction. It was therefore erroneous for the district court to have given it to the jury.

B. The District Court's *Jewell* Instruction Affected Salas's Substantial Rights and the Proceedings' Fairness

Simply put, the erroneous Jewell instruction affected Salas's substantial rights and the proceedings' fairness because – at least concerning Salas's supposed involvement in the putative money-laundering conspiracy – this was a weak case. And Salas – and Orellana – aggressively attacked the government's evidence, particularly Soberano's dubious testimony about him See e.g., ER 614-713, 718-25.

In Baron, this Court held that "[a] defendant may satisfy his or her burden on [the substantial rights] point" of the plain-error inquiry "by demonstrating a significant possibility of acquittal had a different instruction been given." Baron, 94 F.3d at 1318 (internal quotation marks omitted). There, this Court concluded affirmatively, observing that "[t]he evidence in the record suggesting that Baron actually knew that the car contained drugs is not overwhelming." Id. at 1318-19 (emphasis added).

Similarly, other than Soberano's testimony – which, at most, generally

attributed knowledge to Salas without providing any specifics about his putative role in the money laundering conspiracy (see supra at 12-13) – the government apparently proffered only two documentary pieces of evidence to demonstrate Salas's scienter: a text message between Salas and Soberano (which Soberano attempted to interpret to provide context, see ER 575-76) and evidence that Salas withdrew cash from an account he controlled, shortly after Sarmiento had received a cash deposit into hers from Soberano and then transferred money into Salas's. See ER 895-96.

Thus, much like in Baron, there was a "significant probability" that absent the Jewell instruction (and rejecting Soberano's dubious generalized testimony), a jury would have acquitted Salas on count 2. Baron, 94 F.3d at 1319. And concerning the final plain-error prong – whether "the error seriously affected the fairness of the trial" (id.) – there was "a distinct possibility that the jury in this case impermissibly inferred guilty knowledge on [Salas's] part on the basis of mere negligence or recklessness, without proof of deliberate avoidance." Id.; see also Griffin v. United States, 502 U.S. 46, 59 (1991) ("When . . . jurors have been left the option of relying on a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from error.").

* * *

Consequently, because the improper Jewell instruction regarding Salas cannot survive this Court's plain error review, it should reverse Salas's conviction on count 2.

IX. THE DISTRICT COURT PLAINLY ERRED BY GIVING THE JURY A CONFUSING INSTRUCTION REGARDING § 1001's MATERIALITY ELEMENT.

Regarding the § 1001 count that the first superseding indictment charged against Salas, the district court's instruction regarding that offense's materiality element ("a natural tendency to influence or was capable of influencing,"[10] see supra at 25-26) plainly would have confused a reasonable jury. See, e.g., Warren, 25 F.3d at 898 ("We consider whether the instructions – taken as a whole and viewed in the context of the entire trial – were misleading or confusing, inadequately guided the jury's deliberations, or improperly intruded on the fact finding process.") (emphasis added). This is so for two reasons.

First, the instruction initially referred to the "activities or decisions of the Drug Enforcement Administration and Customs and Border Protection." ER 53. (emphasis added). Placing both a disjunctive word ("or") and a conjunctive one

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[10] See generally United States v. Duncan, 693 F.2d 971, 975 (9th Cir. 1982) ("This court has held that a statement satisfies the materiality requirement of 18 U.S.C. § 1001 if the false statements [could] have affected or influenced the exercise of a governmental function.") (internal quotation marks omitted, alteration in original).

("and) within the same opening verbiage inexorably would have left the jury to wonder what it needed – if at all – to scrutinize separately. Thus, a natural reading would have allowed the jury to disaggregate agency "activities" or "decisions," but concomitantly required it to consider ones that both DEA and CBP undertook here. Thus, even that initial language would have been confusing to a jury untrained in parsing legalistic niceties.

Second, after that initially confusing language, the jury then had to evaluate everything that followed the semi-colon, all of which the district court phrased disjunctively ("influence or was capable of influencing either agency's decisions or activities"). Thus, although the district court concluded the instruction by using the phrase "the agency affected," the language preceding the semi-colon, which combined the DEA and CBP, inevitably would have flummoxed even a careful jury.

As this Court has held, a "conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue." United States v. Pazsint, 703 F.2d 420, 424 (9th Cir. 1983) (internal quotation marks omitted); see also United States v. Terry, 911 F.2d 272, 280 (9th Cir. 1990) (same). And that would necessitate reversal for plain error whenever "the instructions destroyed the defendant's substantial right to be tried only on charges presented in an indictment

returned by a grand jury . . . ." Id. (internal quotation marks omitted).

Here, count 8 of the first superseding indictment charged generally that the investigative "matter" was "within the jurisdiction of the executive branch of the government of the United States, namely the Drug Enforcement Administration and Customs and Border Protection . . . ." ER 198. But the district court's confusing instruction instead complicated that element, referring to the two agencies at issue (DEA and CBP) both conjunctively and disjunctively, therefore presenting the type of "ambiguous and equivocal instruction[] to the jury on a basic issue" that Pazsint precludes. Pazsint, 703 F.2d at 424. And simply put, that was a sufficiently serious error to warrant reversal even under such an exacting standard of review.

This Court should therefore reverse Salas's conviction under count 8.

X. ALTERNATIVELY, THIS COURT SHOULD REVERSE SALAS'S CONVICTION BECAUSE OF CUMULATIVE ERROR.

As this Court has observed, when "no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." Frederick, 78 F.3d at 1381. Indeed, as this Court further explained in Frederick, when "there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less

A P P E N D I X 8

Nos. 19-50140 & 19-50141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAYDA ORELLANA AND MANUEL SALAS,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. SA CR 17-10-CJC

GOVERNMENT'S ANSWERING BRIEF

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At bottom, there was no dispute that Soberano was hoping a judge would give him a sentencing reduction based on his testimony. Both the prosecutor and the district court explicitly advised the jury that they should consider this information when evaluating the cooperator's credibility. There was no plain, prejudicial error.

5. Because defendants have not identified any prejudicial error, there was no cumulative error.

6. The district court did not clearly err in imposing a 2-level role enhancement for each defendant. The district court did not rely on Sarmiento's participation in the offense when it applied the enhancement, and its finding that both defendants directed Soberano to move narcotics and deposit money was logical and supported by the record.

IV

ARGUMENT

A. The District Court Did Not Abuse Its Discretion in Denying Salas's Motion for Mistrial

1. Facts

In January 2009, prior to the conduct alleged in this matter, CBP agents interviewed Salas in connection with a separate, unrelated

The district court had the opportunity to see and hear the witness, weigh his testimony, and judge the effects of the incident. The court did not abuse its discretion in denying the mistrial motion. *See Lemus*, 847 F.3d at 1025.

B. The District Court Did Not Plainly Err in Giving Jointly Proposed Jury Instructions

1. Standard of review

"[A] defendant waives the right to appeal if the 'defendant considered the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction.'" *United States v. Laurienti*, 611 F.3d 530, 543 (9th Cir. 2010) (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)).

If not waived, defendants did not object to any of the instructions they now challenge, and thus any review is for plain error. *See United States v. Olano*, 507 U.S. 725, 731-37 (1993) (holding that plain error review applies when defendant failed to object at trial to jury instruction challenged on appeal). To prevail under plain-error review, defendant bears the burden of establishing four things. "First, there must be an error or defect . . . that has not been intentionally relinquished." *Puckett v. United States*, 556 U.S. 129, 135 (2009).

Second, "the legal error must be clear or obvious." "Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings.'" *Puckett*, 556 U.S. at 135 (quoting *Olano*, 507 U.S. at 734). Fourth, "if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error 'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *Olano*, 507 U.S. at 736 (alterations omitted)). As the Supreme Court has emphasized, "[m]eeting all four prongs is difficult, 'as it should be.'" *Id.* (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)).

2. Jewell instruction

a. There was sufficient evidence of deliberate ignorance to support giving the instruction

At trial, defendants advanced the theory that they lacked knowledge of the source of the laundered funds. For example, during cross-examination of the government's money laundering expert, Orellana's counsel asked whether money launderers could launder money through a source "who is—because of compartmentalization[,]

who's unaware that they are being used for the purpose of laundering money?" (SER 464.) During closing argument, both defendants maintained that they lacked knowledge of the drug conspiracy (and thus the source of the laundered funds). (*See, e.g.*, SER 1238 (Salas arguing that "[t]he phrase 'knew that the property represented the proceeds of unlawful activity' means that he knew that the property involved in the transactions represented proceeds from some form of activity that constitutes a felony. And I submit there is no evidence of that.").

The government argued that both defendants had actual knowledge of the illegal source of the proceeds because of their involvement in the drug conspiracy. (SER 1163-64.) However, this Court has explained that the government may pursue alternative theories. *See United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007) (en banc) ("The government has no way of knowing which version of the facts the jury will believe, and it is entitled (like any other litigant) to have the jury instructed in conformity with each of these rational possibilities.")

The district court did not plainly err in giving the deliberate ignorance instruction derived from *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc). Deliberate ignorance involves "(1) a subjective belief that there is a high probability a fact exists and (2) deliberate actions taken to avoid learning the truth." *United States v. Yi*, 704 F.3d 800, 804 (9th Cir. 2013). In determining the applicability of the jury instruction, "the district court must view the evidence in the light most favorable to the party requesting it." *Id.* Here, if the jury rejected the government's evidence of actual knowledge, it still could rationally have found that defendants took deliberate steps to avoid learning the source of the funds, such as by asking Soberano about the source of the funds that he was depositing into their accounts.[3] *See United States v. Santos*, 553 U.S. 507, 521-23 (2008) (in money laundering prosecutions, the government will be entitled to a willful blindness instruction if the professional money launderer, aware of a high probability that the laundered funds were profits, deliberately avoids learning the truth

[3] Indeed, at sentencing, Salas argued that the evidence established at most that he was willfully blind. (SER 104.)

about them."); *United States v. Liddle*, 565 F. App'x 607, 610 (9th Cir. 2014) (affirming use of *Jewell* instruction in money laundering case in which defendant failed to investigate source of funds defendant deposited and spent).

Defendants argue that the instruction was improper because negligence or recklessness are insufficient; rather, the defendant must take deliberate actions to avoid confirming suspicions of criminality. *Heredia*, 483 F.3d at 918 n.4; *United States v. Baron*, 94 F.3d 1312, 1318 (9th Cir. 1996), *overruled on other grounds by Heredia*, 483 F.3d 913. They further contend that the instruction is not warranted where the government's evidence shows only either actual knowledge or no knowledge, but not a middle ground of deliberate ignorance. *E.g., United States v. Sanchez-Robles*, 927 F.2d 1070, 1075 (9th Cir. 1991).

The deliberate ignorance cases defendants cite are readily distinguishable. For example, unlike the odor of drugs in *Sanchez-Robles*—where familiarity with the odor of marijuana, or lack thereof, meant either that the defendant had actual knowledge or no knowledge of the drugs, *id.*—the depositing of hundreds of thousands of dollars into defendants' bank accounts would have raised defendants'

suspicions about the source of those funds to the extent they lacked direct knowledge. Nor is this a case of mere negligence or recklessness. *Cf. Baron*, 94 F.3d at 1318 (defendant was at most negligent or reckless in disregarding risk that car contained drugs where he agreed to drive car under suspicious circumstances). Defendants withdrew and spent the funds deposited into their bank accounts, which far exceeded their legitimate income, supporting a finding that they deliberately avoided learning the truth about the source of funds. *See Yi*, 704 F.3d at 805.

In these circumstances, there was no error, let alone clear or obvious error. *See Henderson v. United States*, 568 U.S. 266, 278 (2013) (rulings that concern "matters of degree, not kind," and rulings that are "questionable but not plainly wrong" are not plain error).[4]

b. Any error did not affect substantial rights or the fairness of the proceedings

Under plain error review, defendants bear the burden of demonstrating prejudice. *Olano*, 507 U.S. at 734. Defendants cannot

[4] Defendants cite to cases suggesting that the *Jewell* instruction is disfavored (SOB 41-42), but this Court overruled those cases to the extent that they speculated on the general propriety of providing the *Jewell* instruction. *Heredia*, 483 F.3d at 924 n.16.

establish that the *Jewell* instruction affected the outcome of the proceedings for two reasons.

First, an erroneously-given deliberate ignorance instruction is harmless if direct knowledge was "abundantly clear" from the evidence. *United States v. Alvarado*, 838 F.2d 311, 317 (9th Cir. 1987) (applying harmless error analysis). The jury convicted defendants of the drug conspiracy, which did not rely on a *Jewell* instruction. (SER 1136, 1207.) The jury thus concluded that defendants had actual knowledge that their actions were furthering a drug conspiracy and, necessarily, defendants had direct knowledge that the money they received constituted drug proceeds.

Second, the government did not rely upon the *Jewell* instruction at trial. In its closing argument and rebuttal, the government did not mention willful blindness and relied solely upon a direct knowledge theory. (SER 1146-83, 1241-68.) The only brief reference to the *Jewell* instruction was made by Orellana's counsel. (SER 1206-07 ("So when it comes to the money laundering, what I submit to you on Counts Two through Six is your task is going to be to decide was . . . Orellana negligent, careless, or foolish, or was there knowledge, including willful

blindness?").) In light of the fact that the government did not advance a deliberate ignorance theory in its closing argument, defendants cannot establish that the *Jewell* instruction affected the outcome of the proceedings. *Cf. Baron*, 94 F.3d at 1319 (finding plain error, in part, because prosecutor made argument related to *Jewell* instruction in closing argument).

3. False statement instruction

a. Facts

Count 8 charged Salas with making a false statement to CBP Agent Skinner and DEA Agent Sellers during his interview. (SER 198.) The First Superseding Indictment alleged that during the interview Salas "falsely stated that he could not recall if he spoke to Jose Soberano on the telephone, when, in fact, as [Salas] knew at the time he made the statement, he had regular telephonic contact with Jose Soberano." (*Id.*)

The jointly proposed jury instructions for count 8 described the elements as follows:

> First, defendant Manuel Salas made the alleged false statement;

> Second, the statement was made in a matter within the jurisdiction of the Drug Enforcement Administration and Customs and Border Protection;
>
> Third, defendant Manuel Salas acted willfully; that is, the defendant acted deliberately and with knowledge both that the statement was untrue and that his conduct was unlawful;
>
> Fourth, the statement was material to the activities or decisions of the Drug Enforcement Administration and Customs and Border Protection; that is, it had a natural tendency to influence or was capable of influencing either agency's decisions or activities with all of you agreeing on the agency affected.

(SER 1138-39.)

b. The instruction was not clearly or obviously confusing, nor was Salas prejudiced

On appeal, Salas contends for the first time that the use of both the conjunctive and the disjunctive in the fourth element of the instruction—that the jury had to determine if the false statement was material to the "activities *or* decisions of the Drug Enforcement Administration *and* Customs and Border Protection"—was confusing. (SOB 48-49.) Salas never raised this objection at trial, which indicates there was no confusion at the time. *See United States v. Ancheta*, 38 F.3d 1114, 1116- 17 (9th Cir. 1994) (finding "[t]he absence of objection suggest[ed] that the mistake was not noticeable or confusing").

Contrary to defendant's contention (SOB 49), the instruction was not ambiguous; certainly there was no clear or obvious error.

Salas also cannot meet his burden under plain error review to establish that the outcome was altered by the district court's instruction. *Puckett*, 556 U.S. at 135. In its closing argument, the government referenced testimony that the investigation involved a matter within the jurisdiction of both the DEA and CBP. (SER 157, 184, 1022.) The government further referenced testimony from both Agent Gonzalez and Agent Skinner about how Salas's false statement influenced the investigation of both the DEA and CBP. (SER 990, 1021-22, 1158-59.) The government presented no evidence that any other agency was influenced. Thus, there is no reasonable probability that the jury convicted based on an effect on an uncharged agency. *Cf. United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983) (finding reversible error when the district court instructed the jury on the elements of an offense that was wholly different from the one charged in the indictment).

Finally, even where the materiality element is omitted entirely, the error is harmless if the materiality element "is supported by

uncontroverted evidence." *Neder v. United States*, 527 U.S. 1, 18 (1999). At trial, materiality was never in dispute. For example, in his closing argument, Salas argued that he did not deliberately make a false statement but rather failed to remember the relevant facts. Salas focused exclusively on whether the statement was false, not whether it was within the jurisdiction of the respective agencies or influenced their investigations. (ER 1238.) The evidence at trial established that Salas's lie about his relationship with Soberano affected the investigation (SER 990, 1021-22, 1158-59), and defendant has not identified evidence in the record "that could rationally lead to a contrary finding." *Neder*, 527 U.S. at 19. Accordingly, Salas has not demonstrated that any error affected his substantial rights or the fairness of the proceedings.

4. Aiding and abetting instruction

a. Facts

Counts 3-5 charged Orellana alone with substantive counts of promotional money laundering and count 6 charged her with a substantive count of concealment money laundering based on four cash

deposits Soberano made into Orellana's bank accounts at her direction. (OER 85-86.)

The parties jointly proposed giving Ninth Circuit Model Criminal Jury Instruction 5.1 for aiding and abetting with respect to Counts 3-6. (GER 4-7.) The model instruction provides in relevant part:

> A defendant acts with the intent to facilitate the crime when the defendant actively participates in a criminal venture with advance knowledge of the crime [and having acquired that knowledge when the defendant still had a realistic opportunity to withdraw from the crime].

This portion of the model instruction addresses the Supreme Court's holding in *Rosemond v. United States*, 572 U.S. 65, 77-78 (2014), that the intent requirement for aiding and abetting is satisfied when the defendant actively participates in a criminal venture with advance knowledge of the charged offense. The defendant in *Rosemond* was charged with aiding and abetting the crime of using a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c), and the Supreme Court held that the defendant must have advance knowledge that a confederate would be armed at a time when the defendant could "realistically walk away" from the crime. *Id.* at 81 n.10. The comment to the model instruction directs that the bracketed

language should be used "[i]f, as in *Rosemond*, there is an issue as to when the defendant learned of a particular circumstance that constitutes an element of the crime."

The parties proposed giving the instruction without the bracketed language (GER 4-7), and the court gave the instruction without adding the bracketed phrase (OER 51, 55). Orellana now contends that omission of the bracketed language was error. (OOB 21-26.)

b. The claim is waived, not merely forfeited

The parties jointly requested that the court give Model Instruction 5.1 without the additional bracketed phrase. (GER 4-7.) Where "the defendant was aware of the right he was relinquishing and relinquished it anyway," this Court finds waiver, not merely forfeiture. *United States v. Depue*, 912 F.3d 1227, 1233 (9th Cir. 2019).

This Court has found waiver where defense counsel jointly submits the jury instructions and later challenges those instructions based on a case that was on the books at the time of trial. *United States v. Cain*, 130 F.3d 381, 383-84 (9th Cir. 1997); *accord United States v. Morton*, 776 F. App'x 395, 399 (9th Cir. 2019) (finding waiver based on *Cain*). Through the joint filing here, Orellana's counsel "represented to

the court that he had read the instructions, that he had studied them, and that to the best of his knowledge" they were correct and the bracketed language from the model instruction was not necessary in this case. *Cain*, 130 F.3d at 383. Orellana therefore waived her objection to the aiding and abetting jury instruction. *Id.* at 384.

c. If not waived, there was no plain error

i. The model instruction is not plainly erroneous

Initially, defendant contends that the portion of the model instruction that the court did use is flawed because it does not make sufficiently clear that advance knowledge is required. Orellana contends that the model instruction should include the word "only" so that the first sentence would read: "A defendant acts with the intent to facilitate the crime *only* when the defendant actively participates in a criminal venture with advance knowledge of the crime." (*See* OOB 23-24.)

The model instruction defines what "intent to facilitate" means, and clearly conveys that advanced knowledge is a requirement, not merely one of several ways a defendant can act with intent to facilitate. Ninth Circuit Model Criminal Jury Instruction 5.1. This court has

upheld other model instructions that define terms without using the word "only." *United States v. Soto-Zuniga*, 837 F.3d 992, 1004 (9th Cir. 2016) (upholding pattern instruction that "[a] reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation"); *United States v. Greer*, 640 F.3d 1011, 1020 (9th Cir. 2011) (upholding language in Ninth Circuit Model Criminal Jury Instruction 5.7 that "[a]n act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident"). There was no error, let alone plain error. *United States v. Liew*, 856 F.3d 585, 599 (9th Cir. 2017) (no plain error where there is no "clear or controlling authority" addressing the question).

ii. The optional language from the model instruction was not required

The district court did not plainly err by agreeing with the parties to omit the optional language from the model instruction because the issue Orellana disputed at trial was *whether* she had knowledge that the money derived from drug trafficking, not *when* she acquired such knowledge. (SER 1207 (Orellana's closing argument: "So when it comes to the money laundering, what I submit to you on Counts Two through Six is your task is going to be to decide was Ms. Orellana negligent,

careless, or foolish, or was there knowledge, including willful blindness?"). On these facts, whether the additional language was required is, at the very least, subject to reasonable dispute, and thus cannot be "plain" error. *United States v. Marcus*, 560 U.S. 258, 262 (2010) (Plain error is "clear or obvious, rather than subject to reasonable dispute"); *see Henderson*, 568 U.S. at 278 (rulings that concern "matters of degree, not kind," and rulings that are "questionable but not plainly wrong" are not plain error).

iii. Any error was harmless

Even if the Court finds error in the district court's instruction, the error did not affect substantial rights because there is not "a reasonable probability . . . that the jury would have found [Orellana] not guilty had the district court" added the bracketed language from the model instruction. *United States v. Tydingco*, 909 F.3d 297, 305 (9th Cir. 2018). Nor is there a reasonable possibility that the jury relied on a legally invalid theory that she gained knowledge only at a point that she could no longer withdraw before the crime was committed. *Id.* at 306. Unlike a bank robber who learns in the middle of a robbery that a co-conspirator is carrying a firearm, *see Rosemond*, 572 U.S. at 80-81,

Orellana had every opportunity to withdraw prior to directing Soberano where to deposit the drug proceeds and withdrawing those proceeds from her bank account. Further, this is simply not a situation where knowledge gained in the middle of the offense would come "too late for [Orellana] to be reasonably able to act on it." *Id.* at 81. If Orellana gained knowledge after directing Soberano where to deposit the money, she could have declined to withdraw the proceeds from her bank account. Finally, the jury convicted Orellana of participating in the drug conspiracy, which spanned a period of time that both preceded and followed the charged money laundering counts. Orellana therefore understood at the time she was aiding and abetting each substantive money laundering offense that she was assisting to launder drug proceeds.

C. The District Court Did Not Plainly Err in Permitting Agent Gonzalez To Provide Expert Testimony Regarding Money Laundering

1. Facts

As part of his expert testimony, IRS Agent Gonzalez generally described what money laundering is and gave example of the three types of money laundering charged in this case (promotional money

A P P E N D I X 9

CA NO. 19-50140

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAYDA POWERY ORELLANA, Defendant-Appellant.	D.C. No. 8:17-cr-00010-CJC

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE CORMAC J. CARNEY
United States District Judge

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CA NO. 19-50140

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAYDA POWERY ORELLANA, Defendant-Appellant.	D.C. No. 8:17-cr-00010-CJC

I.

ARGUMENT

A. IT WAS ERROR TO ALLOW THE CASE AGENT TO TESTIFY ABOUT MONEY LAUNDERING LAW.

1. Review Is Not Limited to Plain Error.

Initially, review of the agent's expert testimony about money laundering law is not limited to plain error review. Defense counsel's objection that the testimony called for a legal conclusion was sufficient. *See United States v. Diaz*, 876 F.3d 1194, 1199 (9th Cir. 2017) (framing question of improper expert testimony about law as whether testimony is "impermissible legal conclusion"). What alternative buzzwords the government thinks should have been used instead is unclear, but

B. THE AIDING AND ABETTING INSTRUCTION WAS PLAINLY ERRONEOUS.

1. Simply Acquiescing in Joint Proposed Jury Instructions Was Not a Waiver.

The government argues there is a waiver because the aiding and abetting instruction was included in the joint proposed jury instructions. But simply acquiescing in joint proposed jury instructions does not create a waiver that bars even plain error review. As this Court stated in *United States v. Laurienti*, 611 F.3d 530 (9th Cir. 2010): "Waiver does not occur when there is 'no evidence that [the defendant] considered submitting the [omitted] element to the jury, but then, for some tactical or other reason, rejected the idea." *Id.* at 543 (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)). There was a waiver in *Laurienti* because the defendant affirmatively objected to the correct instruction. *Id.*, 611 F.3d at 543-44.

The Court did treat joint jury instructions as a waiver in *United States v. Cain*, 130 F.3d 381 (9th Cir. 1997), *see id.* at 383, but *Cain* must be read in light of *Laurienti*. That *Cain* does not preclude plain error review is made clear by at least two unpublished opinions which have acknowledged *Cain* but engaged in plain error review nonetheless. In *United States v. Caballero-Perez*, 637 Fed. Appx. 313 (9th Cir. 2016) (unpublished), the Court cited *Cain* only for the proposition that having agreed to joint jury instructions "may" have resulted in a waiver, but did not need to decide the issue because there was no plain error in any event. *See Caballero-Perez*, 637 Fed. Appx. at 314 n.1. In *United States v.*

Muhammad, 740 Fed. Appx. 887 (9th Cir. 2018) (unpublished), the Court acknowledged *Cain* but applied plain error review to an instruction on the other subsection of the same statute at issue here – 18 U.S.C. § 2. *See Muhammad*, 740 Fed. Appx. at 889 (considering jury instruction for causing act to be done under § 2(b)). Just as the Court applied plain error review to the § 2(b) causing an act instruction in *Muhammad*, it should apply plain error review to the § 2(a) aiding and abetting instruction here.[4]

2. The Instruction Was Plainly Erroneous.

The government's arguments on the merits also fall short. The two cases it cites – *United States v. Soto-Zuniga*, 837 F.3d 992 (9th Cir. 2016), and *United States v. Greer*, 640 F.3d 1011 (9th Cir. 2011) – are distinguishable. Initially, the defendants in *Greer* and *Soto-Zuniga* made different arguments than the defense is making in the present case. *See Soto-Zuniga*, 837 F.3d at 1004 (argument that reasonable doubt instruction interfered with presumption of innocence); *Greer*, 640 F.3d at 1019 (argument that knowingly instruction conflicted with extortion instruction). Secondly, the instructions given in *Soto-Zuniga* and *Greer* are very different. The reasonable doubt instruction at issue in *Soto-Zuniga* does not give an *example* of reasonable doubt by stating there is reasonable doubt "when" there is a doubt based upon reason and common sense, but *defines* reasonable doubt, by stating reasonable doubt "is" a doubt based on reason and common sense. *See*

[4] The government itself is inconsistent. It asserts waiver in response to the challenge to the aiding and abetting instruction, but does not assert waiver in response to the challenges to the Jewell instruction and false statement instruction, which were also included in the joint jury instructions, *see* SER 16-17.

A P P E N D I X 10

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October 27, 2020

Molly C. Dwyer
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

re: Supplemental authority in *United States v. Sayda Orellana*, No. 19-50140

Dear Ms. Dwyer:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, I wish to bring to the Court's attention *United States v. Lindsey*, 634 F.3d 541 (9th Cir. 2011), as supplemental authority. *Lindsey* is relevant to the government's argument that the inclusion of the aiding and abetting instruction in joint jury instructions is a waiver that precludes a challenge to the instruction on appeal.

Lindsey held a stipulation to an erroneous jury instruction was not a waiver under the invited error doctrine. It found the defendant did not "affirmatively act[ ] to relinquish a known right," *id.* at 555 (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)), as required by *Perez*, where the record did not reveal any discussion about the instruction in any court proceedings or filings. *See Lindsey*, 634 F.3d at 555.

The only discussion of aiding and abetting in the record here was a discussion of the need to make clear that the aiding and abetting instruction applied only to Ms. Orellana and not her codefendant, Mr. Salas. *See* RT(11/26/18) 19-23. *See also* ER 51, 55 (change discussed appearing in final instructions). There was no discussion of the instructional language defining

aiding and abetting. This precludes finding a waiver of the challenge to the aiding and abetting instruction, under *Lindsey* and *Perez*.

Sincerely,

s/ Carlton F. Gunn

Carlton F. Gunn
Attorney at Law

A P P E N D I X 11

CA No. 19-50140
CA No. 19-50141

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAYDA POWERY ORELLANA and MANUEL SALAS, Defendant-Appellants.	D.C. 8:17-cr-00010-CJC

JOINT PETITION FOR REHEARING AND REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE CORMAC J. CARNEY
United States District Judge

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAYDA POWERY ORELLANA, and MANUEL SALAS, Defendant-Appellants.	D.C. 8:17-cr-00010-CJC

JOINT PETITION FOR REHEARING AND REHEARING EN BANC

The Court should grant rehearing en banc in this case because there is an intracircuit conflict which needs to be resolved, namely, whether signing onto joint proposed jury instructions, without more, creates an absolute "invited error" bar rather than merely a higher hurdle of plain error review. En banc review is also appropriate because the panel memorandum held there was waiver of even challenges for which the government did not argue waiver, and this conflicts with

* * *

this Court's rule that it will not address waiver unless it is raised by the opposing party.

Respectfully submitted,

DATED: December 11, 2020

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

DATED: December 11, 2020

By s/ David A. Schlesinger
DAVID A. SCHLESINGER
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STATUTES AND RULES

I.

INTRODUCTION

The panel memorandum declined to address the merits of three instructional challenges on the ground that trial counsel's approval of joint proposed jury instructions waived the challenges. This highlights a stark intracircuit conflict in the Court's case law. Some cases hold, consistent with the panel memorandum's view, that stipulating to instructions or joining in joint proposed instructions is "invited error" that creates an absolute bar to review. But other cases hold there is still plain error review in this circumstance. It is important to resolve this conflict because joint proposed jury instructions are a common practice, and defense counsel should know whether a simple mistake in agreeing to an erroneous instruction creates an absolute invited error bar or merely the higher hurdle of plain error review.

En banc review is also warranted because the panel memorandum found waiver of all three instructional challenges when the government argued waiver only for one. This conflicts with a well-established rule that a party can "waive the waiver" and this Court will not address waiver if not raised by the opposing party.

II.

FACTUAL BACKGROUND

Sayda Powery Orellana and Manuel Salas, married but since divorced, were

charged with conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846; conspiracy to launder monetary instruments and actual money laundering, in violation of 18 U.S.C. § 1956; and making false statements within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001.[1] *See* Orellana ER 71-90; Salas ER 181-200. Prior to trial, the government filed a document titled, "Joint Proposed Jury instructions." GER 1. The document stated that the government and defendants, "by and through" their counsel, "hereby submit their Joint Proposed Jury Instructions in the above-captioned case." GER 1-2. It bore government counsel's electronic signature and defense counsel's electronic signatures "by email authorization." GER 2-3.

A jury found Ms. Orellana and Mr. Salas guilty of all counts after a weeklong trial. *See* Salas ER 72. Ms. Orellana and Mr. Salas both appealed after being sentenced. *See* Orellana ER 1-6; Salas ER 1403. The issues raised in the appeals, which were consolidated, included challenges to several jury instructions that had been included in the joint proposed jury instructions and been given by the district court.[2] First, Ms. Orellana argued that the aiding and abetting instructions, which applied only to her, *see* Salas ER 310-14, were deficient because they failed to make clear the requirement that Ms. Orellana had knowledge of the underlying crime sufficiently in advance of the crime's completion. *See* Orellana Opening Brief, at 21-26. Second, Mr. Salas, joined by

---

[1] Only Ms. Orellana was charged in the substantive money laundering counts.

[2] There were also several other issues raised, but those are not germane to this petition for rehearing.

Ms. Orellana, argued there was insufficient evidence to support a willful blindness instruction. *See* Salas Opening Brief, at 39-48; Orellana Opening Brief, at 26-27. Third, Mr. Salas argued the elements instruction for his 18 U.S.C. § 1001 charge was impermissibly confusing in naming two different agencies which could have been impacted by the false statements. *See* Salas Opening Brief, at 48-50.[3]

There had been no objection to these instructions in the district court, but neither had there been any affirmative adoption of them beyond their inclusion in the joint proposed jury instructions. The only discussion of the instructions during jury instructions conferences was about a clarification of the aiding and abetting instructions to make clear they applied only to Ms. Orellana, *see* Salas ER 310-14, correction of pronouns in the 18 U.S.C. § 1001 instructions, *see* Salas ER 314, and a modification of the 18 U.S.C. § 1001 instructions to identify the specific false statements, *see* Salas ER 1038.

In response to the challenge to the aiding and abetting instructions, the government argued there was a waiver precluding even plain error review because of the defense attorneys' agreement to the joint proposed jury instructions. *See* Govt. Brief, at 35-36 (citing *United States v. Cain*, 130 F.3d 381, 383-84 (9th Cir. 1997), and *United States v. Morton*, 776 Fed. Appx. 395, 399 (9th Cir. 2019)(unpublished)). The government did not make this waiver argument in response to the other jury instruction challenges. For these challenges, it argued only that review was limited to review for plain error and addressed the merits under that standard of review. *See* Govt. Brief, at 23-33. It also made an

[3] Each defendant had a separate 18 U.S.C. § 1001 charge, and this argument did not apply to Ms. Orellana's charge.

alternative argument addressing the merits of the challenge to the aiding and abetting instruction. *See* Govt. Brief, at 36-39.

Ms. Orellana argued in her reply brief that simply acquiescing in joint proposed jury instructions was not a waiver that precluded even plain error review. *See* Orellana Reply Brief, at 7-8 (quoting *United States v. Laurenti*, 611 F.3d 530, 543 (9th Cir. 2010), and *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)), and citing *United States v. Caballero-Perez*, 637 Fed. Appx. 313, 314 n.1 (9th Cir. 2016) (unpublished), and *United States v. Muhammad*, 740 Fed. Appx. 887, 889 (9th Cir. 2018) (unpublished)). She also cited further authority in a supplemental authority letter filed after the oral argument. *See* Supplemental Authority Letter, filed October 27, 2020, Docket #48 (citing *United States v. Lindsey*, 634 F.3d 541, 555 (9th Cir. 2011)). Mr. Salas did not address waiver since the government had not asserted it in response to his instructional challenges.

A panel of this Court decided the case in a memorandum disposition. *See* Appendix. The panel did not address the merits of the challenges to the instructions, but held that approval of the joint proposed jury instructions meant the challenges were waived. And the panel found waiver not only of the aiding and abetting instruction challenge, for which the government had made the waiver argument, but also of the willful blindness and 18 U.S.C. § 1001 instruction challenges, for which the government had not made the argument.

> Nor is Orellana's and Salas's challenge to the joint proposed jury instructions persuasive. "A defendant's right to challenge a jury instruction is waived if the defendant considered the controlling law and 'in spite of being aware of the applicable law, proposed or accepted a flawed instruction.'" *United States v. Burt*, 143 F.3d 1215, 1217 (9th Cir. 1998) (quoting *United*

> *States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc)). Because Orellana's and Salas's defense counsel approved the jointly proposed jury instructions, their argument is waived. *See Perez*, 116 F.3d at 845 n.7 ("We have long held that jury instructions may be waived by a defendant's attorney.").

Panel Memorandum, at 5.

III.

ARGUMENT

A. THE CASE SHOULD BE REHEARD EN BANC TO RESOLVE AN INTRACIRCUIT CONFLICT ON WHETHER THE MERE AGREEMENT TO JOINT PROPOSED JURY INSTRUCTIONS IS A WAIVER PRECLUDING EVEN PLAIN ERROR REVIEW.

The Court's lead case on "invited error" and waiver is *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997) (en banc). *Perez* recognized that *United States v. Olano*, 507 U.S. 725 (1993), limited this Court's previously broad application of the invited error doctrine. Specifically, "*Olano* limits our application of the invited error doctrine to those rights deemed waived, as opposed to merely forfeited, that is, 'known rights' that have been 'intentionally relinquished or abandoned.'" *Perez*, 116 F.3d at 842 (quoting *Olano*, 507 U.S. at 733). *Perez* explained the limits created by *Olano* as follows:

> Until now, our invited error doctrine has focused solely on whether the defendant induced or caused the error. We now recognize, however, that we must also consider whether the defendant intentionally relinquished or abandoned a known right. If the defendant has both invited the error, and relinquished a known right, then the error is waived and

> therefore unreviewable.

Perez, 116 F.3d at 845 (citations and footnote omitted). This sets what the Court recently characterized as "a high standard" for applying the invited error doctrine. *Claiborne v. Blauser*, 934 F.3d 885, 893 n.2 (9th Cir. 2019).

Perez also gave several examples of invited error from past cases which it reaffirmed. In *United States v. Baldwin*, 987 F.2d 1432 (9th Cir. 1993), there was invited error because the defendant affirmatively rejected a government effort to cure an omission in an instruction. *See Perez*, 116 F.3d at 845 (discussing *Baldwin*). In *United States v. Staufer*, 38 F.3d 1103 (9th Cir. 1994), the defendant's trial attorney affirmatively modified model jury instructions. *See Perez*, 116 F.3d at 845 (discussing *Staufer*). And in *United States v. Guthrie*, 931 F.2d 564 (9th Cir. 1991), the defendant's attorney affirmatively objected to the omitted instruction when the trial court offered to give it. *See Perez*, 116 F.3d at 845 (discussing *Guthrie*). "Waiver occurred in each of these cases because the defendant considered the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction." *Perez*, 116 F.3d at 845.

This contrasted with what the defendants in *Perez* had done. As the Court explained:

> Although [the defendants] did submit erroneous instructions, there is no evidence that they affirmatively acted to relinquish a known right. That is, there is no evidence that [the defendants] considered submitting the [omitted] element to the jury, but then, for some tactical or other reason, rejected the idea.

Perez, 116 F.3d at 845-46.

Merely signing on to joint proposed instructions with no evidence of

consideration and rejection of alternative instructions does not satisfy the test established by *Perez*. As the Court recognized in *United States v. Alferahin*, 433 F.3d 1148 (9th Cir. 2006), "it is not enough simply for the defense attorney to be implicated in the error"; rather, "defense counsel must make an 'intentional relinquishment or abandonment of a known right.'" *Id.* at 1154 n.2 (quoting *Olano*, 507 U.S. at 732); *see also Alferahin*, 433 F.3d at 1154 n.2 (quoting statement in *Perez*, 116 F.3d at 845, that "we must also consider whether the defendant intentionally relinquished or abandoned a known right"). More specifically, as recognized in *Erickson Products v. Kast*, 921 F.3d 822 (9th Cir. 2018), it is not enough that "both parties stipulated to the relevant instruction," because "merely submitting an erroneous instruction does not waive a later challenge, so long as there is no evidence that the appellant considered and rejected a correct instruction 'for some tactical or other reason.'" *Id.* at 832 n.7 (quoting *Perez*, 116 F.3d at 845-46).

Other of this Court's cases and/or judges, however, have questioned statements such as these. Judge Berzon, concurring in *Alferahin*, opined that "the plain error/invited error question [is] more difficult than the majority opinion suggests." *Id.*, 433 F.3d at 1162 (Berzon, J., concurring in part). And *United States v. Laurenti*, 611 F.3d 530 (9th Cir. 2010), directly criticized the *Alferahin* majority opinion, stating, "We echo the concurrence's sentiment in that case that the majority opinion inadequately distinguishes *Perez*." *Laurenti*, 611 F.3d at 545 n.10.

Worse than this intracircuit criticism, this Court's cases addressing joint or stipulated jury instructions are in direct conflict. In addition to the *Erickson*

Products case quoted above, there are at least two more published cases declining to apply the invited error bar based on just a stipulation or jointly proposed jury instructions, *see United States v. Lindsey*, 634 F.3d 541, 555 (9th Cir. 2011); *United States v. Hugs*, 384 F.3d 762, 766-67 (9th Cir. 2004), as well as several unpublished dispositions, *see United States v. Muhammad*, 740 Fed. Appx. 887, 889 (9th Cir. 2018) (unpublished); *United States v. Rincon*, 654 Fed. Appx. 867, 868 (9th Cir. 2016) (unpublished); *United States v. Manuelito*, 471 Fed. Appx. 774 (9th Cir. 2012) (unpublished); *cf. United States v. Caballero-Perez*, 637 Fed. Appx. 313, 314 n.1 (9th Cir. 2016) (stating defendant "may have waived the issue entirely," but "we need not decide this issue").

Standing in stark conflict with these cases is *United States v. Cain*, 130 F.3d 381 (9th Cir. 1997), which is the case the government cited in its waiver argument, *see* Govt. Brief, at 35-36,[4] and several different unpublished cases, *see United States v. Morton*, 776 Fed. Appx. 395, 399 (9th Cir. 2019) (unpublished); *United States v. Turner*, 754 Fed. Appx. 664 (9th Cir. 2019) (unpublished); *United States v. Redmond*, 748 Fed. Appx. 760, 762 (9th Cir. 2018) (unpublished); *United States v. Paniry*, 711 Fed. Appx. 387, 391 (9th Cir. 2017) (unpublished). *Cain* held it was sufficient that "[the defendant's] attorney's signature clearly appears on the joint request for proposed instructions," because "[w]hen an attorney signs a jury instruction proposal, he certifies to the court, as an officer of the court, that the

[4] The panel did not cite *Cain*, but cited *Perez* and *United States v. Burt*, 143 F.3d 1215 (9th Cir. 1998). *See* Panel Memorandum, at 5. *Burt* simply stated the general rule that "[a] defendant's right to challenge a jury instruction is waived if the defendant considered the controlling law and 'in spite of being aware of the applicable law, proposed or accepted a flawed instruction,'" Panel Memorandum, at 5 (quoting *Burt*, 143 F.3d at 1217, and *Perez*, 116 F.3d at 845).

instructions are legally correct." *Id.*, 130 F.3d at 383. *Cain* also asserted, quoting a different statement in *Perez* than the *Perez* statements quoted in *Alferahin* and *Erickson Products*, that "[i]t is no answer 'merely [to assert] he did not know the instructions were flawed.'" *Cain*, 130 F.3d at 383-84 (quoting *Perez*, 116 F.3d at 845).

The panel in the present case chose the reasoning of *Cain* and the unpublished cases on that side of the split rather than the reasoning of *Alferahin*, *Erickson Products*, and the cases on the other side of the split. But it was not because the latter cases are distinguishable, *i.e.*, not because there was evidence of a tactical decision or intentional relinquishment of a known right rather than oversight. The panel simply chose the other side of the split.

Consequently, the Court should grant en banc review. It is the view expressed in *Alferahin* and *Erickson Products* rather than the view expressed in *Cain* that is consistent with *Perez* and *Olano*, and it is important to resolve the conflict in the cases. First, it is important because it is a common practice for the government to prepare joint proposed jury instructions and have defense counsel sign them as a joint submission; in some district courts, including the one in which the present case was tried, it is a requirement, *see* Honorable Cormac J. Carney, Judge's Procedures, http://www.cacd.uscourts.gov/honorable-cormac-j-carney (paragraph 12 regarding trial preparation requiring parties to submit joint jury instructions).

Second, it is important because defense counsel has a right to know the implications of signing such proposed jury instructions. Does simply making a mistake by agreeing to an erroneous jury instruction create an invited error bar or

must there be some conscious, tactical decision to give up an argument? Defense counsel will want to decline to sign such joint proposed instructions if signing them transforms a mere mistake into the absolute bar of invited error rather than just the higher hurdle of plain error.

B. THE CASE SHOULD BE REHEARD EN BANC BECAUSE THE PANEL'S RELIANCE ON WAIVER OF THE CHALLENGES TO THE WILLFUL BLINDNESS AND 18 U.S.C. § 1001 ELEMENTS INSTRUCTIONS CONFLICTS WITH THE COURT'S RULE OF NOT ADDRESSING WAIVER WHEN IT IS NOT RAISED BY THE OPPOSING PARTY.

Rehearing is also required because the panel's reliance on waiver even for the two instructional challenges for which the government did not argue waiver conflicts with a line of "waive the waiver" cases. The Court has stated in multiple opinions that "this court will not address waiver if not raised by the opposing party." *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1995). *Accord Norwood v. Vance*, 591 F.3d 1062, 1068 (9th Cir. 2010) (quoting *United States v. Doe*, 53 F.3d 1081, 1082-83 (9th Cir. 1995), and *Schlesinger*); *United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th Cir. 2002) (quoting *Doe* and *Schlesinger*); *Doe*, 53 F.3d at 1082-83 (quoting *Schlesinger*). The rule is now "well-established." *Norwood*, 591 F.3d at 1068. *Accord United States v. Sainz*, 933 F.3d 1080, 1085 (9th Cir. 2019) (quoting *Norwood* and *United States v. Tercero*, 734 F.3d 979, 981 (9th Cir. 2013)); *United States v. Pridgette*, 831 F.3d 1253, 1258 (9th Cir. 2016) (quoting *Norwood*); *Graham-Sult v. Clainos*, 736 F.3d

724, 747 n.16 (9th Cir. 2014) (quoting *Norwood*); *Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) (also describing rule as "well-established").

The Court has also applied the rule in multiple contexts. Those include waiver of a severance issue by failure to renew a severance motion in the district court, *see United States v. Lewis*, 787 F.2d 1318, 1323 n.6 (9th Cir. 1986); waiver in failing to challenge imposition of a supervised release term until revocation of the supervised release, *see Doe*, 53 F.3d at 1082-83; waiver of appeal in a plea agreement, *see Garcia-Lopez*, 309 F.3d at 1122-23; waiver of a claim in an immigration hearing, *see Tokatly*, 371 F.3d at 618; waiver of a qualified immunity defense in a civil rights action, *see Norwood*, 591 F.3d at 1068; waiver of arguments in other civil cases, *see Graham-Sult*, 756 F.3d at 747 & n.16; *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958, 965 (9th Cir. 2011); waiver of an alternative theory of sufficiency of evidence in a criminal case, *see United States v. Katakis*, 800 F.3d 1017, 1024 & n.3 (9th Cir. 2015); waiver of the remedy of sentencing on a closed record, *see Pridgette*, 831 F.3d at 1258; waiver of venue, *see United States v. Obak*, 884 F.3d 934, 937 (9th Cir. 2018); and waiver of the right to file a motion for reduction of sentence under 18 U.S.C. § 3582(c), *see Sainz*, 933 F.3d at 1083-87. Given this sweeping application of the rule, it must also apply in the context here – an alleged waiver of the right to challenge a jury instruction.

The rule's application is made even more appropriate by the government's selective assertion of the waiver here – asserting it for the challenge to the aiding and abetting instruction, but not for the challenges to the willful blindness and 18 U.S.C. § 1001 instructions. That this adds weight is illustrated by both *Norwood*

and *United States v. Murguia-Rodriguez*, 815 F.3d 566 (9th Cir. 2016), where the court considered the similar but distinguishable question of waiver of the plain error standard of review.[5] In *Murguia-Rodriguez*, the Court placed weight on how "the government consistently stated that *clear error* applies to [one] issue, even though it asserted that *plain error* applies to two of the three other errors that [the defendant] raised on this appeal." *Id.*, 815 F.3d at 573 (emphasis in original). In *Norwood*, the Court placed weight on how the defendant "addressed qualified immunity on the merits while arguing waiver of the two other principal issues in the case." *Id.*, 591 F.3d at 1068.

The selective assertion of waiver implicates the rationale for the rule articulated in the Court's most recent "waive the waiver" case:

> [A]s a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief. The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.

United States v. Sainz, 933 F.3d at 1087 (citations and internal quotations omitted).

A party here – namely, the government – made choices, and this Court should assume, consistent with the foregoing rationale, that the government knows

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[5] Waiver of a standard of review differs because courts arguably have an independent interest in the standard of review, at least in some cases. *See Murguia-Rodriguez*, 815 F.3d at 579 (Callahan, J., dissenting). *See also id.* at 573 (majority opinion acknowledging discretion to apply correct standard of review in "extraordinary cases" (quoting *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100-01 (9th Cir. 2005)). The question in the present case is not the *standard* of review, which the parties agree is plain error, but *whether to review at all*.

what is best for it. The government chose to "waive the waiver" for the willful blindness and 18 U.S.C. § 1001 instructions, and that choice should be, from one perspective, respected and, from another perspective, enforced.

III.

CONCLUSION

The Court should grant en banc review. Such review is needed to resolve the intracircuit conflict over whether the mere joinder in joint proposed jury instructions is sufficient to constitute a waiver barring any review at all. It will also allow correction of the panel memorandum's conflict with the rule that this Court will not address waiver unless raised by the opposing party.

Respectfully submitted,

DATED: December 11, 2020

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

DATED: December 11, 2020

By s/ David A. Schlesinger
DAVID A. SCHLESINGER
Attorney at Law

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rule 32 of the Federal Rules of Appellate Procedure, Circuit Rule 32-1, and Circuit Rule 40-1, that this petition is proportionally spaced, has a typeface of 14 points or less, and is 3,642 words in length.

DATED: December 11 , 2020

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SAYDA POWERY ORELLANA AND MANUEL SALAS, PETITIONERS,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 12th day of May, 2021, a copy of the Petitioners' Joint Motion for Leave to Proceed in Forma Pauperis and Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was served on the Solicitor General of the United States, by electronic mail, at supremectbriefs@usdoj.gov, as consented to by the Solicitor General's office and authorized by this Court's order issued April 15, 2020 in light of the ongoing public health concerns relating to COVID-19.

Respectfully submitted,

May 12, 2021

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law