CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. 1:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

NOT FOR PUBLICATION

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LAWRENCE J. GERRANS, AKA Larry Gerrans, Defendant-Appellant.	No. 20-10378 D.C. Nos. 3:18-cr-00310-EMC-1 3:18-cr-00310-EMC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted October 19, 2021
San Francisco, California

Before: WATFORD and HURWITZ, Circuit Judges, and BAKER,** International Trade Judge.
Partial Concurrence and Partial Dissent by Judge BAKER.

Lawrence Gerrans challenges his convictions and sentence for six counts of financial crimes (wire fraud and money laundering), three counts of making false

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

** The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

statements to the FBI, and three counts of post-release misconduct (contempt of court, witness intimidation, and obstruction of justice). We affirm.

1. The government introduced sufficient evidence to support the false statement convictions (Counts 7–9). Chris Gerrans testified that Gerrans instructed him to create the Halo invoices, dated January through March 2010, years after Gerrans and his wife supposedly completed work for Sanovas. However, signed statements that the couple submitted during their bankruptcy proceedings indicated that, as of April 2010, Sanovas was not a source of income for them. Considering the contradiction between those statements and the Halo invoices, as well as the unusual circumstances under which Chris created the invoices, a rational jury could infer that the invoices were falsified.

Regarding the March 2015 promissory note from Gerrans to Hartford Legend, the government's evidence established that no such loan was recorded on the house's title. The government also introduced evidence establishing that when Gerrans applied for a mortgage on the house in December 2015, his submissions to the bank indicated that there were no open loans against the property. A rational jury could infer from this evidence, and the fact that Hartford Legend was established in February 2015 and never filed any tax returns, that the promissory note did not reflect a real loan and thus had been falsified.

Based on all of the evidence presented at trial, a rational jury could also conclude that Gerrans acted knowingly and deliberately when he presented the falsified invoices and promissory note to the FBI during its 2017 investigation.

2. The government introduced sufficient evidence to support the post-release misconduct convictions (Counts 10–12). The jury was entitled to credit testimony from Chris Gerrans and Ryan Swisher about the argument at the storage facility, which both witnesses characterized as being about Gerrans's criminal proceedings. Both witnesses also described Gerrans's physical aggression toward his brother, and a rational jury could have inferred from their accounts that Gerrans was acting with an intent to influence Chris's testimony. Moreover, the three post-release misconduct counts were predicated on more than just the storage facility incident. Chris Gerrans also testified about other conversations in which Gerrans raised the charges pending against him, and the government introduced the burner phone that Gerrans gave to Chris to facilitate clandestine communications between them after the district court had ordered Gerrans not to discuss the case with Chris.

3. We agree with the district court that our decision in *United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020), does not require a new trial on the financial crimes (Counts 1–6). Because Gerrans did not object to the challenged intent instruction during trial, we review only for plain error. *See United States v. Moreland*, 622 F.3d 1147, 1165–66 (9th Cir. 2010). The erroneous intent

instruction did not affect Gerrans's substantial rights for the same reason it did not warrant a new trial in *Miller*: The error was rendered harmless by another instruction requiring the jury to find that Gerrans knowingly engaged in a scheme to defraud or obtain money or property by dishonest means. *See Miller*, 953 F.3d at 1101–03. That second instruction ensured that the jury would not have convicted Gerrans of wire fraud unless it found that he intentionally cheated Sanovas of funds.

Gerrans argues that his lawyer failed to present evidence showing that he believed he was entitled to the money he took from Sanovas. Those arguments, while relevant to his ineffective assistance of counsel claims, do not show that the jury could have convicted Gerrans without finding that he intended to cheat.

4. We decline to resolve Gerrans's claims for ineffective assistance of counsel. The record as it stands now does not contain evidence establishing that his trial counsel's performance fell below an objectively reasonable standard or that Gerrans was prejudiced by any alleged deficiency. *See Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984). We therefore adhere to our usual practice of deferring resolution of these claims until post-conviction proceedings. *See United States v. Lillard*, 354 F.3d 850, 856 (9th Cir. 2003). Nothing in our decision precludes Gerrans from conducting additional investigation and asserting his ineffective assistance claims in a 28 U.S.C. § 2255 motion.

5. The district court did not err in rejecting Gerrans's claims of prosecutorial misconduct. Gerrans has not identified any evidence introduced at trial, or any statement made by the government, that was actually false. *See United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). The May 2013 email showing that Sanovas's then-CFO approved certain expenses on the corporate credit card does not directly contradict any aspect of Lloyd Yarborough's testimony about his own analysis of Gerrans's expenses. Gerrans's evidence does not render false the board members' testimony that they never received Gerrans's existing employment agreement. The same is true of the board members' testimony that they would not have approved the restated employment agreement had they known about the money Gerrans had already taken. As noted above, Chris Gerrans's testimony regarding the storage facility altercation was supported, not contradicted, by Swisher's testimony. Finally, given the evidence introduced at trial, there was nothing inappropriate about the government's portrayal of Gerrans, Halo, and Hartford Legend in its closing argument. Nor did the government mislead the jury by stating that co-founder Erhan Gunday's departure from Sanovas did not trigger a payout for Gerrans.

6. The district court correctly calculated the applicable Sentencing Guidelines range. The Guidelines required the court to group the post-release misconduct counts with the underlying wire fraud and money laundering counts

before determining the group offense level. *See* U.S.S.G. §§ 3D1.1, 3C1.1 cmt. n.8. The court then properly applied the three-level enhancement for crimes committed while on release to the group offense level. *See* U.S.S.G. § 3C1.3.

7. For the reasons stated above, we affirm Gerrans's convictions and sentence. We decline to rule on his ineffective assistance of counsel claims.

AFFIRMED.

BAKER, Judge, concurring in part and dissenting in part:

I join Parts 1, 2, 5, and 6 of the memorandum disposition. But I respectfully dissent as to: (i) Gerrans's ineffective assistance of counsel challenge to his convictions under Counts 1–6 (wire fraud and money laundering) and 10–12 (contempt, witness tampering, and obstruction of justice), and (ii) Gerrans's jury instruction challenge to his convictions under Counts 1–6. With regard to those charges, I would vacate Gerrans's convictions and remand for a new trial.

1. The majority correctly observes that ineffective assistance claims are normally resolved through a subsequent collateral proceeding brought under 28 U.S.C. § 2255. *Ante* at 5 (citing *United States v. Lillard*, 354 F.3d 850, 856 (9th Cir. 2003)). But this is not always necessary; in some cases, the record is sufficiently developed that an appellate court can decide the issue on direct appeal. *See United States v. Alferahin*, 433 F.3d 1148, 1160 n.6 (9th Cir. 2006). I think this is one such case, and that both judicial economy and fairness to Gerrans support lancing this boil now.

Trial counsel is "typically afforded leeway in making tactical decisions regarding trial strategy." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112 (9th Cir. 2006) (citing *Riley v. Payne*, 352 F.3d 1313, 1324 (9th Cir. 2003)). But "counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision." *Id.* (citing *Riley*, 352 F.3d at 1324).

Here, because Gerrans's trial counsel never bothered to interview several key witnesses, he could not possibly have made professionally responsible decisions regarding which witnesses to call and which evidence to introduce. According to the declaration of Gerrans's post-trial counsel, who reviewed the relevant records, trial counsel never interviewed Sanovas's CFO Farrell, whose emails established that Gerrans's expense reimbursements were authorized, and who calculated that the company owed Gerrans over $700,000 in deferred compensation. Nor did Gerrans's trial counsel interview the attorneys at King & Spalding, who specifically advised Gerrans that he would face steep tax penalties if he delayed in taking the money due to him under his deferred compensation arrangement. As Gerrans's only defense to the wire fraud charges against him was that he thought he was entitled to the receipt of the funds in question, trial counsel's failure to at least interview Farrell and the King & Spalding attorneys was inexcusable, as those witnesses might have vouched for his defense.

As if that weren't bad enough, trial counsel also inexcusably failed to interview Swisher and Huante, the two witnesses to the confrontation between Gerrans and his brother Chris that undergirds the contempt, witness tampering, and obstruction of justice charges. Again, these witnesses might have vouched for Gerrans's defense at trial, and to make a professional judgment about whether to call

them, counsel needed to interview them.[1]

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). "A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." *Reynoso*, 462 F.3d at 1112 (quoting *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) (brackets in *Lord*)). In that same vein, we have held that "[f]ailure to investigate possible exculpatory witnesses can be ineffective assistance." *United States v. Mendoza*, 107 F.3d 878, 1997 WL 97279, at *1 (9th Cir. Mar. 4, 1997) (citing *Sanders v. Ratelle*, 21 F.3d 1446, 1456–58, 1461 (9th Cir. 1994)); *see also United States v. Tucker,* 716 F.2d 576, 583 (9th Cir. 1983) (failure to even attempt to interview key prosecution witnesses constitutes deficient performance).

Here, there is simply no conceivable tactical justification for defense counsel's flagrant abdication of the duty to fully prepare. *See Riley*, 352 F.3d at 1318–19. Since the failure to interview many critical witnesses in connection with

[1] Gerrans also argues that "there is no evidence" that his trial counsel sought to interview the Sanovas Board members, but on this record neither is there any evidence to the contrary, and therefore I do not rely on this argument.

Counts 1–6 and 10–12 is so glaring,[2] I do not think we need to wait for Gerrans to develop a separate record through a 28 U.S.C. § 2255 motion. *Riley*, 352 F.3d at 1319–20. In my view, these "multiple deficiencies have the cumulative effect of denying a fair trial" to Gerrans as to those counts. *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979).[3]

2. The majority acknowledges that as to the wire fraud charges (Counts 1–5), the intent element of the jury instruction was erroneous under *United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020), and *Shaw v. United States*, 137 S. Ct. 462 (2016), because it allowed the jury to convict if it determined that Gerrans merely meant to "deceive" rather than "cheat." *Ante* at 4. Nevertheless, the majority concludes—as

[2] Gerrans has not identified any critical witnesses that trial counsel failed to interview in connection with Counts 7–9.

[3] Trial counsel's abject failure to interview key witnesses standing alone warrants a new trial in connection with Counts 1–6 and 10–12, but unfortunately for Gerrans, his counsel dug an even deeper hole at trial by failing to put on any affirmative defense in connection with any of the charges against him. As a result, the jury never learned of various potentially exculpatory documents, such as the email from Farrell authorizing the challenged reimbursements, the memorandum from Farrell outlining the deferred compensation owed to Gerrans, the email from the King & Spalding attorneys advising him to take the deferred compensation to avoid tax penalties, an accounting firm's report detailing the money owed to Gerrans, and Gerrans's employment agreement authorizing a loan to him to purchase a home. Nevertheless, unlike the failure to interview critical witnesses—which seems to me patently unreasonable in these circumstances—trial counsel's highly suspect failure to put on any affirmative defense is better suited for resolution in a subsequent collateral proceeding.

in *Miller*, which involved the same Ninth Circuit pattern jury instruction[4]—that this error was rendered harmless by "another instruction requiring the jury to find that Gerrans knowingly engaged in a scheme to defraud *or* obtain money or property by dishonest means." *Ante* at 4 (citing *Miller*, 953 F.3d at 1101–03) (emphasis added).[5] And so, the majority reasons, "[t]hat second instruction ensured that the jury would not have convicted Gerrans of wire fraud unless it found that he intentionally cheated Sanovas of funds." *Id*.

Miller, however, relied not only on the other language in the pattern jury instruction to find harmless error, but also on, *inter alia*, the jury's conviction of Miller on related tax fraud charges, because that conviction foreclosed "any notion that the jury thought that Miller was guilty of deception, but not cheating." 953 F.3d at 1103. Here, there were no related charges (and convictions) that might be said to establish that the jury found Gerrans guilty of cheating rather than mere deception. Because *Miller*'s harmless error analysis does not apply here, we should reverse and remand for a new trial as to Counts 1–5.[6]

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[4] *Manual of Modern Criminal Jury Instructions for the District Courts of the Ninth Circuit* § 8.124 (2019).

[5] I emphasize the disjunctive "or" in the quoted passage for the reasons explained below.

[6] Reversal and remand for a new trial as to Counts 1–5 would also necessarily require reversal and remand for Gerrans's conviction under Count 6 for money laundering

In any event, if *Miller* stands for the proposition that the majority ascribes to it—that the quoted language renders the jury instruction's error on the intent element essentially *per se* harmless—then I respectfully submit that *Miller* (while binding on us) itself is in error.

The pattern jury instruction used both in *Miller* and here provided that the defendant was charged with "wire fraud in violation of Section 1343 of Title 18 of the United States Code," and that for

> the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, *the defendant knowingly participated in, devised, or intended to devise a scheme or plan to defraud,* ***or*** *a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or omitted facts*. Deceitful statements of halftruths may constitute false or fraudulent representations;
>
> Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;
>
> Third, the defendant *acted with the intent to defraud, that is, the intent to deceive or cheat*; and
>
> Fourth, the defendant used, or caused to be used, an interstate wire communication to carry out or attempt to carry out an essential part of the scheme.

(emphasis added).

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in violation of 18 U.S.C. § 1957, as the government conceded at argument that Gerrans's convictions under Counts 1–5 and 6 rise and fall together.

Critically, the pattern jury instruction's first element, which contains the language invoked by *Miller* and the majority—is disjunctive: "the defendant knowingly participated in, devised, or intended to devise a scheme or plan to defraud, *or* a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or omitted facts." Although the second part of that formulation—"a scheme or plan for obtaining money or property by means of false or fraudulent [actions]"—necessarily implies intent to obtain money or property via deceptive means (and thus cheat), the first part—"a scheme or plan *to defraud*"—does not, because the instruction's third element defines "intent to defraud" as "the intent to deceive *or* cheat." In short, the first part of the disjunctive first element of the pattern jury instruction relied on by the majority to salvage Gerrans's wire fraud convictions necessarily incorporates the erroneous intent standard of the instruction's third element.

Applied here, that means the jury might have concluded that Gerrans "knowingly participated in, devised, or intended to devise a scheme or plan to defraud" with the intent to "deceive" but *without* the intent to "cheat" Sanovas—a standard at odds with the Supreme Court's decision in *Shaw*. *See* 137 S. Ct. at 469 (wire fraud jury instruction was erroneous insofar as it "could be understood as permitting the jury to find [the defendant] guilty if it found no more than that his scheme was one to deceive the bank but not to '*deprive*' the bank of anything of

value") (emphasis in original). Thus, insofar as *Miller* is read as the majority does, it conflicts with *Shaw*, under which "wire fraud requires the intent to deceive *and* cheat—in other words, to deprive the victim of money or property by means of deception." *Miller*, 953 F.3d at 1103 (emphasis in original).

* * *

For the reasons above, I concur in part and respectfully dissent in part.

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LAWRENCE J. GERRANS, AKA Larry Gerrans, Defendant-Appellant.	No. 20-10378 D.C. Nos. 3:18-cr-00310-EMC-1 3:18-cr-00310-EMC Northern District of California, San Francisco ORDER

Before: WATFORD and HURWITZ, Circuit Judges, and BAKER,* International Trade Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judge Watford and Judge Hurwitz vote to deny the petition for rehearing en banc, and Judge Baker so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed February 18, 2022, is DENIED.

* The Honorable M. Miller Baker, Judge for the United States Court of International Trade, sitting by designation.

No. 20-10378

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAWRENCE J. GERRANS,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:18-cr-00310-EMC-1
Hon. Edward M. Chen

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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By appointment by the Court

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953 F.3d 1095, 1103 (9th Cir. 2020) to his case. If the panel does not revise its opinion as to *Miller,* appellant asks the court to grant rehearing en banc as to whether *Miller* has been misapplied, or must be overruled because it causes all wire fraud jury instruction errors described therein to be harmless *per se*.

Appellant also asks the court to grant rehearing en banc on the following: Whether this court should be permitted to remand to the district court, for further development of the record, particularly troubling claims of ineffective assistance of counsel; and, an issue of first impression, whether the government's violation of a defendant's First Amendment right to possess and consult a Bible during the exercise of his Sixth Amendment right to trial requires a new trial.

II. REASONS FOR REHEARING

A. The Panel should Reconsider its Clearly Erroneous Decision on the Sentencing Guidelines

Appellant argued that the district court erred by increasing his offense level for Counts 1-9 by 3-levels pursuant to USSG §3C1.3, "Commission of Offense While on Release," where that conduct predated his pretrial release. AOB at 56.[1] He argued that the court failed to first calculate the offense levels for each count, applying the §3C1.3 enhancement only to the post-release conduct in Counts 10-

[1] References are as follows: Excerpts of Record: ER; Appellant's Opening and Reply Briefs: AOB and RB; Panel Decision: SlipOp; and the Presentence Investigation Report: PSR.

12, before grouping and finding the group offense level. RB at 27. The result was a final offense level 33 rather than 30.

The panel affirmed, stating: "The Guidelines required the court to group the post-release misconduct counts with the underlying wire fraud and money laundering counts before determining the group offense level. *See* U.S.S.G. §§3D1.1, 3C1.1 cmt.n.8. The court then properly applied the three-level enhancement for crimes committed while on release to the group offense level. *See* U.S.S.G. §3C1.3." SlipOp-6.

1. Legal Error

The sentencing issue may have been lost amidst complex trial-related issues. The court did not follow the Guidelines' requirement that it first determine the offense level for each count, including adjustments in Chapter 3, Parts A-C; and only then apply "Part D of Chapter Three to group the various counts and adjust the offense level accordingly." §1B1.1(a)(1)-(4). Critically, the panel missed that the selection of the "group offense level" under §3D1.3[2] simply involves choosing the highest offense level amongst the offense levels of various counts in that group, not applying additional obstruction enhancements. As described below, the U.S. Sentencing Commission's own worksheets show that the offense levels for Counts

[2] "Offense Level Applicable to Each Group of Closely Related Counts." §3D1.3.

10-12 should have been calculated separately before grouping; and that the higher offense levels of Counts 1-9 (without the 3-level §3C1.3 enhancement) ultimately determine the group offense level for the group of Counts 1-12. *See* U.S. Sentencing Commission Worksheets (November 1, 2018), Worksheets for Individual Offenders ("Worksheets") (first 2 pages).[3]

The panel's citation to §3C1.1 cmt.n.8 for a ruling on the order of operations of the Guidelines is inapposite: §3C1.**1** concerns the 2-level enhancement for obstruction of justice that Gerrans *also* received and did *not* contest or appeal; it cannot possibly explain the panel's decision regarding the 3-level enhancement under §3C1.**3**.[4] (The other cited guideline, §3D1.1, simply states that the offense level for multiple counts is determined under §§3D1.2-3D1.4.) Nor did the panel discuss the only appellate case on point, *United States v. Wright*, 401 F. App'x 168 (8th Cir. 2010), which found that the district court committed "obvious" "procedural" error when it applied the §3C1.3 enhancement exactly as the district court did here.

The panel is correct that the court must first "group the post-release misconduct counts with the [pre-release] counts before determining the group offense level," but the error identified by appellant occurred prior, when the PSR

[3] www.ussc.gov/sites/default/files/pdf/training/worksheets/2018_offender_worksheet.pdf, attached for the court's convenience as Exhibit A.

[4] Appellant cited to that Application note for a different purpose.

grouped Counts 10-12 with the other counts *before* calculating offense levels for Counts 1-9 and for Counts 10-12. The group offense level is determined by looking at offense levels for all of the counts in the group, and essentially just picking the highest offense level. *See* §3D1.3.

2. Application to this Case

a. Determination of Offense Levels

Here, §1B1.1(a)(1)-(4) required the PSR/court to first calculate the offense level for each count of conviction, which should have been calculated as follows:

Pre-release Counts:

Counts 1-9 each and collectively resulted in offense level 30, based on: Base offense level 7 (§2B1.1)(§2S1.1), with specific offense characteristics under Chapter Two for loss amount (+16), use of sophisticated means (+2), conviction for money laundering (+1); Chapter Three, Part B ("Role in the Offense"), abuse of trust, §3B1.2 (+2); Chapter Three, Part C ("Obstruction and Related Adjustments") Obstruction of Justice, §3C1.1 (+2).[5] It is clear that §3C1.3 cannot apply to Counts 1-9 because none was committed while Gerrans was on pretrial release.

Post-release counts:

The guideline corresponding to the three statutes Gerrans was convicted of violating in Counts 10-12 is §2J1.2 (Obstruction of Justice), which has a base

[5] *See* PSR ¶¶50-58 (except the PSR improperly included Counts 10-12 and the §3C1.3 enhancement, and a too-high loss-category.

offense level of 14, to which three-levels are added pursuant to §3C1.3 (Commission of Crime while on Release), resulting in an adjusted offense level of 17 for each count.[6]

The Sentencing Commission Worksheets instructs one to "[c]omplete a separate Worksheet A for each count of conviction…" with the "exception" of where the group offense level is based primarily on "aggregate value or quantity (see §3D1.2(d))" or conspiracy/solicitation/attempt. *See* Exhibit A. Thus, for Counts 1-9, which the PSR correctly found are grouped under §3D1.2(d) (aggregate value/quantity), one uses the same Worksheet A.

However, separate Worksheet A(s) are required for Counts 10-12, which will only later group with the other counts under §3D1.2(c) (as per the PSR) on Worksheet B. *See* Exhibit A. Gerrans receives the §3C1.3 enhancement only on the Worksheet A(s) for Counts 10-12 (No. 4 "(Obstruction Enhancements")).

b. Grouping

The parties agreed that Counts 1-9 grouped under subsection §3D1.2**(d)** (total loss/aggregated harm), and that Counts 10-12 grouped with the other counts under subsection §3D1.2**(c).**[7]

[6] The PSR never calculated a separate offense level for Counts 10-12. The applicable guidelines are found in Appendix A.

[7] §3D1.2(c) applies "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." Because the PSR found that Gerrans' conduct in Counts 10-12 constituted obstruction under §3C1.**1** (the obstruction enhancement that Mr.

The next guideline, §3D1.3 ("Offense Level Applicable to Each Group of Closely Related Counts"), critically determines how to calculate the group offense level. Where counts are grouped pursuant to §3D1.2(a)-(c), as Counts 10-12 were with the remaining counts, the offense level for the whole Group is "the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, *i.e.*, the highest offense level of the counts in the Group." *See* §3D1.3(a). *See also* §3D1.3(a)-(b), App.Note.1. (Note: the disputed §3C1.3 enhancement has already been applied to Counts 10-12 before the group offense level is determined here).

The highest offense level in the Group comprising Counts 1-12 is 30 because the offense level for Counts 1-9 [30] is higher than the offense levels for Counts 10-12 [17, even including the §3C1.3 "Commission of an Offense While on Release" enhancement].

Again, the Worksheets make this clear. Under Worksheet B-Step 1, all of the counts group, with Counts 1-9 having been grouped under §3D1.2(**d**) as noted on Worksheet A, and with Counts 10-12 grouping with the rest under §3D1.2(**c**). *See* Exhibit A. Under Step 2, one would list the highest adjusted offense level for any count from any of the multiple Worksheet A(s). The highest offense level is 30 (for

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Gerrans did *not* appeal) as an enhancement to Counts 1-9 (*see* PSR ¶¶49,56), §3D1.2(c) mandated that Counts 10-12 grouped with the other counts.

Counts 1-9), which is then entered in Step 3-#1. As there are no other groups, the highest adjusted offense level is 30 (Step 3-##7-8).

c. The PSR

The PSR/court did not follow the proper order of operations, and instead *first* grouped all of the counts together under §3D1.2 (subsections (c) and (d)) *before* calculating the guidelines. *See* PSR¶ 49.

Then, the PSR/court applied Chapter Two through Chapter Three, Part C of the guidelines to the *group* of Counts 1-12, thus effectively adding the §3C1.**3** (commission of a crime while on release) adjustment to the offense levels for Counts 1-9. *See* PSR ¶¶ 50-58. This unequivocally violated the Guidelines' order of operations, and the Worksheets that parallel it.

Because the court erred, over defense objection, in finding a final offense level of 33 instead of 30, the case should be remanded for resentencing.[8]

[8] The district court sentenced Gerrans to the lowest-end of the guideline range for offense level 33, 135-months.

EXHIBIT A: U.S. Sentencing Commission Worksheets (November 1, 2018), Worksheets for Individual Offenders ("Worksheets") (first 2 pages)**

**Please note: As noted in the Petition, this Worksheet may be found at www.ussc.gov/sites/default/files/pdf/training/worksheets/2018_offender_worksheet.pdf and is attached for the Court's convenience. If Exhibits are not permitted, please disregard, as website above may be used instead.

WORKSHEET A

OFFENSE LEVEL

Defendant _____ District/Office _____

Docket Number _____

Count Number(s) _____ U.S. Code Title & Section _____:_____; _____:_____

Guidelines Manual Edition Used: 20___ (*Note*: The Worksheets are keyed to the November 1, 2018 *Guidelines Manual*)

INSTRUCTIONS

Complete a separate Worksheet A for each count of conviction or as required in a situation listed at the bottom of Worksheet B.* *Exceptions*: Use only a single Worksheet A where the offense level for a group of closely related counts is based primarily on aggregate value or quantity (*see* §3D1.2(d)) or where a count of conspiracy, solicitation, or attempt is grouped with a substantive count that was the sole object of the conspiracy, solicitation, or attempt (*see* §3D1.2(a) & (b)).

1. Offense Level (*See* Chapter Two)

Enter the applicable base offense level and any specific offense characteristics from Chapter Two and explain the bases for these determinations. Enter the sum in the box provided.

Guideline	Description	Level

If the Chapter Two guideline requires application of a cross reference or other reference, an additional Worksheet A may be needed for that analysis. *See* §1B1.5.

Sum ☐

2. Victim-Related Adjustments (*See* Chapter Three, Part A)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0".

§_____ ☐

3. Role in the Offense Adjustments (*See* Chapter Three, Part B)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If the adjustment reduces the offense level, enter a minus (–) sign in front of the adjustment. If no adjustment is applicable, enter "0".

§_____ ☐

4. Obstruction Adjustments (*See* Chapter Three, Part C)

Enter the applicable section and adjustment. If more than one section is applicable, list each section and enter the combined adjustment. If no adjustment is applicable, enter "0".

§_____ ☐

5. Adjusted Offense Level

Enter the sum of Items 1–4. If this Worksheet A does not cover all counts of conviction or situations listed at the bottom of Worksheet B, complete Worksheet B. Otherwise, enter this result on Worksheet D, Item 1. ☐

☐ Check here if **all** counts (*including* situations listed at the bottom of Worksheet B)* are addressed on this one Worksheet A. If so, no Worksheet B is used.

☐ If the defendant has no criminal history, enter "I" here and on Worksheet D, Item 4. No Worksheet C is used.

WORKSHEET B

MULTIPLE COUNTS*

Defendant _____ Docket Number _____

INSTRUCTIONS

STEP 1: Determine if any of the counts group under §3D1.2(a)–(d) ("the grouping rules"). All, some, or none of the counts may group. Some of the counts may have already been grouped in the application under Worksheet A, specifically: (1) counts grouped under §3D1.2(d); or (2) a count charging conspiracy, solicitation, or attempt that is grouped with the substantive count of conviction (*see* §3D1.2(a)). Explain the reasons for grouping:

_____

_____

_____

STEP 2: Using the box(es) provided below, for each group of "closely related counts" (*i.e.*, counts that group together under any of the four grouping rules), enter the highest adjusted offense level from Item 5 of the various Worksheets "A" that comprise the group. *See* §3D1.3. Note that a "group" may consist of a single count that has not grouped with any other count. In those instances, the offense level for the group will be the adjusted offense level for the single count.

STEP 3: Enter the number of units to be assigned to each group (*see* §3D1.4) as follows:

- One unit (1) for the group of counts with the highest offense level
- An additional unit (1) for each group that is equally serious or 1 to 4 levels less serious
- An additional half unit (1/2) for each group that is 5 to 8 levels less serious
- No increase in units for groups that are 9 or more levels less serious

1. Adjusted Offense Level for the First Group of Counts

Count number(s) _____ [ ] _____ Unit

2. Adjusted Offense Level for the Second Group of Counts

Count number(s) _____ [ ] _____ Unit

3. Adjusted Offense Level for the Third Group of Counts

Count number(s) _____ [ ] _____ Unit

4. Adjusted Offense Level for the Fourth Group of Counts

Count number(s) _____ [ ] _____ Unit

5. Adjusted Offense Level for the Fifth Group of Counts

Count number(s) _____ [ ] _____ Unit

6. Total Units

_____ **Total Units**

7. Increase in Offense Level Based on Total Units (See §3D1.4)

1 unit:	no increase	2½ – 3 units:	add 3 levels
1½ units:	add 1 level	3½ – 5 units:	add 4 levels
2 units:	add 2 levels	More than 5 units:	add 5 levels

[ ]

8. Highest of the Adjusted Offense Levels from Items 1–5 Above

[ ]

9. Combined Adjusted Offense Level (See §3D1.4)

Enter the sum of Items 7 & 8 here and on Worksheet D, Item 1. [ ]

**Note*: Worksheet B also includes applications that are done "as if there were multiple counts of convictions," including: multiple-object conspiracies (see §1B1.2(d)); offense guidelines that direct such application (e.g., §2G2.1(d)(1) (Child Porn Production)); and stipulations to additional offenses (see §1B1.2(c)). Note also that these situations typically require the use of multiple Worksheets A.