No. _____

In the Supreme Court of the United States

MEREDITH MCCONNELL, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The wire fraud statute criminalizes the use of wire communications to effect "any scheme or artifice to defraud, or for obtaining money or property by false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. In *Neder v. United States*, 527 U.S. 1, 25 (2000), this Court held that materiality of the falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes. Despite this holding, the Ninth Circuit Court of Appeals continues to hold, as it did in the present case, that it is unnecessary to allege specific false statements or omissions when setting forth the crime of wire fraud.

The question presented is:

Does an indictment charging the offense of wire fraud, in violation of 18 U.S.C. § 1343, require pleading and proof of a specific false statement or omission, or is the allegation of an unspecified "material scheme to defraud" sufficient to state all elements of the offense?

RELATED PROCEEDINGS

Petitioner is unaware of any related proceedings.

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I. PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court to grant certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming her conviction and the sentence she received following her conviction for Wire Fraud, including her sentence to pay restitution.

II. OPINION BELOW

The Memorandum decision entered in the Ninth Circuit Court of Appeals Case No. 21-30224 is unreported, but is available at 2023 WL 3533893 and is included in the Appendix at App. A.

III. JURISDICTION

The court of appeals entered a decision on May 18, 2023, and denied rehearing on July 7, 2023. This Court has jurisdiction under 28 U.S.C.§ 1254(1).

IV. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 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.

The federal wire fraud statute, 18 U.S.C. § 1343 provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such

> scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

V. STATEMENT OF THE CASE

Petitioner is a Native American woman who was born and raised on the Northern Cheyenne Indian Reservation in Montana. In September 2017, Petitioner was elected to serve as the board chairperson over a non-profit organization called the Montana Native Women's Coalition (MNWC). MNWC is made up of representatives from seven tribes with reservations in Montana. MNWC works to form relationships between domestic violence programs and to improve services for victims of domestic and sexual violence. Although MNWC employed a full-time executive director and a part-time certified public accountant, all board members, including Petitioner, were volunteers.

Activities of MNWC are financed primarily through grant funding from the Office of Violence against Women (OVW). When accessing or "drawing down" funding, grant recipients are required to follow a complicated set of rules and procedures contained in the award document; a DOJ Financial Guide; as well as any applicable federal regulations contained in 2 CFR Part 200. The failure to comply with grant regulations could result in expenditures being "disallowed," increased oversight by OVW, or the program could lose its funding.

Petitioner presided over her first board meeting on September 19-20, 2017. (6-ER-1210.) Board members travel from all over Montana to attend, some from great distances. The regular practice was for the accountant for MNWC to advance board members travel expenses before the meeting to allow them to attend. As

meetings often took place over the course of two days, this would include mileage, hotel and per diem. (4-ER-657). Advances were necessary for some board members to attend meetings. One board member was late to the meeting in September because she had to wait for her travel check to arrive before leaving home. (6-ER-1217).

There were times that board members would receive travel advances, but be unable to attend the meeting. (4-ER-769). If so, board members were expected to set up a payment plan to pay the travel advance back, or MNWC's accountant would deduct the funds from the board member's next travel advance. (2-ER-187, 5-ER-869).

At the meeting in September, board members were given door prizes for attending. Door prizes included purses, keychains, and other items. (4-ER-709). Later, it was determined that the purchase of door prizes could be considered "trinkets" under grant regulations, and so considered an expenditure that was "disallowed." (4-ER-599).

At the meeting in September, some of the board members asked to receive "days in service" pay. (6-ER-1125). The idea behind the "days in service" pay was to reimburse board members for time away from their regular jobs or family responsibilities while attending board meetings. As explained by one board member, when she was away from home, someone else was required to assume her responsibilities, which included caring for five grandchildren that she was raising. (Id.) This board member also had a disabled spouse that needed 24-hour care. (Id.)

This board member thought the "days in service" fee was to reimburse her for these extra expenses. (Id.)

Some members of the MNWC were previously advised that compensation for volunteer board members, while not disallowed, was "frowned upon" by the OVW. (6-ER-1220). The OVW explained that this type of expenditure could be viewed as a conflict of interest. (Id.) Nevertheless, board members voted and approved the payment of $200 for each "day in service" at the September meeting. (4-ER-650).

Directly after her first board meeting, Petitioner signed a check authorizing a "days in service" payment. (4-ER-651). The check was cashed at a local bank, and board members were provided with a cash payment for two "days-in-service." (4-ER-653). When later communication with OVW revealed that it would not approve "days-in-service" payments, no further payments were ever made. (7-ER-1218.)

At the meeting in September, a motion was made to travel to Las Vegas to have a special meeting or conference to develop policy and procedures for the board. (4-ER-701). Board members had been told by First Nations, a consulting agency for the OVW, that MNWC needed to develop a strategic plan and adopt policies and procedures. First Nations had also provided a training to board members that included team building activities and discussed "high-level board duties and responsibilities." (4-ER-529, 551, 630).

When Petitioner took over as the chair of the board, the previous grant received by MNWC still had approximately $35,000 left to be expended. (5-ER-905). The OVW encouraged grant recipients to find a use for the funds as opposed to

returning them. (2-ER-172, 3-ER-474). Grant recipients were not allowed to use funds from a new grant until any funds from a prior grant were expended. (4-ER-517). Executives from the OVW contacted the MNWC suggesting they extend the award to allow them to use the remaining $35,000. (2-ER-197, 5-ER-905).

The MNWC grant had funds budgeted for the travel expenses of board members. When accessing funds for travel, grantees were required to follow travel procedures as established by the individual grantee program. (3-ER-486). In the absence of an official travel policy, grantees were required to follow federal travel regulations, which established federal rates for mileage and per diem. (3-ER-487).

Prior to leaving on the trip to Las Vegas, and consistent with previous practice, all board members received a travel advance to allow them to attend. (4-ER-659). Members also received per diem for expected days of travel and for attendance at the training. (Id.)

By all accounts, the policy and procedures conference in Las Vegas did not go as planned. Although an agenda for the conference had been prepared in advance (2-ER-171), the conference did not follow the agenda. The conference was scheduled to take place over the course of three days; but instead, lasted only 3 hours—in total. (7-ER-1329).

After returning to Montana, board members learned the trip to Las Vegas was not preapproved and OVW was questioning this expenditure. (6-ER-1064). Petitioner also discovered her signature had been forged on several documents, including checks for the purchase of computer equipment and for the construction of

a deck. (4-ER-718, 6-ER-1137). Petitioner later reported the forgeries to tribal authorities and the OVW. (6-ER-1137).

Unbeknownst to Petitioner, her report resulted in an investigation being launched against all board members of MNWC, but especially her. See (2-ER-200). Petitioner cooperated with the investigation and was interviewed by federal investigators on multiple occasions. During one interview, Petitioner mistakenly told investigators she had driven to Las Vegas, when she flew. (6-ER-1223). Investigators questioned Petitioner because they had obtained her flight information and knew the cost of her flight was lower than the amount advanced to her for mileage. Petitioner corrected her mistake, but also told investigators she thought she was allowed to keep the difference, because this was the policy followed by her tribe. (2-ER-208).

Petitioner was eventually named in a Superseding Indictment (SI) and charged with four counts: (Count I) Theft from a Program Receiving Federal funding, in violation of 18 U.S.C. § 666A, (Count II) Wire Fraud, in violation of 18 U.S.C. § 1343, (Count IV) False Claim, in violation of 18 U.S.C. § 287 and (Count VIII) Misprision. (2-ER-333). The misprision count was dismissed prior to trial.

For Count II, Wire Fraud, the SI charged Petitioner as follows:

> That in or about August 2017, and continuing thereafter until in or about March 2018, at Lame Deer and in Rosebud County, in the State and District of Montana, and elsewhere, the defendants, . . . having devised and intending to devise a material scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, for the purpose of executing such scheme and artifice, knowingly transmitted and caused to be transmitted by means of wire

> communication in interstate and foreign commerce, writings, signs, signals pictures, and sounds for the purpose of executing such scheme and artifice.
>
> (2-ER-338).

In a section entitled "the scheme and artifice to defraud" the SI alleged:

> During the period of the superseding indictment, it was part of the scheme and artifice to defraud that the defendants . . . committed and facilitated travel fraud, received double payments for meals, received travel payments on non-approved trips, including Las Vegas, received, authorized, and obtained double-payment for "days in service," authorized unapproved construction projects, and took and authorized other benefits that members of the Montana Native Women's Coalition were not entitled to receive, including "door prizes" such as jewelry, purses and other luxury items.
>
> (2-ER-339).

Finally, in a section setting forth the "interstate and foreign wire communications," the SI described wire communications alleged to have been transmitted for the purpose of executing the alleged fraud. (2-ER-339-40).

Prior to trial, Petitioner filed a motion to dismiss Count II, arguing that this count was insufficient as it failed to allege material misrepresentations or falsehoods. (2-ER-339). The Government argued this count was sufficient because it alleged a "material scheme and artifice to defraud." (CR-109). Adopting the Government's argument that an allegation of a "material scheme" as opposed to a "material falsehood," was sufficient, the district court denied Petitioner's pretrial motion to dismiss. (1-ER-119).

A jury trial took place over the course of five days. A major topic at trial was whether the grant from OVW required prior approval for expenditures—specifically

the travel to Las Vegas. Administrators from the OVW testified that grantees were required to request prior approval from the OVW when asking to move costs between budget categories that exceeded ten percent or more of the total award amount. (3-ER-502). If this precondition applied, grantees were required to apply for preapproval through a Grant Adjustment Notice, or a GAN. (*Id.*) For example, if the award amount was $336,000, and if the grantee wanted to move $33,000 into a travel category, then the grantee was required to file a GAN and receive prior approval before doing so. (*Id.*) If the total amount to be moved, however, was less than $33,000 in a budget of $336,000, a GAN was not required. Using the example as to the Las Vegas trip, the total cost for the trip was less than ten percent of the grant and so prior approval was not required.

The jury was instructed generally as to the elements of wire fraud. At the government's request, the jury was also provided with a modified "good faith" instruction. This instruction stated that "Wire fraud does not require the government to prove the underlying conduct was itself a violation of a particular statute or regulation." ER-10. The instruction also said: "While an honest, good faith belief in the truth of the scheme to defraud may negate an intent to defraud, a good-faith belief that the victim will be repaid and will sustain no loss is no defense at all" (Id.) Finally, the instruction said: "It is not necessary for the government to prove that the defendant was actually successful in obtaining money or property by a scheme to defraud. It is likewise not necessary for the government to prove anyone lost money or property as a result of the scheme or plan." (Id.)

After deliberating for four hours and forty-five minutes, the jury returned a guilty verdict on all counts. (7-ER-1447-1448). Petitioner was sentenced to probation for four years on each count to run concurrently. (1-ER-92). Petitioner was also ordered to pay restitution in the total amount of $29,114.14, which included all expenses incurred by the MNWC for the conference in Las Vegas. (1-ER-95.)

Petitioner filed an appeal of her conviction and sentence with the Ninth Circuit Court of Appeals. The case was assigned to a three-member panel. The panel affirmed Petitioner's conviction in full. Of relevance here, the panel held that the district had properly declined to dismiss the wire fraud count of the superseding indictment and had properly ordered restitution. The panel drew no distinction between allegations of a "material scheme" and the "materiality of a scheme." Based upon a prior Ninth Circuit decision of *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005) (*per curiam*), the panel concluded that an indictment alleging wire fraud "was not required to allege specific false statements or omissions."

VI. REASONS FOR GRANTING THE WRIT

This case presents yet another expansion of the federal fraud statutes, used in this case to criminalize good faith funding mistakes made by volunteer board members of a nonprofit domestic violence organization. As demonstrated by this case, failing to require proof or an allegation of a specific false statement or omission to establish a violation of the wire fraud statute allows a criminal

prosecution to proceed based upon a nebulous and undefined "scheme to defraud" which may or may not require a false representation. Not requiring the allegation or proof of a specific false statement or omission leaves the outer boundaries of the statute ambiguous, but upon closer examination, also runs afoul of this Court's conjunctive reading of the statute set forth in *Cleveland v. United States*, 531 U.S. 12, 26 (2000) and affirmed in *Ciminelli v. United States*, 598 U.S. 306, 312 (2023).

The petition should be granted in this case to clarify that to properly allege a violation of the federal wire fraud statute, it is insufficient to *just* allege a material scheme to defraud. Instead, it is necessary to also allege *the means by which* the scheme was committed. In other words, this Court should conclude that it is insufficient to allege a material scheme to defraud—without also alleging the materially false or fraudulent pretenses, representations, or promises by which the scheme was committed.

A. The decision below is inconsistent with the common law requirement to employ material falsehoods to establish a violation of fraud.

In *Neder v. United States*, 527 U.S. 1 (1999), this Court addressed whether the fraud statutes incorporated the common-law element of materiality, despite the failure to include the word "materiality" in the statutes. While recognizing that the fraud statutes do not reach all conduct that would constitute fraud at common law, this Court concluded that fraud statutes did incorporate those elements that were not incompatible with the language of the statutes. For example, by prohibiting the "scheme to defraud," rather than the completed fraud, the common-law elements of

reliance and damage would clearly be inconsistent with the statutes Congress enacted. The element of "materiality" on the other hand, was not inconsistent. Therefore, this Court concluded that the materiality of the falsehood was a necessary element to prove federal fraud.

It is difficult to conceptualize how the government can properly allege the "materiality" of a falsehood without identifying the specific falsehood that is material, but that is what happened in this case. Coupled with the jury being instructed that "[w]ire fraud does not require the government to prove that the underlying conduct was itself a violation of a particular statute or regulation" the government here was allowed to proceed on a nebulous conflict of interest or violation of a duty of loyalty theory that did not require the showing of any specific false or fraudulent representations or omissions.

The government's error in reading the statute is much clearer than it was in *Neder*. Here, the statute explicitly requires the alleged fraud to have been committed by means of "false or fraudulent pretenses, representations, or promises." The Ninth Circuit's conclusion that it is unnecessary to allege a specific false statement or omission is not only inconsistent with the text of the statute, but it also leads to arbitrary enforcement of the fraud statute based on the prosecutor's personal belief of what is appropriate behavior for board members—even absent any showing the expenditure actually violated a funding restriction. The Ninth Circuit panel decision must be reversed.

B. The decision below is based upon precedent established before this Court's decision rejecting a disjunctive reading of the statute and is wrong.

Despite this Court's clear directive that the two phrases in the statute do not define two separate offenses, the Ninth Circuit continues to find that it unnecessary to allege specific false representations or omissions so long as the government alleges a "material scheme" to defraud. *United States v. McConnell*, No. 21-30224, 2023 WL 3533893, at *1 (9th Cir. May 18, 2023), citing to *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005) (per curiam).

Tracing it back, the *Omer* decision relies on outdated Ninth Circuit precedent, which opined that there were "alternative routes to a mail fraud conviction, one being proof of scheme or artifice to defraud, which may or may not involve any specific false statements." See e.g., *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir.1981). The "alternative routes" to establishing fraud relied on a disjunctive reading of the statute that separated it into two parts. Specifically, the court identified the alternative ways of violating the statute "*two of which* were charged in the indictment" as:

> (1) a scheme or artifice to defraud, *and*
>
> (2) obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

Halbert, 640 F.2d at 1007 (emphasis added.) The *Halbert* court's conclusion that it was unnecessary to allege a false or fraudulent representation was based on a disjunctive reading of the statute and is no longer valid.

Not requiring a specific allegation of a materially false or fraudulent statement or omission also results in an inconsistent application of the statute in violation of "ordinary notions of fair play and the settled rules of law." *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). Not requiring a specific allegation of a materially false statement or omission allows the government to enforce its own view of the ethical requirements for nonprofit board members and invites arbitrary enforcement. *Johnson*, 135 S. Ct. at 2556. No one should be required at peril of liberty or property to speculate as to the meaning of penal statutes, or the restrictions under confusing and internally inconsistent grant funding guidelines. Failing to require all elements of the statute provides inadequate notice and lacks any ascertainable standard for how it should be enforced in violation of the right to due process guaranteed by the Fifth Amendment. See *Smith v. Goguen*, 415 U.S. 566, 578 (1974).

The Ninth Circuit's position that the government is not required to allege specific false statements or omissions to establish fraud is untenable in view of this Court's decisions in *McNally v. United States*, 483 U.S. 350 (1987); *Cleveland v. United States*, 531 U.S. 12, 26 (2000); as well as additional binding precedent acknowledging the requirement to prove a material falsehood, See, e.g., *Neder,* 527 U.S. at 25 ("Accordingly, we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.")

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VII. CONCLUSION AND PRAYER FOR RELIEF

This Court should grant certiorari to review the Ninth Circuit's memorandum decision affirming Petitioner's judgment and sentence of restitution, summarily reverse the decision below, or grant such other relief as justice requires.

Respectfully submitted this 28th day of September 2023,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

2023 WL 3533893
Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America,
Plaintiff-Appellee,
v.
Meredith MCCONNELL,
Defendant-Appellant.

No. 21-30224
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Argued and Submitted May 11, 2023 Seattle, Washington
|
FILED MAY 18, 2023

Appeal from the United States District Court for the District of Montana Susan P. Watters, District Judge, Presiding, D.C. No. 1:19-cr-00090-SPW-1

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Before: TALLMAN, CLIFTON, and IKUTA, Circuit Judges.

MEMORANDUM*

***1** Meredith McConnell was the chairwoman of the board of the Montana Native Women's Coalition (MNWC), a federally funded organization that combats threats of domestic and sexual violence against Native women. She was convicted of theft from a program receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(A), (a)(2); wire fraud in violation of § 1343; and false claims in violation of § 287. McConnell appeals her conviction and the district court's order of restitution, and we affirm. As the parties are familiar with the facts of this case, we do not repeat them here.

1. The district court did not abuse its discretion nor deny McConnell due process by admitting evidence of a prior MNWC executive director's prosecution for similar, but unrelated, prior conduct. McConnell and other board members attended a special training regarding the proper administration of federal program monies where they discussed the former executive director's conduct and how it amounted to the improper use of MNWC funds. Accordingly, evidence of the prior prosecution and this training was admissible for the purposes of proving McConnell acted with knowledge and intent to defraud when she engaged in similar misconduct and for the purposes of proving the absence of any mistake or accident. *See* Fed. R. Evid. 401, 404(b)(2). The district court carefully balanced the risk of "unfair prejudice" that admission of this evidence might pose and ultimately found that its probative value was not "substantially outweighed" by that risk. Fed. R. Evid. 403. Moreover, the government's closing argument mitigated the prejudicial effect of the evidence by making it clear to the jury that there was "no link between Ms. McConnell and the" former executive director's "criminal activity."

The district court's Rule 403 balancing is entitled to "considerable deference," and we see no abuse of discretion in the admission of the challenged evidence. *United States v. Bussell*, 414 F.3d 1048, 1059 (9th Cir. 2005) (citation omitted).

2. The district court properly declined to dismiss the wire fraud count of the superseding indictment. McConnell's argument that the superseding indictment should have alleged "the materiality of the scheme" to defraud instead of alleging a "material scheme" to defraud lacks merit. "[C]hallenges to minor or technical deficiencies, even where the errors are related to an element of the offense charged and even where the challenges are timely, are amenable to harmless error review." *United States v. Du Bo*, 186 F.3d 1177, 1180 (9th Cir. 1999). McConnell cannot establish any harm to her substantial rights because the superseding indictment "fairly inform[ed]" her "of the charge against which [s]he must defend," *United States v. Ross*, 206 F.3d 896, 899 (9th Cir. 2000) (citation omitted), and she does not dispute that the petit jury was properly instructed on the element of materiality, *see United States v. Leveque*, 283 F.3d 1098, 1104 (9th Cir. 2002); *see also United States v. Salazar-Lopez*, 506 F.3d 748, 754-56 (9th Cir. 2007) (explaining overwhelming evidence and proper instructions before the petit jury can rectify minor errors before the grand jury).

Nor was the superseding indictment required to allege specific false statements or omissions. *See United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005) (per curiam).

***2** 3. The district court's instruction on good faith was not plain error. McConnell argues for the first time on appeal that Instruction 36 reduced the government's burden of proof and required the jury to convict even if it concluded that McConnell had acted in good faith. The relevant portion of Instruction 36 reads: "While an honest, good-faith belief in the truth of the scheme to defraud may negate an intent to defraud, a good-faith belief that the victim will be repaid and will sustain no loss is no defense at all." The instruction is a near-verbatim quote from *United States v. Spangler*, 810 F.3d 702, 708 (9th Cir. 2016) ("While an honest, good-faith belief in the truth of the misrepresentations may negate intent to defraud, a good-faith belief that the victim will be repaid and will sustain no loss is no defense at all." (citation omitted)). The district court's minor alteration was not plain error. Rather, the instruction adequately informed the jury that McConnell's good-faith belief in the veracity of her actions could negate an intent to defraud. By its verdict, the jury disbelieved her good-faith defense.

4. Because McConnell has failed to demonstrate a single instance of error, she cannot show that her trial suffered from cumulative errors. *Id.* at 711.

5. The district court did not err in calculating and imposing restitution. First, the district court properly shifted the burden of production to McConnell to substantiate her request for an $18,253 reduction after the government adequately established the total loss amount by a preponderance of the evidence. 18 U.S.C. § 3664(e); *cf. CFPB v. CashCall, Inc.*, 35 F.4th 734, 751 (9th Cir. 2022) (discussing burden shifting in other restitution contexts). Second, the record unequivocally reflects that the district court found that the total loss was $37,149.88 and that the restitution sum owed by McConnell was $29,114.14. Thus, the district court understood the distinction between total loss and restitution. Third, the district court was not obliged to order that she make only nominal payments based on her ability to pay. *See* 18 U.S.C. § 3664(f). Moreover, given that McConnell failed to object to the restitution award on these grounds at sentencing, we cannot conclude that the district court's consideration of her economic circumstances constituted plain error. Finally, contrary to McConnell's suggestion, the district court did apportion liability among her codefendants, although it was not obliged to do so. *See United States v. Booth*, 309 F.3d 566, 576 (9th Cir. 2002) (citing 18 U.S.C. § 3664(h)).

AFFIRMED.

All Citations

Not Reported in Fed. Rptr., 2023 WL 3533893

Footnotes

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

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